

CANADA / JUDGMENT

Bilin v. Sidhu

2022 BCSC 1780

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Supreme Court of British Columbia

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2022 BCSC 1780 Bilin v. Sidhu

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bilin v. Sidhu,

2022 BCSC 1780

Date: 20221017

Docket: S156074

Registry: New Westminster

Between:

Tarsem Bilin

Plaintiff

And:

Hardip Singh Sidhu,

Hardip Auto Repair & Sales Ltd.,

Santokh Singh Sidhu and Lakhwinder Kaur Sidhu

Defendants

Before: The Honourable Madam Justice Norell

Reasons for Judgment

Counsel for the Plaintiff:

D. Gautam

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Counsel for the Defendant, Lakhwinder Kaur Sidhu:

J. Virk

Place and Date of Hearing:

New Westminster, B.C.

May 24, 2022

Place and Date of Judgment:

New Westminster, B.C.

October 17, 2022

Introduction

- [1] On March 18, 2022, I issued reasons indexed at 2022 BCSC 399 ("Trial Reasons"). I have adopted the same naming protocols and abbreviations as used in the Trial Reasons.
- [2] The trial concerned three alleged Loans. In the Trial Reasons, I made the following orders:
- a) Tarsem will have judgment against Hardip and HARS Ltd., for \$31,000 plus interest calculated in accordance with PN#1 to the date of the Trial Reasons;
 - b) Tarsem will have judgment against Hardip, for \$341,000 plus interest calculated in accordance with PN#2 to the date of the Trial Reasons; and
 - c) A declaration of a resulting trust between Lakhwinder and Hardip with respect to the Sidhu Home. Lakhwinder holds 38% of the equity in the Sidhu Home in trust for Hardip.
- [3] Tarsem now seeks the following orders:
- a) special costs, or in the alternative party and party costs but at an increased unit value (uplift costs), against Hardip, HARS Ltd., and Lakhwinder;
 - b) contractual costs against Hardip;
 - c) a declaration that the interest on PN#1 and PN#2 is compounded monthly and is not simple interest; and
 - d) an order "settling" the wording of the resulting trust declaration.
- [4] Lakhwinder seeks special costs against Tarsem. In response to Tarsem's application, Lakhwinder opposes a variation of the wording of the resulting trust declaration.

- [5] Hardip submits there was divided success and seeks apportionment of party and party costs between him and Tarsem. Hardip submits that the interest on PN#1 and PN#2 is simple interest. Hardip did not make any submissions on contractual costs.
- [6] I will address the applicable legal principles, the parties' arguments, and analysis under the following headings:
- a) Costs;
 - b) Interest under PN#1 and PN#2; and
 - c) Declaration of resulting trust.

Costs

Legal framework

- [7] Although the submissions focused on special costs, three different costs have been collectively advanced by the parties: contractual costs, special costs, and party and party costs. Contractual costs find their basis in an agreement between parties; party and party or special costs find their basis in the Supreme Court Civil Rules [Rules]: *Cardero Coal Ltd. v. Carbon Creek Partnership*, 2022 BCSC 1103 [Cardero], citing the discussion in *Eisler Estate v. GWR Resources Inc.*, 2020 BCSC 562, *aff'd* 2021 BCCA 247.
- [8] In *Cardero*, Branch J. summarized the legal principles which guide the determination of contractual costs. The principles of contract law apply:
- [8] Contractual costs indemnities will generally be enforced. As stated by Justice Voith in *Eisler Estate v. GWR Resources Inc.*, 2021 BCCA 247 [Eisler Estate CA] at para. 8, when assessing the effect of such indemnitees, "[a] contract is a contract." Parties are free to contract for indemnities, including for costs of legal proceedings on a solicitor-and-client basis.
- [9] Justice Brown summarized the legal principles applicable to costs indemnities in *Bakshi v. Shan*, 2013 BCSC 969 at para. 44:
- [44] Generally, parties are free to contract as between themselves that a party is entitled to a specific order of costs in certain circumstances. Where a contract exists, however, a contractual right to be indemnified by solicitor-and-client costs must be clearly and unequivocally expressed: *M. Orkin, The Law of Costs*, 2d ed. (looseleaf) (Toronto: Thomson Reuters, 2012) at §219.1.1. Nevertheless, no magical incantation is required in order for a party to be entitled to a specific order of costs: *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, 1999 ABQB 266 at para. 19. Like all questions of contractual interpretation, the reasonable intention of the parties falls to be determined on the basis of the language used: *Aegon Canada Inc. v. ING Canada Inc.*, [2003] O.J. No. 1239 (S.C.) at para. 8. See also: *Epoch Press Inc. v. Sewak*, 2011 BCSC 323.

- [9] Turning to costs under the Rules, Rule 14-1(9) provides the general default rule that costs of a proceeding must be awarded to the "successful party" unless the court "otherwise orders":
- [10] With respect to determining who is the successful party, in *The Owners, Strata Plan LMS 3259 v. Sze Hang Holding Inc.*, 2017 BCCA 346, the Court stated:
- [90] At its most basic, the successful party is the plaintiff who establishes liability under a cause of action and obtains a remedy, or the defendant who obtains a dismissal of the plaintiff's case: *Loft v. Nat*, 2014 BCCA 108 at para. 46.
- [91] Different considerations, however, arise when the litigation concerns multiple causes of action. In such cases, the more flexible "substantial success" test will usually be more appropriate. The "substantial success" standard was described by Bouck J. in *Fotheringham v. Fotheringham*, 2001 BCSC 1321 at para. 45:
- [45] Gold now seems to say that substantial success in an action should be decided by the trial judge looking at the various matters in dispute and weighing their relative importance. The words "substantial success" are not defined. For want of a better measure, since success, a passing grade, is around 50% or better, substantial success is about 75% or better. That does not mean a court must descend into a meticulous mathematical examination of the matters in dispute and assign a percentage to each matter. Rather, it is meant to serve as a rough and ready guide when looked at all the disputed matters globally.
- [92] While the "substantial success" formula is particularly well suited to family cases when the court has to wrestle with several separate and distinct causes of action, the principles in *Fotheringham* may be applicable in any case in which there are multiple causes of action.
- See also *Cottrill v. Utopia Day Spas and Salons Ltd.*, 2019 BCCA 26 at para. 18.
- [11] A court may "otherwise order" and deprive a successful party of costs if that party has acted disreputably or reprehensibly: *McKay v. Marx*, 2012 BCSC 484 at paras. 30, 33. The burden of establishing that the court should "otherwise order" is on the unsuccessful party: *Grassi v. WIC Radio Ltd.*, 2001 BCCA 376 at para. 24.
- [12] Where there has been divided success, Rule 14-1(15) provides that a court may award costs of a proceeding, or may apportion costs as they relate to a particular application, step or matter in or related to the proceeding.
- [13] A party seeking apportionment of costs under Rule 14-1(15) must establish that: (1) there are separate and discrete issues upon which the ultimately unsuccessful party succeeded; (2) there is a basis upon which to identify time attributable to those issues; and (3) apportionment would create a just result: *Sutherland v. The Attorney General of Canada*, 2008 BCCA 27 at paras. 30-31. Applications under this rule should be relatively rare and not a regular part of litigation: *British Columbia v. Worthington (Canada) Inc.* (1988), 29 B.C.L.R. (2d) 145 (C.A.) at 162-164, 169-170.

- [14] Rule 14-1(1)(b) provides the general default rule that costs which are awarded in favour of a party are assessed as party and party costs unless the court awards special costs for the proceeding, or for an application, step or other matter in the proceeding.
- [15] Special costs may be awarded where there has been reprehensible conduct on the part of the opposing party during the course of the litigation: *Gichuru v. Pallai*, 2018 BCCA 78 at para. 86; *Tsai v. Li*, 2020 BCCA 264 at para. 16. The reprehensible conduct must be related to the conduct in the litigation and not pre-litigation conduct: *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177, at paras. 52, 134.
- [16] Special costs are punitive in nature, and intended to censure and deter litigation misconduct. The party seeking special costs bears the burden of establishing exceptional circumstances, and the court must exercise restraint in awarding special costs: *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352 [*Westsea*] at para. 73; *Hollander v. Mooney*, 2017 BCCA 238 at para. 96, leave to appeal to SCC ref'd, 37752 (5 April 2018), 2018 CanLII 28109.
- [17] Reprehensible conduct "encompasses scandalous or outrageous conduct" and "milder forms of misconduct deserving of reproof or rebuke": *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 119 D.L.R. (4th) 740, 1994 CanLII 2570 at para. 17 (C.A.). Not all misconduct attracts special costs: *Westsea* at para. 73. It is not necessary that all aspects of a party's conduct be reprehensible to award costs for the entire proceeding, but the court may award special costs for only certain aspects of a proceeding if it would be disproportionate to award special costs of the entire proceeding: *Sebok v. Babits*, 2022 BCCA 2 [*Sebok*] at para. 35.
- [18] In *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914 [*Mayer*], at para. 11, Justice Walker summarized a non-exhaustive list of circumstances that may amount to reprehensible conduct. Those that the parties argue are relevant to this case are:
- (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;
 - (h) where a party maintains unfounded allegations of fraud or dishonesty;
- [19] Untruthful testimony, or testimony which was not accepted, is alone insufficient to warrant an order for special costs. Something more is required, for example that a party deliberately lied or concocted evidence, or forged documents, in an attempt to mislead the court: *Mayer* at paras. 12-15; *Sebok* at para. 60.

- [20] Unproven allegations of fraud or dishonesty may amount to reprehensible conduct, but not all unproven allegations of fraud or dishonesty will result in a special costs award, because special costs should not be used to deter a person from pursuing what are reasonably thought to be legitimate claims: Mayer at paras. 16-19; Young v. Young, [1993] 4 S.C.R. 3 at 134.
- [21] If party and party costs are awarded, s. 2 of Appendix B of the Rules provides that the court may fix the scale of costs. Subsections 2(5) and (6) provide that a court may order an increase in value of each unit allowed under a Scale by 1.5 times if the court finds that as a result of "unusual circumstances", an award of costs on that scale would be "grossly inadequate or unjust". These are known as uplift costs. An award is not grossly inadequate or unjust merely because there is a difference between actual legal expenses and what would be awarded as costs under a particular Scale.
- [22] In Shen v. West Continent Development Inc. (BC0844848), 2022 BCSC 462 at paras. 29-37, Justice Maisonville reviewed the principles guiding uplift costs. Those most pertinent to the parties' arguments in this matter are:
- [30] Uplift costs are meant to indemnify the successful party where there are unusual circumstances, not punish the unsuccessful party: Sheppard v. Vancouver Coastal Health Authority, 2021 BCSC 539 at para. 56.
- [31] Section 2(5) does not prescribe what constitutes "unusual circumstances" or an award that is "unjust or grossly inadequate". This inquiry is highly fact-specific: Herbison v. Canada (Attorney General), 2014 BCCA 461 at para. 42.
- [32] Misconduct may amount to an "unusual circumstance" justifying an award of uplift costs. However, the party asserting misconduct must show there was misconduct deserving of some form of rebuke, including disobedience of court processes, incivility, frivolity, actions taken in bad faith, and impertinence: J.P. v. British Columbia (Children and Family Development), 2018 BCCA 325 at para. 57.

Tarsem's position

- [23] With respect to costs under the Rules, Tarsem argues that the "substantial success" test applies and that he was the successful party as he obtained a monetary judgment and a declaration that Lakhwinder holds part of the equity in the Sidhu Home on a resulting trust for Hardip.
- [24] Tarsem seeks special or uplift costs. I note here that Tarsem's notice of application sought special or party and party costs at Scale C; and not uplift costs. Despite this, he argues that Scale B is appropriate but with the uplift. Lakhwinder was agreeable to the parties arguing this application on the basis that uplift costs were sought in the notice of application. Hardip was not agreeable as he submitted that it was raised too late.

- [25] Tarsem submits that he should be awarded special costs against Hardip and Lakhwinder because their conduct in the litigation was reprehensible. There were two main prongs to his argument.
- [26] First, Tarsem submits that Hardip and Lakhwinder failed to make document disclosure necessitating several repeated applications, and did not fully comply with court orders. Hardip did not initially pay costs awards made against him following these applications, and filed untruthful affidavits in an attempt to mislead the court on those applications. Their conduct made prosecution of this action difficult every step of the way. It took eight years to get this matter to trial.
- [27] Second, Tarsem submits that Hardip and Lakhwinder gave untruthful evidence at trial. There were multiple instances where their evidence was not accepted. As an example, and tying this to the failure to disclose documents, Tarsem refers to Lakhwinder's evidence suddenly remembered during cross-examination of an alleged \$40,000 loan to Hardip to try to explain mortgage payments by HARS Ltd. on the mortgage on the 88 Ave. Home which Lakhwinder claimed was owned and financed solely by her. Despite orders for production of documents, it was only when Tarsem finally applied himself for banking records (even though Hardip had been ordered to make the application), that he was able to prove that HARS Ltd. was making the mortgage payments.
- [28] Tarsem also made brief reference to contractual costs against Hardip for obtaining judgment and enforcing payment. The only Loan which provides for this is PN#2, which has the following clause:

For value received, if there is a default in making any payment on this note, the undersigned also promises to pay on demand all reasonable incurred costs of enforcing payment on the note, including but not necessarily limited to, legal fees, disbursements and costs of collections of all parties herein.

Lakhwinder's position

- [29] Lakhwinder argues that Tarsem was not substantially successful against her, and that she was substantially successful against Tarsem. Every claim against her, except the resulting trust claim, was dismissed by this court. Tarsem's request to amend his notice of civil claim to seek a resulting trust between her and Hardip was made mid-way through trial with her consent. There was no judgment against her to pay money. Regardless of the court's findings concerning her credibility, she was still substantially successful. I note here that Lakhwinder did not file a notice of application seeking costs against Tarsem, but Tarsem was agreeable to Lakhwinder arguing this application as if she had done so.
- [30] On the basis that she was substantially successful, Lakhwinder argues that she should be awarded special costs against Tarsem because of his reprehensible conduct. The bases are Tarsem's alleged failure to recognize or being recklessly indifferent to what she submits were manifestly deficient claims, and for recklessly making claims of fraud against her.

Lakhwinder refers to Tarsem's evidence at his examination for discovery, that Lakhwinder appeared to be surprised when he and his wife went to the Sidhu Home and first talked to Lakhwinder about payment of the Loans, yet Tarsem persisted in his claims that she knew the Loan#2 money had come from Tarsem, and maintained unsuccessful claims based on that allegation. Lakhwinder works in banking and these were serious allegations against her.

- [31] If this court finds that Tarsem, and not Lakhwinder, was substantially successful, Lakhwinder opposes special costs against her. She submits she complied with the letter and spirit of each disclosure order, some orders were not directed at her but only Hardip, and she consented to some orders. There was only one costs award against her regarding disclosure and no contempt application was made against her. Testifying to her version of events does not amount to lying to the court. Lakhwinder submits that the court should be careful to avoid the chilling effect of a special costs award. Her conduct did not contribute to the eight years it took for this matter to get to trial. Further, her participation in the trial was minimal. She testified that she did not know anything about the Loans or Hardip's allegation of the Scheme and she was not involved in the dispute between Tarsem and Hardip which took the majority of the trial time. Despite that Lakhwinder consented to the mid-trial resulting trust amendment, she now argues that the action should have proceeded against Hardip and HARS Ltd. only, and that a separate action should have been brought against her and Hardip for the resulting trust claim.

Hardip's position

- [32] With respect to costs under the Rules, Hardip submits that there was divided success. The central issues were determining the terms of Loan#2, and whether the Loans were repaid. He was successful on the terms of Loan#2, and Tarsem was successful on whether the Loans were repaid. Costs should be apportioned on that basis. It was Tarsem's allegations that the terms of Loan#2 were not as written in PN#2, and his other allegations including those of fraud, that added to the complexity and prolonged the trial. Hardip refers to the first day of trial when Tarsem produced a binder of documents that he had not had an opportunity to review and which caused a delay. Hardip argues that he did not make any allegations against Tarsem that increased the complexity of the trial. I note here that Hardip also did not file a notice of application seeking apportionment of costs, but Tarsem was agreeable to Hardip arguing this hearing as if he had done so.
- [33] Hardip submits that special costs should not be awarded against him as his conduct was not reprehensible. Hardip argues that most of the bank statements ordered to be produced were joint accounts with Lakhwinder, suggesting that it was not completely within his control if documents were produced. He provided authorizations to Tarsem for records, and there is no evidence of what efforts Tarsem made to obtain documents with those authorizations. He eventually did pay the costs awards against him. His previous affidavits were simply used to impeach or test his credibility at trial. There needs to be "something more" for a special costs order to be made with respect to testimony not accepted, and it is not present here. He

refers to the chilling effect a special costs order can have. He argues that there were credibility findings against Tarsem as well.

Tarsem's response

- [34] In reply to Lakhwinder's and Hardip's arguments as to who was the successful party, Tarsem argues that the Court must look at the ultimate result and not the path to how it was achieved. Lakhwinder and Hardip focus on the causes of action which were not successful. While Tarsem pled several causes of action, parties often do to get to the same ultimate result. Tarsem's goal was to obtain judgment and to trace the Loan#2 funds to the Sidhu Home. All of the alternative causes of action were legal arguments to obtain that result. The focus of assessing whether Lakhwinder and Hardip were successful has to be viewed from the perspective of the defences they raised. Lakhwinder's goal was to keep the Sidhu Home in her name alone. Despite separate representation, this was a goal shared by Hardip, and there was a concerted effort between them to obtain that goal. They were unsuccessful in doing so. Even if Tarsem did not get a direct proprietary interest in the Sidhu Home, he was successful in obtaining a declaration of a resulting trust which will enable him to execute. Tarsem agrees that the only successful claim against Lakhwinder was the resulting trust, which was allowed by an amendment with the consent of all parties. He submits that as discussed then, the real issue from the beginning had been to be able to trace the Loan#2 funds to the Sidhu Home.
- [35] Further, Tarsem submits that the evidence supporting the unsuccessful claims was the same as or intertwined with the evidence which supported the successful claims. Even if the only claim against Lakhwinder had been a resulting trust claim, the Court would still have had to hear all of the evidence.
- [36] In reply to Lakhwinder's arguments regarding disclosure, Tarsem submits that the test is not whether a contempt application was brought against her, or whether she consented to orders. The test is her conduct from the beginning of this proceeding. There was no opposition to orders because Lakhwinder should have produced the documents. Any consent was not a bona fide consent, but an attempt to avoid the repercussions of not producing the documents.
- [37] In reply to Lakhwinder's claim for special costs against him, Tarsem argues that even if the court were to parse through the various claims to find that Lakhwinder was successful, his conduct was not reprehensible. Tarsem was justified in maintaining those other claims against Lakhwinder.
- [38] Finally, as to Hardip's argument that this was a straightforward claim for repayment of debt, Tarsem argues that Hardip made this complex by raising dishonest and fraudulent conduct (the Scheme) on the part of Tarsem to justify alleged payments in cash.

Analysis

Success of the parties

- [39] As multiple causes of action for different personal and proprietary remedies were sought, the relevant test in determining who was the successful party, is the "substantially successful" test.
- [40] Using the approach in *Fotheringham*, I find the major matters in dispute, in terms of importance, weight, and/or time spent at trial, are broadly stated as:
- a) The causes of action in debt for the Loans: Very little time was spent on whether there was a small Loan#3, and on that issue Tarsem was not successful. There was no issue on the terms of Loan#1 which is unsecured. Most of the trial time was spent on Loan#2, which was also by far the largest sum of money in issue. The two main issues on the debt claims were: (1) whether the terms of Loan#2 were as set out in PN#2, or whether there were additional verbal or implied terms, or misrepresentations; and (2) whether Hardip repaid any portion of the Loans in cash. Hardip's financial circumstances and his allegation of the Scheme were an integral part of this. Hardip was successful in refuting that there were any verbal or implied terms, or misrepresentations; and Tarsem was successful in establishing that Hardip had not repaid any part of the Loans.
 - b) Tarsem's claims for a proprietary remedy to enforce judgment against the Sidhu Home: With respect to Loan#2, these were: causes of action for fraud, breach of an equitable obligation for which it would be appropriate to impose a constructive trust, unjust enrichment, and money had and received; and a claim of a resulting trust with respect to the \$260,000 payment by Hardip to Lakhwinder and used by Lakhwinder to purchase the Sidhu Home. Tarsem was successful on the resulting trust claim but not the other claims.
- [41] I find the evidence relevant to all of these claims was either largely the same or intertwined, and that if this case had been advanced solely on the claims on which Tarsem was successful, the trial would have been shortened, but not to a great extent. Hardip would still have testified that Tarsem and Sukh were participating in a Scheme, and that he had the financial resources to repay the Loans in cash. Hardip's financial position would still have been explored. Tarsem would still have testified that Hardip asked him for Loan#1 to pay business and legal expenses, and Loan#2 to purchase a new home, and about the discussions they had, even if there were no allegations of additional verbal or implied terms, or misrepresentations. The evidence is also relevant to Hardip's financial circumstances and ability to pay, and the resulting trust claim. Hardip would still have testified he did not ask Tarsem for Loan#2 to purchase the Sidhu Home to resist any intention on his part that he was in fact the purchaser of the Sidhu Home along with Lakhwinder. Lakhwinder and Hardip would still have alleged that there was no resulting trust because when Hardip gave the \$260,000 to Lakhwinder he was repaying a debt to Lakhwinder. The evidence would still have explored the alleged separation of finances between Lakhwinder and Hardip and the

purchase of the 88 Ave. Home, the alleged \$155,000 loan in connection with the Computershare mortgage, the alleged \$32,000 loan and the alleged \$9,000 loan, and the fourth alleged loan which came up for the first time at trial. The evidence would still have explored Lakhwinder's claim that she did not need the \$260,000 from Hardip to purchase the Sidhu Home.

- [42] Considering globally the major causes of action and claims in dispute, and their weight and importance, I find that Tarsem was the substantially successful party even though he was not successful on every cause of action or remedy sought. Tarsem ultimately obtained a monetary judgment very close to what he claimed. Tarsem was successful in establishing that Hardip had a beneficial interest in the Sidhu Home and it is a proprietary interest against which Tarsem will be able to register his judgment. Hardip was completely unsuccessful in establishing that he had paid all of Loan#1 and most of Loan#2, and Hardip and Lakhwinder were both unsuccessful in preventing a proprietary remedy.
- [43] Lakhwinder argues that the resulting trust claim could have been brought in separate proceedings once judgment was obtained. I noted this in the Trial Reasons at para. 259, however in the circumstances of this case, it was conveniently brought in this action. The fact that the amendment was made by consent (with no change in any allegation of fact) is an acknowledgement that the same evidence was relevant to all the claims. In the circumstances of this case, this saved time and resources.
- [44] Although Hardip and Lakhwinder were successful on some claims, I do not find that this is an appropriate case to apportion costs. The evidence on those issues was not separate and discrete, but was intertwined with and also relevant to the successful claims. There is no basis upon which to identify time attributable to those issues, and apportionment would not create a just result because Hardip and Lakhwinder were fundamentally unsuccessful.
- [45] As neither Hardip nor Lakhwinder were the substantially successful parties, they are not entitled to costs, be those party and party costs, or special costs.
- [46] Lakhwinder argued that Tarsem's behaviour was reprehensible because there was no reasonable basis to make most of the claims against her. Although she argued this is the context of claiming special costs against him, it may also be a basis to "otherwise order" and deprive Tarsem of costs to which he would otherwise be entitled as the successful party. I do not find reprehensible behaviour on the part of Tarsem in the conduct of this action that should deprive him of costs. I found that although Lakhwinder may not have known who lent the money to Hardip, she was aware of Hardip's poor financial situation and knew that the money came from someone. In my view, the fact that she looked surprised when confronted regarding the Loans is not sufficient reason to conclude the claims were manifestly deficient. I did not accept her evidence of the four alleged loans and what she claimed was a repayment of debt. There was a reasonable basis for Tarsem to claim against Lakhwinder.

[47] In summary, Tarsem is entitled to his costs of the action against Hardip, HARS Ltd., and Lakhwinder.

Party and party costs or special costs

[48] I now turn to whether the costs payable to Tarsem should be special costs or costs at Scale B with an uplift.

[49] There were numerous pre-trial orders for disclosure. I found at paras. 58-61 of the Trial Reasons that Hardip, and to a limited extent Lakhwinder, failed to make proper disclosure of documents. I do not find it necessary to repeat the details and circumstances of the orders, but will highlight aspects of them.

[50] First, there were multiple repeated orders for the same records because Hardip and/or Lakhwinder did not comply with the previous orders. Orders for disclosure were made on May 27, 2014, March 24, 2016, December 12, 2016, October 24, 2018, February 22, 2019, and January 8, 2021 (the "Disclosure Orders"). Most of the Disclosure Orders were directed at Hardip and HARS Ltd., and not Lakhwinder. However, this did not relieve Lakhwinder of her obligation under the Rules to make proper document disclosure.

[51] Second, the Disclosure Orders concerned documents which should have been produced without the need for court orders as they were clearly relevant documents. These include the financial statements and income tax returns of HARS Ltd., the banking and other documents related to the alleged loans between Lakhwinder and Hardip, and the banking records of Hardip and Lakhwinder which would have disclosed their financial situation and who was paying for what. Timely production of relevant documents in accordance with the Rules "is essential to the proper conduct of civil litigation": *Forsyth v. Pender Harbour Golf Club Society*, 2006 BCSC 1108 at paras. 67-72; *LeClair v. Mibrella Inc.*, 2011 BCSC 533 at paras. 27-35.

[52] Third, the Disclosure Orders show a lack of compliance by Hardip that is unexplained and serious. Previous presiders referred negatively to this non-compliance. In reasons on an adjournment application, Justice Schultes stated that there had been "serious noncompliance" by Hardip with the requirements of the Rules and with previous orders of this court: *Bilin v. Sidhu* (13 May 2019), New Westminster S156074 (B.C.S.C.). In reasons in a subsequent application, Master Keighley stated that he found it "shocking that six applications have now been made in the last six years, soon to be seven years, seeking appropriate document disclosure in this case, and the allegation is that certain of the orders, even to this date, have not been complied with": *Bilin v. Sidhu* (8 January 2021), New Westminster S156074 (B.C.S.C.). I adopt those comments.

[53] Fourth, Hardip swore affidavits regarding the status of document disclosure which were misleading. On March 24, 2016, Hardip swore that he had "made every attempt to locate, retrieve and provide documents". He stated the accountant had "yet to finalize" the HARS Ltd. financial statements. Similarly, on February 16, 2019, Hardip attached to his affidavit a

document in which he answered some outstanding requests. With respect to the financial statements and income tax returns of HARS Ltd. after 2010, Hardip stated that they "have been requested from the accountant". I find that Hardip knew that tax returns and financial statements were not in existence after 2010, and never would be in existence. The authorizations for records which Hardip produced were not within the spirit and intent of what was ordered. They were vague, and conditional with respect to any joint accounts.

- [54] Fifth, although Lakhwinder had fewer orders directed at her, and Tarsem acknowledges that once she had new counsel in June 2019 she responded to some requests, one response is concerning. With respect to a numbered account (which turned out to be her oldest daughter's account), Lakhwinder's response through her counsel, was that she was "unaware" of the owner. This is not a sworn statement, however Lakhwinder was not "unaware" of the owner. This is one of the accounts she identified as being able to use to fund the purchase of the Sidhu Home and the bank statement shows that she regularly used it.
- [55] The evidence does not establish that the document disclosure issues were the main reason this matter took so long to proceed to trial, although they likely contributed to it. There were other applications that contributed to the delay. These were Tarsem's unsuccessful summary trial application in 2015; Lakhwinder's initially successful application to have the certificate of pending litigation against the Sidhu Home removed in 2016 and 2017; Tarsem's amendment of his pleadings; and the subsequent Court of Appeal decision in 2017. Part of the delay was also Lakhwinder's counsel ceasing to practice in BC, which resulted in her successful application to adjourn the trial in 2019, and the restriction of court services in 2020 during the COVID-19 pandemic which resulted in another lost trial date. These latter matters cannot be the fault of any party.
- [56] Finally, with respect to Hardip's and Lakhwinder's evidence at trial, there are many parts which were not accepted. Although the focus is on their conduct, at para. 11 of the Trial Reasons I noted that each of the main witnesses' credibility suffered at times. I rejected Hardip's evidence that he had repaid the Loans, and found that the notes on the calendars which recorded those payments were fabricated. I rejected his and Lakhwinder's evidence regarding the four alleged Loans and that Lakhwinder had the ability to and had purchased the Sidhu Home on her own. These were material issues.
- [57] In considering all of the above, I find that Tarsem is entitled to an award of special costs of his action against Hardip and HARS Ltd., primarily for Hardip's failures with respect to document disclosure, his lack of candour regarding disclosure, and what I find was concocted evidence regarding repayment of the Loans, including the calendars. In my view, there was "something more" regarding Hardip's conduct that deserves rebuke. I have considered whether special costs should be awarded only with respect to the applications regarding document disclosure, but reject that as document disclosure was critical to the main issues. His positions affected the entire trial and caused it to be much longer than it needed to be.

- [58] Lakhwinder's failure to make adequate document disclosure was not as significant, and as acknowledged by Tarsem, she did attempt greater compliance once she had new counsel. I did not accept her evidence regarding the alleged four loans, and that she alone purchased the Sidhu Home. However, I conclude that her conduct does not rise to the level that attracts an award of special costs against her.
- [59] As I find that Tarsem is entitled to party and party costs against Lakhwinder, and I go on to consider whether these should be uplift costs. I do not find that as a result of unusual circumstances, an award of costs at Scale B would be grossly inadequate or unjust. Tarsem did not identify any unusual circumstances other than generally arguing that Lakhwinder failed to make proper disclosure and that parts of her evidence were not accepted. I do not find that these are unusual circumstances in the facts of this case. Tarsem did not detail how those alleged unusual circumstances would result in an award being grossly inadequate or unjust. Tarsem did not provide a draft bill of costs with respect to Lakhwinder. Lakhwinder had much less involvement in the issues than Tarsem and Hardip, and her participation in the trial was small in comparison. As a result, I find that Tarsem is entitled to party and party costs for the action at Scale B against Lakhwinder.

Contractual costs

- [60] I turn now to the contractual costs claim against Hardip. This claim is not listed in the Orders Sought section of the notice of application, but is made in the Factual Basis section. Hardip did not argue that the notice of application was therefore deficient and he did not receive notice. Submissions at the hearing from Tarsem on contractual costs were very brief. This is likely because if special costs are awarded against Hardip and HARS Ltd., they will be greater than the claim for contractual costs which only relates to PN#2. PN#1 does not contain a contractual costs clause. For convenience, again the relevant portion of PN#2 is:

For value received, if there is a default in making any payment on this note, the undersigned also promises to pay on demand all reasonable incurred costs of enforcing payment on the note, including but not necessarily limited to, legal fees, disbursements and costs of collections of all parties herein.

- [61] I did not receive argument on the scope of this clause other than it relates only to PN#2. I did not receive any argument from Hardip that the contractual term in PN#2 ought not to be given effect. The right to contractual costs is clear and unequivocal, although on the facts of this case, the scope of those costs could ultimately be in dispute.
- [62] I conclude that Tarsem is entitled to contractual costs, being his reasonable legal fees and disbursements incurred to enforce payment of and collect the amount owing under PN#2. Those amounts would overlap substantially with special costs and Tarsem cannot be paid both, so the orders will be in the alternative.

Interest under PN#1 and PN#2

Legal framework

- [63] Compound interest reflects the time-value of both principal and unpaid interest payments, while simple interest does not. Compound interest "is the norm in the banking and financial system in Canada": *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43 [Bank of America] at paras. 21-24.
- [64] In *CSRS Ltd v. Embley*, 2008 BCCA 533 at para. 51, the Court noted that Bank of America effectively overruled any presumption in favour of simple interest in business transactions. With respect to interpretation of an interest clause in a contract, the ordinary principles of construction of contracts apply:
- [53] In the absence of the presumption of simple interest, the interest provisions in the promissory notes must be construed in accordance with the ordinary principles for the construction of all written contracts. The question is what the parties intended with respect to interest on the promissory notes. That question is answered by reference to the language used in the context of the surrounding circumstances, including the wording and structure of the promissory notes as a whole, and the terms and structure of the entire transaction between the parties
- [65] Generally, the word "calculated" when used in the context of an interest computation means "compounded": *Dyson Estate v. Moser*, 2002 BCSC 1486 [Dyson Estate]. However, as discussed in *Bank of Nova Scotia v. Dunphy Leasing Enterprises Ltd.*, 1991 ABCA 351, [1992] 1 W.W.R. 577 (Alta. C.A.), [Dunphy] at paras. 98-132, aff'd. [1994] 1 SCR 552, although those words are frequently used interchangeably, it is important to distinguish between them when payment dates are more frequent than the interest calculation period.

Parties' positions

[66] PN#1 states:

For value received the undersigned Borrower promises to pay Tarsem Singh Bilin of [address] (the "Lender") the Principal Amount and interest thereon from the date hereof at the rate of 5% per annum on or before the Due Date. Interest is calculated monthly and is payable both before and after maturity.

LOAN AGREEMENT:

1. The monthly payments will consist of interest only (\$129.16 per month)
3. The rate of interest will be 5%.

[67] PN#2 states:

For value received, the undersigned promises to pay to the order of TARSEM SINGH BILIN, of [address], the principal sum of THREE HUNDRED [FORTY] ONE THOUSAND DOLLARS [\$341,000] (Canadian Currency), with 4.0% interest per annum from this date, calculated monthly, both before and after default, until paid in full, in monthly installments of interest only payments of \$1116.35 commencing on FEBRUARY 10, 2012, AND ON THE 1ST DAY OF EVERY SUCCESSIVE MONTH, UNTIL REPAID IN FULL. The full principal amount and any accrued interest shall be paid no later than FEBRUARY 14, 2014.

- [68] Referring to Dyson Estate, Tarsem submits that "calculated" means "compounded", but without an analysis of the principles in that case, and how they apply to the wording of the PNs.
- [69] Hardip submits that the "plain reading" of the PNs is that they provide for simple interest and not compound interest, but also without an analysis of how the wording supports that conclusion. Hardip further also argues that if there is any ambiguity in the terms of PN#1 and PN#2, this issue should have been raised at trial by Tarsem.
- [70] In response, Tarsem argues that there is no ambiguity in PN#1 and PN#2 and that he is not asking the court to imply a term or alleging a collateral verbal term. He sought an order with respect to this issue at this hearing to avoid another application before the court at a later date.

Analysis

- [71] I do not accede to Hardip's argument that the PNs provide for only simple interest. In my view, there is no wording in the PNs which suggests that was the intention of the parties. The fact that interest is to be calculated and paid monthly indicates a contrary intention. Further, as explained below, I am reinforced in this view by the monthly dollar amounts stated to be payable in each PN.
- [72] PN#1 states that the interest rate is 5% per annum and requires monthly "interest only" payments of \$129.16. The fact that this amount is exactly 1/12 of 5% of the principal of \$31,000, is some indication that the parties intended that interest be compounded and paid monthly. I note that this conclusion results in an effective annual interest rate that is slightly greater than 5%.
- [73] PN#2 states that the interest rate is 4% per annum and requires monthly "interest only" payments of \$1116.35. This amount is less than 1/12 of 4% of the principal of \$341,000, which at first blush might support that monthly compounding was not intended. However, and this is a mathematical calculation, the \$1116.35 is exactly the amount that would be required to be paid if the 4% annual rate referred to in PN#2 is an effective annual rate arising from monthly compounded interest payments. On that assumption (the parties made no submissions on nominal versus effective interest rates), this is a strong indication that the parties intended interest to be compounded monthly. I note that a 4% effective annual interest rate results in a monthly compounded rate that is slightly less than 1/12 of

4% as a result of the reinvestment principle. This is explained in Dunphy:

- [118] The other sense in which "compounding" is said to occur is, as noted earlier, when the dates for payment of interest are more frequent than the interest calculation periods. When interest payments are made more frequently than interest is permitted to be calculated, the effect is akin to the compounding of interest (as I have discussed earlier.) In this event, the "reinvestment principle" should be applied in interpreting what the parties to a loan contract intended. The rationale for a court to apply the reinvestment principle in these circumstances was discussed by Waldron in "Sections 6 and 7 of the Canada Interest Act: Curiouser and Curiouser", at pp. 171-172:

Where payments containing a component of interest are made more frequently than the interest is calculated, the total amount to be paid by the borrower and the amount of his payments required to extinguish the loan in a specified time are determined by using an interest rate per payment period somewhat less than the interest per calculation period divided by the number of payment periods it contains. In other words, the borrower is being given an interest credit on the amount of interest paid before the calculation date, as if that pre-paid interest were itself bearing interest in the hands of the lender.

- [119] Therefore, where the payment dates for interest are more frequent than the calculation dates stipulated in an agreement, a court would be entitled to conclude (in the absence of contrary contractual terms) that a stated rate per annum in a contract was intended by the parties to be an effective annual interest rate and not a nominal annual interest rate. In other words, the reinvestment principle would be properly imported into the contract. Otherwise, the lender, by receiving interest payments before interest was to be calculated, that it is before it was due, would be securing a greater return than that contracted for in these circumstances. Whether one were to treat this as a case of interest being paid in advance of the due date or as a case of the lender compounding interest when not entitled to do so given the contractual terms, the end result would be the same. The reinvestment principle will be imported into the contract and any stated rate per annum will, in the absence of expressed contractual terms to the contrary, be treated as an effective annual interest rate.

- [74] Hardip argues that Tarsem did not raise the issue of compound versus simple interest at trial. Neither did Hardip. The parties did not advise exactly how this issue arose after the Trial Reasons, but it appears that neither realized before or at trial that it would be an issue. Neither party identified any ambiguity for which additional admissible evidence might have been led with respect to the interpretation of the PN's. Both parties referred to the actual wording of the PNs only. The notice of civil claim refers to the interest terms of the PNs and claims interest, although I note the calculations of the amount owing up to the date of filing, and per diem appears to be based on simple interest. I do not consider this to be an admission by Tarsem of simple interest but if I am wrong, I would grant an amendment as there is no prejudice. Hardip did not raise this in his response to application. Further, in the Trial Reasons, I ordered that interest be calculated in accordance with the PNs. The final

order has not been entered. The issue has to be resolved so the judgment amounts can be calculated. In my view, Hardip has not put forth any compelling reason not to determine the issue at this time.

[75] I declare that the interest on the PNs is compounded and payable monthly.

Declaration of resulting trust

Parties' positions

[76] Tarsem seeks an order that the trial decision be "settled" with respect to the resulting trust on these terms:

Lakhwinder Kaur Sidhu holds 38% of equity in the Property in trust for Hardip Singh Sidhu, making Hardip Singh Sidhu the sole beneficial and legal owner of 38% of the property located at [address] and legal described as [description].

[77] Tarsem argues that this court's declaration of a resulting trust has to be operational so that he can register his judgment on title against Hardip's 38% beneficial interest in the Sidhu Home. Tarsem refers to s. 34 of the Land Title Act, R.S.B.C. 1996 c. 250 [LTA], and submits that the words "and legal owner" must be added to the declaration to permit Tarsem register his judgment. Section 34(1) states:

34(1) Except as provided in section 180, the registrar must not register an indefeasible title in favour of a person under a direction contained in an order of a court unless the order declares that it has been proved to the satisfaction of the court on investigation that the title of the person designated in the direction is a good safe holding and marketable title.

[78] Tarsem also refers to the Land Title Act Manual, 3rd ed., looseleaf (Vancouver, BC: Continuing Legal Education Society of British Columbia, 2021), vol. 1, at §3.18, which provides the following regarding s. 34:

Registration of Indefeasible Title by Court Order

Section 34 requires the court to make a declaration to the effect that a good safe holding and marketable title exists as a condition of directing the registrar to register an indefeasible title or charge.

Determination of Good Safe Holding and Marketable Title

The mandatory requirement in s. 34 applies only if a court order directs the registrar to register an indefeasible title or charge. Where the court order does not contain a declaration as to a good safe holding and marketable title, the registrar has no authority to comply with the direction in the order unless the order contains other apt words that enable the registrar to determine that a good safe holding and marketable title exists. Examples include:

(1) a declaration that a named individual is the sole beneficial and legal owner of the interest;

- (2) vesting language, including expressions such as the described land "be conveyed to and vested in" a specified person; or

Effect of Vesting Language

Where the court order does not contain a direction to the registrar but the court order contains vesting language, the vesting language operates in the same way as words of transfer and the registrar gives effect to the order in the same way as a freehold transfer or other conveyancing instrument.

[Emphasis added.]

- [79] Lakhwinder opposes the addition of the words "and legal owner". She submits that this is not settling the trial order, but bringing an application for a vesting order that was not requested at trial. The process taken by Tarsem is procedurally incorrect.

Analysis

- [80] I agree with Lakhwinder's position. This is not settling an order. It is asking the court to in effect make a vesting order that was neither sought at trial, nor consistent with what was declared. I did not declare Hardip to be the registered legal owner. Lakhwinder is the registered owner, and she holds 38% of the beneficial interest in trust for Hardip. Section 34 of the LTA is not applicable, and it further excepts circumstances in s. 180 which concerns registration of trusts. I did not any receive submissions from Tarsem on s. 180.
- [81] Further, I am not persuaded that Tarsem will not be able to register his judgment against Hardip's beneficial interest, as suggested by him. First, there was no evidence that inquiries have been made and that the Land Title Office has indicated that a certificate of judgment (when it is obtained) could not be registered. Second, no submissions were made with respect to s. 86 of the Court Order Enforcement Act, R.S.B.C. 1996, c. 78 which concerns registration of judgments, including against beneficial interests in land.
- [82] I dismiss Tarsem's application to "settle" the order on the wording he seeks. The declaration remains as in the Trial Reasons.

Orders

- [83] In summary, I make the following orders:
- Tarsem is awarded special costs of his action against Hardip and HARS Ltd. In the alternative, Tarsem is awarded his reasonable contractual costs against Hardip pursuant to the terms of PN#2;
 - Tarsem is awarded party and party costs of his action against Lakhwinder at Scale B;
 - all other claims for costs by the parties are dismissed;

- d) a declaration that the interest on PN#1 and PN#2 is compounded and payable monthly; and
- e) Tarsem's application to settle the wording of the declaration of resulting in terms different than what was declared in the Trial Reasons is dismissed.

"Norell J."

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