
CANADA / JUDGMENT

Boissonnault v. Marler

2021 BCSC 678

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Supreme Court of British Columbia

DECIDED

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2021 BCSC 678 Boissonnault v. Marler

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Boissonnault v. Marler,

2021 BCSC 678

Date: 20210413

Docket: S1611206

Registry: Vancouver

Between:

Brian Boissonnault

Petitioner

And

Shannon Dee Marler and Ralph Douglas Marler

Respondents

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for the Petitioner:

R.U. Bennett

Counsel for the Respondents:

C.D. Steinberg

Place and Date of Hearing:

Vancouver, B.C.

January 18-19, 2021

Place and Date of Supplemental Written Submissions:

Vancouver, B.C.

February 16 and March 4, 2021

Place and Date of Judgment:

Vancouver, B.C.

April 13, 2021

INTRODUCTION

- [1] This action concerned an application by the petitioner, Brian Boissonnault, to compel a sale of a Vancouver condominium (the "Condo"). On title, Mr. Boissonnault co-owned the Condo with the respondents, Shannon Marler, and her father, Ralph Marler (collectively, the "Marler Respondents").
- [2] The major issue that prompted the litigation was the parties' disagreement as to Mr. Boissonnault's share of the Condo ownership. Mr. Boissonnault contended that he was entitled to one-half of the equity; the Marler Respondents took the position that he was only entitled to one-third of the equity.
- [3] In December 2016, this action began. In September 2018, the dispute between the parties was essentially resolved when the Marler Respondents conceded that Mr. Boissonnault owned one-half of the Condo on the eve of the summary trial he brought to resolve the issue. In October 2019, the Condo was sold. Mr. Boissonnault received half of the net sale proceeds; the other half of the proceeds are now held in trust pending a determination of costs in this action.
- [4] The issue before the Court is to determine the cost consequences arising in this proceeding. Mr. Boissonnault seeks an award of special costs against the Marler Respondents, or alternatively, an award of increased costs. The Marler Respondents concede that costs are payable by them, but only on a party-and-party basis.

BACKGROUND FACTS

- [5] In 2010, Mr. Boissonnault and Ms. Marler were in a relationship. In February 2011, Mr. Boissonnault entered into an agreement to purchase the Condo although he later agreed to purchase it jointly with Ms. Marler. Ms. Marler is a realtor and Mr. Boissonnault says that she was involved in the purchase negotiations to some extent in that capacity.

- [6] Ultimately, the couple each contributed half of the deposit, with Mr. Boissonnault borrowing sufficient money to cover his portion. However, they did not qualify for mortgage financing to pay the remainder of the purchase monies. They did eventually secure mortgage financing, but only after Mr. Marler agreed to co-sign the mortgage. As part of those arrangements, the mortgagee required that all three of the parties be on title to the Condo.
- [7] In May 2011, the sale closed and each party was reflected on title as one-third owners.
- [8] In May 2012, the couple's relationship ended and Mr. Boissonnault moved out of the Condo. In fall 2012, the couple attempted to reach agreement on a co-ownership agreement. While draft agreements were prepared (the "Draft Co-Ownership Agreement"), no final agreement was ever signed. Nevertheless, the couple did agree to Ms. Marler paying rent for her occupation and the sharing of the costs associated with the Condo, being the mortgage, strata fees and property taxes.
- [9] In late 2016, Mr. Boissonnault indicated that he wished to sell the Condo. The couple discussed the possibility of Ms. Marler buying out his equity, but terms were never arranged. In the midst of these negotiations, Mr. Boissonnault says that, for the first time, Ms. Marler contended that he only owned one-third of the equity in the Condo, not the half that he thought he owned.
- [10] On December 2, 2016, Mr. Boissonnault filed the petition in this action by which he sought a sale of the Condo and that he receive half of the equity. He alleged that Mr. Marler did not have any beneficial or financial interest in the Condo, despite him being on title. At that time, he sought special costs of the proceeding.
- [11] In February 2017, the Marler Respondents filed their Response to Petition. On the major point of controversy, they both asserted that Mr. Marler beneficially and legally owned one-third of the Condo. At that same time, the Marler Respondents also filed sworn affidavits asserting the same position. In their Response, the Marler Respondents asserted that there was a significant dispute concerning the underlying facts and that the matter should be referred to the trial list.
- [12] In May 2017, Mr. Boissonnault filed an application to obtain disclosure of Ms. Marler's counsel's file relating to the negotiations regarding the draft Co-Ownership Agreement based on a waiver of solicitor/client privilege. Ms. Marler opposed that application. Nevertheless, on July 24, 2017, Master Dick ordered disclosure.
- [13] On July 28, 2017, the parties signed a consent order to refer the matter to the trial list.
- [14] In October 2017, after reviewing the disclosed legal file, Mr. Boissonnault served a Notice to Admit. The Marler Respondents declined to admit any facts, including Mr. Boissonnault's assertion that Mr. Marler did not own any beneficial interest in the Condo.
- [15] In November/December 2017, the parties exchanged their lists of documents.

- [16] In March 2018, Ms. Marler was examined for discovery. In July 2018, Mr. Marler was also examined for discovery but only after Mr. Boissonnault filed an application to compel his attendance from Alberta.
- [17] In August 2018, Mr. Boissonnault filed an application for a summary trial. The Marler Respondents did not file any responding materials. About a week later, the Marler Respondents conceded the major issue as to the ownership of the Condo. Eventually, on September 6, 2018, a consent order was filed confirming that Mr. Boissonnault owned half of the Condo and granting him conduct of sale (the "Conduct of Sale Order").
- [18] Ms. Marler continued to solely occupy the Condo.
- [19] In October 2019, a sale of the Condo was eventually completed. After payment of the mortgage and other adjustments, Mr. Boissonnault received half of the proceeds. The other half, otherwise payable to Ms. Marler, remains in trust pending the results of this application.

SPECIAL COSTS

- [20] In broad terms, Mr. Boissonnault contends that special costs should be awarded against the Marler Respondents for the entire course of this litigation. He asserts that such costs are supported because: firstly, the Marler Respondents filed false affidavit evidence in February 2017; and, secondly, Ms. Marler unreasonably interfered in his efforts to sell the Condo after the Conduct of Sale Order.

Legal Principles

- [21] The Court has discretion to award special costs to dissociate itself from "reprehensible conduct" deserving of reproof or rebuke. Reprehensible conduct encompasses scandalous or outrageous conduct, but it also encompasses milder forms of misconduct deserving of reproof or rebuke: *Garcia v. Crestbrook Forest Industries Ltd.*, (1994) 9 B.C.L.R. (3d) 242 (C.A.).
- [22] Special costs are not compensatory; they are punitive. They are meant to chastise and deter reprehensible conduct in the course of litigation: *Grewal v. Sandhu*, 2012 BCCA 26 at para. 106 and *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177 at para. 134.
- [23] The general principles governing special costs were summarized in *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352 at para. 73:
- a) the court must exercise restraint in awarding special costs;
 - b) the party seeking special costs must demonstrate exceptional circumstances to justify a special costs order;
 - c) simply because the legal concept of "reprehensibility" captures different kinds of misconduct does not mean that all forms of misconduct are encompassed by this term;

- d) reprehensibility will likely be found 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;
 - e) special costs can be ordered against parties and non-parties alike; and
 - f) the successful litigant is entitled to costs in accordance with the general rule that costs follow the event. Special costs are not awarded to a successful party as a "bonus" or further compensation for that success.
- [24] Specifically, in relation to Mr. Boissonnault's allegations that the Marler Respondents have tendered false affidavits in the proceeding and defended his claim knowing that their position was without merit, the authorities indicate:
- a) Dishonest or untruthful testimony alone does not attract an award of special costs. There must be something more egregious to warrant an order for special costs: *Steinebach (Litigation guardian of) v. Fraser Health Authority*, 2011 BCSC 1369 at paras. 28, 35-36 citing *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914 at paras. 13-14; *Gill v. Bassi*, 2016 BCSC 754 at para. 15; and, *Siemens v. Howard*, 2017 BCSC 1193 at para. 13;
 - b) Dishonest and misleading evidence advanced deliberately or where there is a lack of concern for the truth can attract special costs: *Chancery Estate Holdings Corp. v. Sahara Real Estate Investment Inc.*, 2013 BCCA 145 at paras. 73-75;
 - c) Failure to come to terms with a "manifest deficiency" in a claim at an early stage can attract special costs: *Concord Industrial Services Ltd. v. 371773 B.C. Ltd.*, 2002 BCSC 900 at para. 27; and
 - d) The filing of affidavits found to be unsatisfactory, contradictory, obscure and confusing has been found to support special costs: *Edwards v. Bell*, 2004 BCSC 399 at paras. 43-47.

Untruthful Testimony

- [25] Mr. Boissonnault alleges that the Marler Respondents tendered false affidavit evidence, which they relied upon to create an evidentiary conflict to support the matter being placed on the trial list. He alleges that their sole purpose in doing so was to increase the procedural complexity and therefore the cost borne by him. In addition, Mr. Boissonnault alleges that the Marler Respondents then took no steps to establish their version of the (allegedly) conflicting facts, nor to undermine his evidence, leading to them finally capitulating to the relief he sought on the eve of summary trial.
- [26] As a general observation, I am satisfied that Mr. Boissonnault and Ms. Marler's approach to this litigation was coloured by the distrust and acrimony that arose when their romantic relationship ended.

- [27] In their February 2017 affidavits, the Marler Respondents set out their evidence in support of their contention that there was a tripartite agreement with Mr. Boissonnault that they would each own one-third of the Condo. Ms. Marler in particular stated that she had witnessed the conveyancer explain to Mr. Boissonnault that this was the consequence of Mr. Marler being on title.
- [28] While Mr. Boissonnault alleges that this evidence is untrue and "contrived", there was no finding by the Court to that effect. In support, Mr. Boissonnault refers to the later disclosure of Ms. Marler's lawyer's file in the time frame when the couple was discussing the terms of a co-ownership agreement. On August 8, 2012, Ms. Marler said to her lawyer in an email:
- 1) Do we need to include that Brian is to make his best efforts to discharge my Dad from his obligations as cosigner on the mortgage? Reason I'm asking is although Brian and I were planning to rewrite the mortgage in approx May/June of this year to remove my Father from his obligations, this was just so his borrowing power would not be tied up with 'us' anymore as he doesn't care to have interest in the house. However now that Brian and I have parted ways, would it not be advantageous to keep my Father on title since he is a third owner so he would be entitled to a third of the proceeds when we actually sell the property so if Brian ends up being a 'jerk' during this process and not paying his bills etc I am in a better position to recoup loses etc with my Father on title. Does that make sense? And if so, I have spoken to my Dad and he is happy to stay on title and the mortgage for now.
- [Emphasis added.]
- [29] I would not characterize this email as Mr. Boissonnault's "smoking gun" in the sense of supporting that the Marler Respondents were deliberately lying in their February 2017 affidavits. While the inference from Ms. Marler's email was certainly one of exerting leverage, it is not inconsistent with Mr. Marler asserting a one-third interest and perhaps being prepared to give it up in certain circumstances.
- [30] Mr. Boissonnault also alleges that, in October 2017, the Marler Respondents should have admitted all of the facts set out in his Notice to Admit. However, by that time, they were actively defending the proceeding that had, by then, been referred to the trial list, by consent. Further, it can hardly be said that the Marler Respondents were simply being obstructionists. Later, in December 2017, they filed a list of documents in response to the delivery of Mr. Boissonnault's list of documents.
- [31] Mr. Boissonnault also alleges that Mr. Marler was uncooperative in scheduling his examination for discovery. I agree that the parties encountered some difficulties in that respect, particularly on the matter of conduct money for Mr. Marler to travel from Alberta. I agree with Mr. Boissonnault that this process was made unnecessarily more difficult by the Marler Respondents. I have reviewed the circumstances and conclude that there was some gamesmanship on the part of the Marler Respondents in arranging the discovery date. However, in my view, this difficulty does not rise to the level of repressible behavior sufficient to support a special costs award.

- [32] Mr. Boissonnault alleges that the Marler Respondents' evidence at their examinations for discovery in March and July 2018 was "wholly inconsistent" with their affidavit evidence. I agree that some of their evidence on discovery was not as forceful as the evidence found in their earlier affidavits. It is not uncommon that discovery evidence does not correspond directly to that given in an earlier affidavit. However, having compared the affidavits and the transcripts of the discoveries, I am unable to conclude that any discrepancies arose from deliberately false evidence given by the Marler Respondents in their February 2017 affidavits.
- [33] Mr. Boissonnault argues essentially that the Marler Respondents put him to unnecessary complexity and cost in advancing this litigation. He asserts that the Marler Respondents' false evidence was introduced solely to have the matter referred to the trial list. He then says that, having achieved that result, the Marler Respondents never made any effort to advance the conduct of the litigation -- by examining Mr. Boissonnault for discovery, cross-examining him on his affidavit or by responding to his summary trial application.
- [34] In substance, Mr. Boissonnault asks this Court to adjudicate the merits of the major issue in this litigation toward finding that the Marler Respondents' affidavit evidence was not to be believed and that they deliberately gave that false evidence in an attempt to create leverage as against him.
- [35] In *Lim v. Zhu*, 2019 BCSC 88, Justice Adair was addressing the matter of costs after a settlement had been reached resulting in a consent dismissal. She considered various Ontario authorities in similar circumstances where there had been no adjudication of the matter, yet one party asserted that they had essentially succeeded. In the face of a settlement of the dispute, Adair J. rejected that a "shadow trial" was appropriate in the context of a costs application:
- [150] Because the parties settled, there will never be an adjudication of the facts, or findings about which party's evidence was credible and reliable, or about whether parties conspired with one another, or a determination about whether a particular remedy was (or was not) justified. There has been no admission of liability. As opposed to a consent to judgment, the Settlement Agreement requires the signing and entry of a consent dismissal order. All parties gave up the opportunity to achieve (possible) vindication through a trial and final judgment when they accepted the certainty of resolution through the Settlement Agreement. The court should not now be expected to conduct a shadow trial to declare winners and losers for the purposes of a costs award. . . .
- . . .
- [153] I agree with the approach taken by Broad J. in *Waterloo North*. Where parties have settled, the court has not declared a "winner" and a "loser," and the default position where there is a settlement should be an order that there is no order as to costs. To embark on, in effect, a full examination and adjudication of the merits of the parties' respective substantive claims and defences for the sole purpose of determining entitlement to costs, when those

substantive issues have been settled by the parties, is not a proportional or efficient use of the court's time. It runs counter to the principle stated by Gropper J. in *Westsea* (at para. 75) that costs are not the central focus of litigation, and that the disposition of costs should be conducted in a manner that recognizes their secondary importance.

[Emphasis added.]

- [36] In *Berthin v. Berthin*, 2020 BCCA 376, the court denied leave to appeal a special costs award. In doing so, at para. 31, Justice Hunter addressed the "shadow trial theory". At para. 37, the court declined to comment on the correctness of *Lim* or the approach of the Ontario authorities upon which *Lim* was based.
- [37] I agree with Adair J.'s approach in *Lim* that this Court will generally be reluctant to embark upon the full enquiry of the contested issues towards determining a costs outcome after a settlement. In *Lim*, at para. 153, this was referred to as the "default position". This sentiment is in keeping with the discretionary nature of any costs award. However, I would add that there may be circumstances to justify the exercise of the Court's discretion in imposing special costs even in the face of a settlement.
- [38] Here, the Marler Respondents ultimately agreed not to defend the summary trial application and, in doing so, entered into a settlement with Mr. Boissonnault. Via that settlement, they consented to the Conduct of Sale Order and agreed that Mr. Boissonnault and Ms. Marler were declared as the sole beneficial owners of the Condo. In these circumstances, I decline to embark upon a consideration of the merits of the Marler Respondents' defence in the context of a special costs award.
- [39] I do not find the facts and decision in *CIBC v. Marples*, 2008 BCSC 590 to be of assistance here. In that case, a debtor had filed a statement of defence and counterclaim. At paras. 4-7, the Court found the defence was "completely devoid of merit" and the counterclaim was only withdrawn during the course of arguments at the hearing.
- [40] There is no basis upon which I can conclude that the Marler Respondents' affidavits contained false evidence and that they deliberately advanced that false evidence. In addition, there may have been any number of reasons why the Marler Respondents ultimately agreed not to defend the summary trial application by filing evidence, including possibly that they considered that their evidence would not be accepted. However, the authorities are clear that, even if their evidence had not prevailed, there must be "something more" to justify a special costs award. In this case, I see nothing in the Marler Respondents' evidence or conduct that would justify such a result.
- [41] Mr. Boissonnault also refers to the facts in *Chudy v. Merchant Law Group*, 2009 BCCA 93 at paras. 9-10 where the court found that the appellant had engaged in various egregious behavior in the litigation. However, the reprehensible conduct referred to in para. 9 goes well beyond the actions of the Marler Respondents here, which I am unable to characterize as deserving of the Court's rebuke.

[42] In conclusion, I decline to exercise my discretion to award special costs as against the Marler Respondents for their actions up to the date of the Conduct of Sale Order.

Conduct of Sale Order

[43] Mr. Boissonnault also says that special costs are appropriate given Ms. Marler's actions in the face of the Conduct of Sale Order. He says that Ms. Marler repeatedly and over a long period of time breached the Conduct of Sale Order by: (1) restricting the listing agents' access to the property; (2) impugning the agent's professionalism without cause; (3) restricting access to the Condo because she was renting it out on AirBnB; (4) interfering with efforts to market the Condo, and (5) likely delaying its sale during a period when the market was falling.

[44] In *Banner v. Gajie*, 2013 BCSC 379 at para. 26, the Court found that special costs were appropriate where a litigant had promoted lengthy and expensive litigation for the purpose of frustrating the other party's legitimate interests. In that case, the litigant had, in part, refused to cooperate with a real estate agent in showing the property and had frustrated efforts to obtain vacant possession. On this same point see *Hoffman v. Percheson*, 2011 BCSC 1175 at paras. 24.

[45] Disobedience of a court order over a period of several months can attract special costs: *G.W.L. Properties Ltd. v. W.R. Grace & Co. of Canada*, [1993] B.C.J. No. 3113 (S.C.).

[46] The Conduct of Sale Order (dated September 6, 2018) was in the usual terms and required that Ms. Marler provide access to the Condo from 9:00 a.m.-7:00 p.m. from Monday-Sunday. Over the ensuing 13 months until a sale of the Condo was approved by the Court on October 2, 2019, Mr. Boissonnault entered substantial difficulty in marketing the Condo for sale.

[47] I have considered the substantial evidence on this aspect of the dispute. Mr. Boissonnault has filed his Affidavit #3 sworn September 19, 2019 and the Affidavits of his realtor, Shane Baseden, and Natalie Neufeld. In response, Ms. Marler filed her Affidavit #2 and the Affidavits of her dog sitter, Jeffrey MacIntosh, and her friend, Rami Zein.

[48] I conclude that Ms. Marler did repeatedly and unreasonably interfere with Mr. Boissonnault's marketing and sale efforts in relation to the Condo, all of which added to the complexity and cost of him achieving that end. Specifically, I find:

- a) In late September 2018, Ms. Marler unreasonably objected to Mr. Boissonnault's choice of realtor. She stated that she was refusing to work with that realtor, contrary to the Conduct of Sale Order that allowed Mr. Boissonnault to choose the realtor;
- b) In early October 2018, Mr. Boissonnault hired Mr. Baseden, the realtor. I accept Mr. Baseden's evidence in recounting numerous difficulties in his marketing of the Condo, arising from Ms. Marler's actions;

- c) Ms. Marler unreasonably refused to give Mr. Baseden a means of independently accessing the Condo, including providing him with a key for a lockbox or a fob. This resulted in countless requests from Mr. Baseden to arrange access, with Ms. Marler either refusing access at numerous times or not responding at all to those communications. I reject Ms. Marler's explanation that she didn't trust Mr. Baseden to independently gain access to the Condo as baseless and unsubstantiated;
 - d) Numerous showings of the Condo or open houses did not occur arising from Ms. Marler not allowing access during the required hours in breach of the Conduct of Sale Order. In some cases, those showings or open houses were delayed. At times, these delays caused prospective buyers to decline to pursue a potential purchase of the Condo;
 - e) Ms. Marler advanced a series of excuses to deny access to the realtors, all revolving around her personal schedule and her convenience. I do not accept her myriad of reasons -- that she was out of town; that she was heli-skiing with no internet access; that her friend's schedule could not accommodate access; that she had dogs in the Condo; that she was hosting a baby shower; or, that the elevator was not working -- as legitimate reasons for her to deny access in accordance with the Conduct of Sale Order; and
 - f) By late July 2019, Mr. Boissonnault had entered into a sale agreement but he still required access to the Condo toward finalizing the sale. However, by August 2019, and likely far earlier, Ms. Marler was renting the Condo out on AirBnB and improperly denying access to the Condo when Mr. Baseden requested access. I find she did so as not to disrupt her rental activities and her AirBnB customers, from which she was garnering income. More egregious, the evidence establishes that Ms. Marler had fobs waiting for her AirBnB guests to allow them independent entry to the Condo, something she denied to the realtors.
- [49] All of the above interference and obstruction of Mr. Boissonnault's sale activities no doubt also caused substantial further effort on the part of the realtor. However, Ms. Marler's actions also gave rise to Mr. Boissonnault incurring substantially more legal costs than would otherwise have been the case, since her lawyer was involved in ongoing communications with Ms. Marler's lawyer in what amounted to vain and repeated attempts to secure Ms. Marler's cooperation.
- [50] Ms. Marler cannot be taken by surprise by Mr. Boissonnault seeking special costs for this reason. Beginning in fall 2018, Mr. Boissonnault clearly signalled to Ms. Marler in emails that her non-compliance with the Conduct of Sale Order would result in him seeking special costs as against her.
- [51] Given all of the above circumstances, I am satisfied that Ms. Marler acted unreasonably and in breach of the Conduct of Sale Order in frustrating Mr. Boissonnault's efforts to sell the Condo. The most egregious breach was her refusal to allow access so as to gain financially through her AirBnB rentals.

[52] I conclude that Ms. Marler's actions were reprehensible and deserving of the Court's rebuke. I award special costs against Ms. Marler in favour of Mr. Boissonnault for the period from the Conduct of Sale Order until the order granting approval of the sale. Given that Mr. Boissonnault would have incurred some legal costs during that time in any event, I award him 85% of his actual legal fees: Edwards at paras. 59-60.

INCREASED / UPLIFT COSTS

[53] In the alternative, if special costs are not awarded for all or a portion of the proceeding, Mr. Boissonnault seeks increased or uplift costs.

[54] Such costs arise under Appendix B of the Supreme Court Civil Rules:

2(5) If, after it fixes the scale of costs applicable to a proceeding under subsection (1) or (4), the court finds that, as a result of unusual circumstances, an award of costs on that scale would be grossly inadequate or unjust, the court may order that the value for each unit allowed for that proceeding, or for any step in that proceeding, be 1.5 times the value that would otherwise apply to a unit in that scale under section 3 (1).

(6) For the purposes of subsection (5) of this section, an award of costs is not grossly inadequate or unjust merely because there is a difference between the actual legal expenses of a party and the costs to which that party would be entitled under the scale of costs fixed under subsection (1) or (4).

[55] Unlike special costs, which are intended to be punitive, the purpose of increased costs is to provide an indemnity: *National Hockey League v. L.A. Kings* (1995), 2 B.C.L.R. (3d) 13 (C.A.) at para. 32.

[56] As stated in *Lim* at para. 123, there are two pre-requisites before such a costs award may be made: firstly, there must be unusual circumstances; and, secondly, those unusual circumstances would result in a grossly inadequate or unjust award of costs at the fixed scale.

[57] In *Globalnet Management Solutions Inc. v. Aviva Insurance Company*, 2020 BCSC 1361, Justice Blok discussed what factors may be found to be "unusual circumstances":

[30] Factors which may be relevant to "unusual circumstances" include positions or behaviour which have added to the complexity of the litigation, the importance of the matter to a party, misbehaviour by a party that added to the expense incurred by the party claiming costs, and the degree of disparity between costs calculated at Scale B and actual legal fees incurred: *On Call Internet Services Ltd. v. TELUS Communications Company*, 2010 BCSC 1031, at paras. 11-12 [On Call]. See also *Monenco Ltd. v. Commonwealth Insurance Co.*, 1999 BCCA 133; and *National Hockey League v. L.A. Kings* (1995), 2 B.C.L.R. (3d) 13 (C.A.). In the latter case, the Court of Appeal noted that the misconduct in question need not be "reprehensible":

- [33] But where one party to an action is guilty of misconduct in the litigation, and the innocent party is required to spend time and effort responding to such conduct, in most cases it would be unjust if the latter was not adequately indemnified for the costs associated with defending against that which should never have happened. It is in that sense that, whether reprehensible or not, the misconduct of one party is relevant when a court is considering or exercising the discretion to award increased costs to the other.
- [58] Similarly, in *Berthin v. British Columbia (Registrar of Land Titles)*, 2017 BCCA 181 at para. 43, the court described common reasons to award increased costs as including "actions taken in bad faith, disobedience of court processes, incivility, frivolity, and impertinence".
- [59] As with his argument under special costs, Mr. Boissonnault argues that the Marler Respondents deliberately lied in their February 2017 affidavits toward frustrating his legitimate interest in the Condo. This is said to constitute the "unusual circumstances" also sufficient to justify increased costs.
- [60] Again, I am unable to conclude on this costs application that there was any misbehavior on the part of the Marler Respondents in terms of their affidavit evidence or in their discovery evidence. I cannot conclude that their evidence was false and, if so, that it was put forward deliberately to mislead the Court.
- [61] While I have some sympathy for Mr. Boissonnault's situation, I cannot agree that the majority of the Marler Respondents' actions to the time the Conduct of Sale Order was entered involved any unusual circumstances. The petition was filed to obtain relief toward a sale of the Condo based on Mr. Boissonnault's position as to its beneficial ownership. The Marler Respondents filed their affidavits shortly thereafter. In July 2017, the matter was referred to the trial list by agreement. After examinations for discovery were completed, the summary trial was prepared and scheduled, resulting in the settlement.
- [62] The only aspects of the above chronology that I agree can be described as unusual are two matters: firstly, the application by Mr. Boissonnault to obtain disclosure of Ms. Marler's lawyers file; and secondly, his application prepared and filed to compel Mr. Marler's attendance at his discovery. I find that these were unnecessary steps that Mr. Boissonnault was required to take to advance the litigation based on unreasonable positions taken by the Marler Respondents or their "misbehavior", despite my inability to find these positions "reprehensible". In particular, the disclosure application was an important step by Mr. Boissonnault in obtaining relevant evidence which he would later assert in support of his position.
- [63] I am also satisfied that this was a very important matter to Mr. Boissonnault. He is a young man who went into this relationship and property purchase with Ms. Marler in the hopes of advancing his financial security. Neither obviously worked out and, in order to obtain some recovery, he was required to embark upon a litigation process, which as is usually the case, was lengthy and no doubt expensive. I have no doubt that this was the case here. Along that difficult path, I find that, at some points, the Marler Respondents did act unreasonably in

order to frustrate his efforts.

[64] I also find that these unusual circumstances would result in a grossly inadequate or unjust award of costs at the fixed scale in respect of the steps I have identified.

CONCLUSION

[65] Mr. Boissonnault is awarded his party-and-party costs for this litigation, save that:

- a) With respect to the value of the units under Appendix B relating to Mr. Boissonnault's applications for disclosure and to compel Mr. Marler's attendance for discovery, I award increased costs against the Marler Respondents jointly and severally, such that the value of those units will be 1.5 times the default or set value;
- b) From September 6, 2018 to October 2, 2019, I award Mr. Boissonnault 85% of his actual legal costs as special costs as against Ms. Marler; and
- c) I award increased costs for this costs application in favour of Mr. Boissonnault against the Marler Respondents jointly and severally such that the value of those units will be 1.5 times the default or set value.

"Fitzpatrick J."

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