

CANADA / JUDGMENT

Bandpey v. Talebpourazad

2023 BCSC 1265

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Supreme Court of British Columbia

DECIDED

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2023 BCSC 1265 Bandpey v. Talebpourazad

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bandpey v. Talebpourazad,

2023 BCSC 1265

Date: 20230724

Docket: E192002

Registry: Vancouver

Between:

Marzieh Bandpey also known as Shiva Bandpey

Claimant

And

Mohammad Talebpourazad also known as Mike Talebpourazad

also known as Mike Pourazad

Respondent

Before: The Honourable Justice Basran

Reasons for Judgment on Costs

Counsel for the Claimant:

R. Ellis, K.C.

Counsel for the Respondent:

A. Soliman

Place and Date of Hearing:

Vancouver, B.C.

May 23, 2023

Place and Date of Judgment:

Vancouver, B.C.

July 24, 2023

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Introduction

- [1] On April 23, 2021, I issued Reasons for Judgment in this family law case, indexed as 2021 BCSC 763 (the "Trial Reasons"). Except where noted, I will continue to use the same defined terms from the Trial Reasons.
- [2] In the Trial Reasons, among other things, I concluded that Mr. Talebpourazad held undisclosed foreign assets worth \$1,500,000 CDN and \$600,000 USD (\$762,000 CDN) in a bank account in Azerbaijan. I made orders dealing with property division and I also ordered that Mr. Talebpourazad pay lump sum spousal support of \$303,324 to Ms. Bandpey.
- [3] Mr. Talebpourazad appealed this decision. In Reasons for Judgment indexed as 2022 BCCA 352, the Court of Appeal upheld my findings on Mr. Talebpourazad's credibility, undisclosed assets, and lump sum spousal support order.

- [4] Ms. Bandpey seeks special costs against Mr. Talebpourazad for all steps in the litigation, except for the application before Justice McNaughton for a litigation advance for which Ms. Bandpey was awarded \$1,300 in fixed costs. Mr. Talebpourazad argues that his conduct does not warrant an award of special costs. In the alternative, he suggests a fine would be more appropriate and, in the event that special costs are awarded, they should be capped.
- [5] For the reasons that follow, I have concluded that Mr. Talebpourazad's conduct throughout the litigation was reprehensible and deserving of rebuke such that an award of special costs against him is justified.

Findings at Trial

- [6] In the Trial Reasons, I found that Ms. Bandpey had been substantially successful, and I encouraged the parties to reach an agreement on costs:
- [153] I encourage the parties to come to an agreement on costs. To assist them, I note that Ms. Bandpey was substantially successful at trial. I also direct them to consider my findings on Mr. Talebpourazad's credibility. Furthermore, Mr. Talebpourazad did not disclose the Bodrum villa on his first Form 8 financial statement and admitted understating his net worth by \$800,000. He also admittedly and repeatedly refused to disclose his income and assets. He did not cure these deficiencies during the trial.
- [7] In the Trial Reasons, I also made extensive findings in respect of Mr. Talebpourazad's lack of credibility:
- [11] Mr. Talebpourazad's evidence was fraught with inconsistencies, vagueness, and implausible excuses. For example, in 2008, he bought a 5,500 square foot house on 31st Street in West Vancouver for \$3.11 million (the "31st Street Property"). He paid cash for this home. There was no mortgage registered against it. Mr. Talebpourazad claims he borrowed and repaid and/or withdrew the funds for this purchase from his business, Mero Steel. He provided no documentary evidence to support the assertion that this business or its successor, Mero Engineering, earned revenue sufficient to support the purchase of the 31st Street Property. Mr. Talebpourazad reported annual income from his business of approximately \$50,000 to \$80,000 during the years leading up to the purchase. He strongly asserts that his businesses were his only sources of income and that he took funds, as he needed them, in amounts of \$5,000 to \$10,000 per month. It is neither credible nor believable that Mr. Talebpourazad purchased the 31st Street Property, and several other properties in West Vancouver, North Vancouver, and Turkey, and maintained a lavish and expensive lifestyle, on this modest income.
- [12] Mr. Talebpourazad produced no business records, contracts, bank statements, or witnesses that substantiate his claim that his businesses generated profits sufficient to purchase the properties he purchased in Canada and Turkey.

- [13] Another example of Mr. Talebpourazad's evidence that seems detached from the truth involves an import-export business for carpets and antiques that he allegedly sold. He purports to have begun this business in Istanbul and sold it after operating it for several years. Mr. Talebpourazad's description of the circumstances surrounding its sale varied. He deposed in an affidavit that he brought the \$5 million proceeds of sale with him when he came to Canada. However, at trial, he testified that he sold the carpet business after he moved to Canada to someone in Victoria, BC, for \$4.8 million and that this individual paid this purchase price over several years.
- [14] Mr. Talebpourazad provided no credible explanation for what happened to this significant sum. He admitted that by 1999, he faced financial difficulty that caused him to borrow funds from his employer. In 2002, three of his vehicles were repossessed for non-payment of lease amounts. While he was involved in litigation with his former business partner, Ms. Bandpey testified that she and Mr. Talebpourazad were forced to pull their son out of pre-school because they could not afford the monthly expense.
- [15] Mr. Talebpourazad clung to the narrative regarding the lucrative sale of the carpet business but did not make a claim for excluded assets in respect of the purported sale of this business and provided no documents to support this story. He did not provide a reasonable explanation for what happened to the millions of dollars he purportedly received from the sale of this carpet business.
- [16] This carpet business narrative is puzzling because it is not directly relevant to any of the matters in dispute. However, it suggests that once Mr. Talebpourazad lies about something, he steadfastly refuses to admit his deceit even when it serves no purpose for him to continue perpetuating a mistruth. It also demonstrates his propensity to lie about financial issues.
- [17] Another example of Mr. Talebpourazad's misleading evidence involves his September 2019 Form 8 financial statement. In this sworn affidavit, he deposed to having a line of credit as a liability, from which he had withdrawn \$800,000. However, he failed to disclose this amount as an asset that he had access to in the form of a bank draft. At trial, Mr. Talebpourazad testified that he intended to use these funds to purchase two apartments: One for his son, in the Ontario city in which he attends university, and another for Ms. Bandpey. He did not purchase these apartments and the evidence does not disclose what he did with these funds. In any event, I am satisfied that he understated his net worth by \$800,000. Mr. Talebpourazad also failed to disclose income earned from real estate holdings in Dubai on both his 2019 Form 8 financial statement and his income tax returns.
- [18] Mr. Talebpourazad's evidence in respect of a \$1,500 monthly support payment was inconsistent. At trial, he testified that this amount was solely for the support of Ms. Bandpey and that he was willing to pay some undefined additional amount for the support of their son if he chose to live with his mother. However, a separation agreement signed by both parties explicitly describes the \$1,500 amount as being for the benefit of Ms. Bandpey and their son. At trial, he testified that he offered to pay the \$1,500 per month until Ms. Bandpey

told him that she no longer needed these funds and that he would buy her an apartment. He did not buy her an apartment and the separation agreement clearly states that this amount would only be paid for one year. Mr. Talebpourazad is not relying on the terms of the separation agreement in this trial but, in my view, the discrepancy between the agreement and his oral evidence is relevant to his credibility.

[19] In an August 21, 2020, letter, Mr. Talebpourazad's lawyer asserted that the following items were excluded from family property:

- a) The property at 415 Hadden Drive, West Vancouver, B.C. (the "Hadden Drive Property"), acquired after the relationship began "in a direct trade for real property proceeds of disposition of the shares in All Steel Fabricating Ltd.". Leaving aside the conflation of real property with the shares of a company, Mr. Talebpourazad testified that he sold one-half of the shares of All Steel to his business partner for \$1. At trial, Mr. Talebpourazad admitted this assertion regarding the exclusion of the Hadden Drive Property was false.
- b) A townhouse located at 848 West 16th Street in North Vancouver. This property was heavily mortgaged and had a judgment registered against it.
- c) "Proceeds of disposition of the shares in All Steel." There is no evidence of the disposition of these shares or any proceeds received. The only evidence of the value of these shares is that Mr. Talebpourazad sold one-half of these shares to his business partner for \$1.
- d) "Proceeds of disposition of the Sangster Boat". This boat was not sold. Mr. Talebpourazad gave it away.
- e) "Proceeds of disposition of the Mercedes Benz SLK 1998" and "Proceeds of disposition of the Mercedes C220 or C300." Both of these vehicles were leased and subsequently repossessed.

[20] Each of these purported exclusions involves a mischaracterization, omission, or lie. These are further examples of Mr. Talebpourazad's lack of credibility and honesty.

[21] These are only a sampling of Mr. Talebpourazad's misrepresentations and untruthfulness in describing the events and circumstances relevant to the determination of the issues in this matter. His evidence was generally inconsistent and contradictory with the documentary evidence. Mr. Talebpourazad slanted his testimony to suit his interests. On the myriad of issues on which their evidence conflicts, I prefer the evidence of Ms. Bandpey to that of Mr. Talebpourazad.

[Emphasis added.]

[8] I ordered that Mr. Talebpourazad transfer his interest in the Hadden Drive Property in West Vancouver and the 15th Street Property in North Vancouver to Ms. Bandpey within 30 days of the date of that order, including entitlement to receive and retain rent from these properties. I further ordered that Mr. Talebpourazad vacate the 31st Street Property in West Vancouver within 60 days of the date of the order.

Relevant Events Since Trial

- [9] Mr. Talebpourazad stopped making interim spousal support payments effective May 1, 2021. He also took no steps to comply with the order to transfer the Hadden Drive Property or the 15th Street Property by the May 24, 2021 deadline. He did, however, receive and retain the June 1, 2021 rental payments for these two properties that he had been ordered to transfer to Ms. Bandpey.
- [10] Mr. Talebpourazad, as well, did not vacate the 31st Street Property within 60 days of the Trial Reasons.
- [11] One day before the commencement of the trial, Mr. Talebpourazad rented the Hadden Drive Property at a rent which was \$450 month lower than the rent he had been receiving. He did not disclose this prior to or during the trial.
- [12] Although Mr. Talebpourazad kept the rents for the Hadden Drive Property and the 15th Street Property for June 2021, he failed to make any contribution to the property taxes or the municipal utilities for the six months for which he received rental income for those properties.

Legal Principles Governing Special Costs

- [13] Pursuant to subrule 16-1(1)(b) of the Supreme Court Family Rules, the court may award special costs for all or part of a proceeding:

Tariff of costs

- (1) If costs are payable to a party under these Supreme Court Family Rules or by order, those costs must be assessed in accordance with Appendix B unless any of the following circumstances exist:

[]

- (b) the court orders that

- (i) the costs of the family law case be assessed as special costs, or

- (ii) the costs of an application, a step or any other matter in the family law case be assessed as special costs in which event costs in relation to all other applications, steps and matters in the family law case must be determined and assessed under this rule in accordance with this subrule;

[]

- [14] Special costs order must be based on some form of "reprehensible conduct", the test for which was summarized in *De Cotiis v. Hothi*, 2020 BCSC 1545, aff'd 2021 BCCA 60:

- [8] The Court of Appeal reaffirmed in *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177 that an order for special costs requires some form of "reprehensible conduct", which can include "scandalous or outrageous conduct as well as milder forms of misconduct deserving of reproof or rebuke": at paras. 57, 132.
- [9] The Court of Appeal went on to say, at para. 134: "Special costs should be reserved to punish and deter reprehensible conduct in the course of litigation." [Emphasis added.] The purpose of an award of special costs is to chastise a litigant. Such awards are meant to punish and deter bad behavior, as well as to distance the court from the conduct at issue.
- [10] The question is whether reprehensible conduct occurred in the course of this litigation. Have exceptional circumstances been demonstrated to justify an award of special costs? That is the focus of the inquiry that must be undertaken.
- [11] In *Garcia v. Crestbrook Forest Industries Ltd.*, 9 B.C.L.R. (3d) 242, [1994] B.C.J. No. 2486 (C.A.) at para. 17, Lambert J.A. identified "reprehensibility" as the standard for special costs, the meaning of which is broad in scope:

the word reprehensible is a word of wide meaning. It encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke. Accordingly, the standard represented by the word reprehensible, taken in that sense, must represent a general and all encompassing expression of the applicable standard for the award of special costs.

- [12] Reprehensible conduct is found, per *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352 [Westsea] at para. 73:

in circumstances where there is evidence of improper motive, abuse of the court's process, misleading the court and persistent breaches of the rules of professional conduct and the rules of court that prejudice the applicant[.]

- [15] Justice Jackson recently summarized the law applying to an award for special costs in the family law context in *Chapman v. Chapman*, 2020 BCSC 1896:
- [4] This Court has the discretion to order costs of a family law case be assessed as special costs: Supreme Court Family Rules, R. 16-1(1)(b)(i) [SCFR]. Awards of special costs in family and civil proceedings are governed by the same principles.
- [5] Special costs are punitive and imposed to sanction a party's reprehensible conduct during the litigation, conduct from which the court seeks to disassociate itself: *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 119 D.L.R. (4th) 740 at 745, 9 B.C.L.R. (3d) 242 (C.A.) [Garcia]; *R.A.C. v. V.L.C.*, 2009 BCSC 1207 at para. 11. The word "reprehensible" is broad and encompasses scandalous or outrageous conduct as well as milder forms of misconduct deserving of reproof or rebuke: *Garcia* at 746-747. Improper pre-litigation conduct is excluded from consideration: *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177 at paras. 133-134.

- [6] The Court of Appeal recently reviewed the purpose underlying special costs in *567 Hornby Apartment Ltd. v. Le Soleil Restaurant Inc.*, 2020 BCCA 69, leave to appeal ref'd 39145 (1 October 2020) [Le Soleil]. The Court affirmed the purpose of special costs is to punish and deter litigation misconduct, not to compensate the other party: at paras. 40-42.
- [7] However, special costs also enable a court to substantially indemnify a successful party: *Everywoman's Health Centre Soc. (1988) v. Bridges* (1991), 54 B.C.L.R. (2d) 294 at 297, [1991] B.C.W.L.D. 816 (C.A.); *Tanious v. The Empire Life Insurance Company*, 2019 BCCA 329, leave to appeal ref'd 38924 (20 February 2020), at para. 49. The indemnification function is particularly relevant where one party has had to incur excessive costs due to misconduct on the part of the other party: *D'Atri v. Gonzalez*, 2017 BCSC 1244 at para. 55 [D'Atri].
- [8] It is not necessary for the party's conduct throughout the litigation to have been reprehensible to warrant an award of special costs for the entire action: *Bradshaw v. Stenner*, 2012 BCSC 237 at para. 9, leave to appeal ref'd 2012 BCCA 481. Nonetheless, while special costs are usually awarded for the whole proceeding, where such an award would be disproportionate, the court has the discretion to award special costs with respect to particular steps in the litigation: *SCFR R. 16-1(1)(b)(ii)*; *Gichuru v. Smith*, 2014 BCCA 414 at para. 91, leave to appeal ref'd 36221 (16 April 2015).
- [9] Where previous orders are silent as to the scale of costs, the trial judge's cost order for special costs will govern: *Le Soleil* at para. 109. However, if a previous order for a particular step in the litigation has expressly addressed the scale of costs, or has summarily assessed costs, it cannot be varied by the trial judge: *Le Soleil* at paras. 101 and 108.
- [10] While not exhaustive, the types of conduct that may attract an award of special costs include delayed disclosure of or a failure to disclose documents, dissipating or not disclosing assets, depriving the other party of financial assets, disregarding the other party's interest in family assets, pursuing meritless claims and being reckless with regard to the truth, improper allegations of fraud or conspiracy, or making the resolution of an issue far more difficult than it should have been: *Hu v. Dickson*, 2015 BCSC 218 at para. 49; *McIntyre v. McIntyre*, 2018 BCSC 472 at paras. 7-8; *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914 at para. 11; see also *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352 [Westsea] and *D.G.S. v. J.D.S.*, 2014 BCSC 2183.
- [11] Non-disclosure of assets and financial information, in particular, has been described as the cancer of family litigation and is viewed as being particularly egregious, potentially justifying an award of special costs: *Leskun v. Leskun*, 2006 SCC 25 at para. 34, citing with approval *Cunha v. Cunha* (1994), 99 B.C.L.R. (2d) 93, [1994] B.C.W.L.D. 2804 (S.C.); *Jin v. Cheng*, 2019 BCSC 148 at para. 59.

[16] A trial judge cannot change or vary an earlier costs order made in a proceeding. Therefore, a trial judge's costs order is limited to the costs of the proceeding aside from any costs that may have been awarded during the course of the litigation: 567 Hornby Apartment Ltd. v. Le Soleil Restaurant Inc., 2020 BCCA 69 [Le Soleil] at para. 101.

Does Mr. Talebpourazad's Conduct During the Litigation Warrant an Award of Special Costs?

Positions of the Parties

[17] Ms. Bandpey seeks a special costs order in these proceedings based on Mr. Talebpourazad's:

- a) ongoing failure to produce relevant documents;
- b) active concealment of an \$800,000 bank draft;
- c) failure to disclose assets including, initially, the Bodrum villa and a Mercedes Benz in Turkey, bank accounts in Turkey, Azerbaijan, Dubai, and Mero Istanbul;
- d) failure to disclose the means by which he acquired the funds to purchase the properties he owned;
- e) failure to disclose his present income including, but not limited to, rental income from the Dubai Apartments;
- f) false claims for excluded property including, but not limited to, his rejected evidence concerning the sale of a carpet business in Turkey;
- g) entering into a one-year lease with new tenants of the Hadden Drive Property at below market rent one day before trial and failing to disclose this information;
- h) failure to make interim spousal support payments effective May 1, 2021 and failure to pay the lump sum spousal support order;
- i) failure to comply with the order to transfer the Hadden Drive Property and the 15th Street Property by May 24, 2021;
- j) receipt and retention of the June 1, 2021 rental payments for the two aforementioned properties that he had been ordered to transfer and failure to pay the utilities and property taxes for them for the first half of 2021; and
- k) failure to disclose that on July 13, 2021, a former tenant of the Hadden Drive Property had obtained a judgment against him for \$15,508.13. This judgment has been registered against the 31st Street Property and the North Vancouver condominium.

[18] Mr. Talebpourazad argues that preferring the evidence of one party over the other does not justify an award of special costs. He also suggests that delayed disclosure of relevant financial information or documents does not warrant such an award and that, in any event, his conduct was not reprehensible or deserving of rebuke and did not rise to the exceptional circumstances required to justify an award of special costs.

- [19] Mr. Talebpourazad also submits that an award of special costs will reduce his share of the family assets and that they have already been allocated "unfavourably" to discourage his conduct such that an award of special costs will punish him twice for the same conduct.
- [20] Alternatively, Mr. Talebpourazad suggests that his failure to disclose can be addressed with a fine in accordance with s. 92(1) of the Family Relations Act, R.S.B.C. 1996. In the further alternative, he suggests that the Court fix a cap on special costs, pursuant to R. 16-1(14) of the Supreme Court Civil Rules:

Costs of whole or part of family law case

- (14) The court may award costs
- (a) of a family law case,
 - (b) that relate to some particular application, step or matter in or related to the family law case, or
 - (c) except so far as they relate to some particular application, step or matter in or related to the family law case

and in awarding those costs the court may fix the amount of costs, including the amount of disbursements.

Discussion

- [21] As described in detail in the Trial Reasons, I agree with Ms. Bandpey that throughout this proceeding, Mr. Talebpourazad engaged in a deliberate campaign of deceit, obfuscation, and withholding of important and relevant financial information. By failing to disclose millions of dollars worth of assets and either lying or withholding details of his income earning activities, Mr. Talebpourazad unnecessarily lengthened and complicated the trial of this matter.
- [22] Prior to trial, Mr. Talebpourazad did not merely delay disclosure of relevant documents, he failed to disclose many of them entirely. For example, he failed to provide any documents that adequately described his source(s) of income for his seemingly lavish lifestyle.
- [23] The asset division ordered in the Trial Reasons was not some thinly veiled punishment for Mr. Talebpourazad's conduct during the litigation. Specifically, the finding that Mr. Talebpourazad had undisclosed assets of \$1.5 million was a conservative estimate based on his unexplained source(s) of income as compared to his extensive expenditures and asset holdings. Mr. Talebpourazad's failure to disclose relevant documents, combined with his vague, obtuse, and non-responsive testimony at trial necessitated an estimate of his undisclosed assets. I reject Mr. Talebpourazad's argument that an award of special costs in these circumstances is some form of double punishment.

- [24] Furthermore, Mr. Talebpourazad's post-trial conduct further supports the award of special costs because he failed to comply with clear orders. For example, he stopped paying interim spousal support, but failed to pay the ordered lump sum spousal support of \$303,324. Mr. Talebpourazad apparently does not consider himself to be bound by court orders. This conduct is disgraceful.
- [25] By entering into a below-market lease agreement for the Hadden Drive Property one day before the trial commenced, and failing to disclose this information, he inexplicably reduced the rental income available to the parties and complicated the sale of this asset in the wake of the Trial Reasons.
- [26] I realize that special costs awards are exceptional and not all forms of misconduct justify an award of special costs. However, this award is undoubtedly warranted in this case based on Mr. Talebpourazad's reprehensible conduct throughout the course of this proceeding. His behaviour is worthy of rebuke. I am satisfied that these circumstances warrant an exercise of my discretion in ordering special costs against him as a reprimand.

Disposition

- [27] Ms. Bandpey is entitled to special costs in respect of the entire proceeding except for the application before Justice McNaughton for a litigation advance for which Ms. Bandpey was awarded \$1,300 in fixed costs.
- [28] The special costs are to be assessed by the Registrar of the court and are not to be capped.
- [29] This order includes special costs for this application and special costs of the cost assessment: Le Soleil at paras. 137 and 138.

"Basran J."

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