
CANADA / JUDGMENT

Bradshaw v. Stenner,

2012 BCSC 237

COURT

Supreme Court of British Columbia

DECIDED

17 February 2012

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2012 BCSC 237 Bradshaw v. Stenner

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bradshaw v. Stenner,

2012 BCSC 237

Date: 20120217

Docket: S072722

Registry: Vancouver

Between:

Lori Noreen Bradshaw

Plaintiff

And

Kimberley Shane Stenner

Defendant

And

John Bradshaw

Defendant by Counterclaim

Before: The Honourable Madam Justice Dillon

Reasons for Judgment

Counsel for the Plaintiff and the

Defendant by Counterclaim:

I. Donaldson Q.C.

and M. Tweedy

Counsel for the Defendant:

S. Katalinic

Place and Date of Trial/Hearing:

Vancouver, B.C.

December 13-15, 2011

Place and Date of Judgment:

Vancouver, B.C.

February 17, 2012

Introduction

- [1] Reasons for judgment were given in this trial on October 1, 2010 (Bradshaw v. Stenner, 2010 BCSC 1398 (the "judgment")). The matters of a further accounting, costs, and punitive damages were adjourned generally at the request of counsel to allow for further submissions. After much delay, both parties were prepared to argue these remaining matters and the trial continued on the dates set out above. Fortunately, during the continuation of trial, the parties agreed on the final accounting between them and this Court did not hear submissions regarding this issue.
- [2] It should be noted that the style of cause in the judgment did not include John Bradshaw as defendant by counterclaim. The counterclaim was described in para. 1 of the judgment to be for amounts owed for rental of the property at issue in this case, known as the "Peachland property". The counterclaim was specifically dismissed in para. 208 of the judgment. It should also be noted that this Court found it unnecessary to deal with claims of the plaintiff for unjust enrichment, misrepresentation, and breach of contract.
- [3] The plaintiff and defendant by counterclaim (collectively referred to as the "Bradshaws") claim special costs as against the defendant, punitive damages, and a set-off of costs and punitive damages against the final accounting in which the plaintiff owes the defendant \$117,500 by consent. At the outset of the continuation of trial, the defendant brought an application pursuant to Rule 22-7 to dismiss the Bradshaws outstanding claims for failure to comply with orders of the Court. This application was dismissed.

- [4] This matter was originally set for continuation on April 26-28, 2011. It was adjourned at the request of the plaintiff on April 27, 2011, because the defendant had failed to provide a list of the witnesses that she intended to call at the continuation along with a summary of their evidence, as ordered at the trial management conference on December 13, 2010. Between October 1, 2010 and now, there have been 14 additional days of court proceedings, either chambers applications or trial management conferences and many emails to the Court.

Party-Party Costs

- [5] In the judgment at para. 209, this Court said: "... it is apparent that the plaintiff will be entitled to costs throughout except for the application and order of June 26, 2008, in which costs were ordered for the defendant in any event of the cause." After consideration of the defendant's submission that the plaintiff's and defendant by counterclaim's request for party and party costs was "excessive, overreaching and inappropriate", that the defendant by counterclaim was totally unsuccessful, and that the plaintiff was only partially successful, the tentative conclusion expressed in para. 209 is confirmed. The plaintiff and the defendant by counterclaim are entitled to party and party costs.
- [6] Rule 14-1(9) incorporates the long established rule (previously Rule 57(9)) that costs follow the event so that the successful party recovers costs unless the court otherwise orders. The winning party is entitled to a general award of costs of the action if he or she "substantially succeeded" on the event (*Gold v. Gold* (1993), 82 B.C.L.R. (2d) 180 at paras. 21-22 (C.A.); *Fotheringham v. Fotheringham*, 2001 BCSC 1321 at paras. 45-46, leave to appeal to C.A. refused, 2002 BCCA 454 (*Fotheringham*); *Allnorth Consultants Limited v. Tercon Construction Ltd.*, 2010 BCSC 451 at para. 9). In *Fotheringham* at para. 46, this Court identified a four step inquiry that a court might follow to determine whether to award costs. That inquiry is:
1. First, by focusing on the "matters in dispute" at the trial. These may or may not include "issues" explicitly mentioned in the pleadings.
 2. Second, by assessing the weight or importance of those "matters" to the parties.
 3. Third, by doing a global determination with respect to all the matters in dispute and determining which party "substantially succeeded," overall and therefore won the event.
 4. Fourth, where one party "substantially succeeded," a consideration of whether there are reasons to "otherwise order" that the winning party be deprived of his or her costs and each side then bear their own costs.
- [7] In this case, the matter at trial was whether the defendant held the Peachland property in trust for the plaintiff as alleged by the plaintiff, or whether the plaintiff had sold the Peachland property to the defendant and remained in the property as a tenant as alleged by the defendant. The plaintiff was wholly successful on this matter and therefore won the event. A significant issue that arose in the determination of the matter was credibility and,

in this, the plaintiff was also wholly successful. The plaintiff asked for and obtained a declaration of trust, an accounting, and an order for the transfer of the Peachland property back to her subject only to a mortgage and amounts owing on the accounting. The defendant sought dismissal of all of the plaintiff's claims. In view of the findings at trial, it was unnecessary to deal with any claims in misrepresentation or fraudulent misrepresentation. The plaintiff clearly established substantial success.

- [8] In the counterclaim, the defendant (plaintiff by counterclaim) claimed against John Bradshaw and the plaintiff for liquidated damages for non-payment of rent. The plaintiff and defendant by counterclaim asked that the counterclaim be dismissed. The plaintiff and defendant by counterclaim were completely successful on the counterclaim and are entitled to their costs. Given the complexity of the evidence here and nuances of credibility that had to be picked out, the award of costs should be at the high end of the scale, Scale C.

Special Costs

- [9] An award of special costs is both compensatory and disciplinary. Special costs are intended to substantially indemnify a party for the costs to which he or she has been put (*Everywoman's Health Centre Society v. Bridges* (1991), 54 B.C.L.R. (2d) 294 at para. 16 (C.A.)). They are also intended to chastise a party for reprehensible, scandalous or outrageous conduct either in the circumstances giving rise to the cause of action or in the course of the litigation (*Stiles v. British Columbia (Workers' Compensation Board)* (1989), 38 B.C.L.R. (2d) 307 at 311; *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 at paras. 12, 17 (C.A.); *Dockside Brewing Co. Ltd. v. Strata Plan LMS 3837*, 2007 BCCA 183 at para. 87, leave to appeal to SCC refused, [2007] 3 S.C.R. xv; *Cabaniss v. Cabaniss*, 2010 BCCA 348 at para. 74 (Cabaniss)). It is not necessary that all aspects of a party's conduct in the litigation are reprehensible in order to make an award of special costs that applies to the entire action (*927966 Ontario Ltd. v. Cogenix Development Corporation*, 2002 BCSC 442 at para. 9).
- [10] Unproven allegations of fraud may attract an award of special costs (*Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9 at para. 26, [2004] 1 S.C.R. 303; *Cabaniss* at para. 75). Factors to consider are whether the allegations were obviously unfounded, recklessly made, or made out of malice (*Shedwill v. Wilson* (1991), 48 C.P.C. (2d) 70 at para. 7 (B.C.S.C.); *Hung v. Gardiner*, 2003 BCSC 285 at para. 16; *College of New Caledonia v. Kraft Construction*, 2010 BCSC 1695 at para. 23). Madam Justice Ballance summarized the law in *International Hi-Tech Industries Inc. v. FANUC Robotics Canada Ltd.*, 2007 BCSC 1724, where, at paras. 7-11, she said:
- [7] The case law demonstrates a wide variety of circumstances that have resulted in the awarding of special costs. The failure to prove allegations of fraud will not automatically result in such an award (see: *307527 B.C. Ltd. v. Langley*, 2005 BCCA 161, 210 B.C.A.C. 155). However, where the totality of the circumstances reveal that allegations of fraud have been made frivolously, are without foundation, or made in circumstances where the alleging

party had access to information sufficient to conclude that the defendant was merely negligent or had committed no wrongdoing at all, the allegations themselves are seen to be reprehensible warranting an order of special costs: *Chaplin v. Sun Life Assurance Company of Canada et al.*, 2004 BCSC 116, 1 C.P.C. (6th) 271; *Hamilton v. Open Window Bakery Ltd.*, [2004] 1 S.C.R. 303, 235 D.L.R.(4th) 193.

- [8] In *Ip v. Insurance Corp. of British Columbia* (1994), 89 B.C.L.R. (2d) 251 at 253, 23 C.P.C. (3d) 345 (S.C.), Mr. Justice MacKinnon remarked that a party must give thoughtful consideration before making serious allegations of fraud. He stated, "At the very least, a prima facie case must exist and if it does not then special costs by way of 'chastisement' is a reminder to exercise better care in the future." Also noteworthy in the context of the case at hand are the remarks of Madam Justice Sinclair Prowse in *Webber et al v. Cdn. Aviation Ins. Mgrs. Ltd.*, 2003 BCSC 274, 29 C.P.C. (5th) 226 at para. 14:

There is no dispute that if the Court finds that there has been a deliberate attempt to mislead it through contrived, concocted, or fabricated evidence, that such conduct can found an order for special costs. See: *Jogia v. Aetna Life Insurance Co. of Canada*, [1999] B.C.J. No. 1502 (S.C.) *Unternaher v. Wheat Sheaf Inn Ltd.*, [1998] B.C.J. No. 2568 (C.A.); *S.S.G. Trucking Ltd. v. Standard Building Maintenance Ltd.*, [2000] B.C.J. No. 1042 (S.C.); and *Smith v. Garbutt*, [1998] B.C.J. No. 2460 (C.A.).

- [9] In *Ahluwalia v. Richmond Cabs Ltd.* (1994), 28 C.P.C. (3d) 226 (S.C.) [In Chambers], the plaintiffs brought an action for specific performance, deceit, and fraudulent misrepresentation. Newbury J. (as she then was) stated at p. 230:

The question in every case is whether, on a consideration of the substantive conduct of the party making the allegation, and the conduct of the litigation itself, the person or persons against whom the order is sought, has acted in a manner that is sufficiently reprehensible to warrant chastisement by the court.

- [10] Madam Justice Newbury further stated at p. 231 that where a party has "consciously advanced allegations of fraud and deceit and testified as to facts which were found to be untrue " as well as created delays, pressured the defendants, and failed to comply with court orders and the Rules, such actions qualify as reprehensible conduct and warrant an order for special costs. (Also see: *Paz v. Hardouin* (1996), 138 D.L.R. (4th) 292, 25 B.C.L.R. (3d) 201 (C.A.)).
- [11] An underlying rationale of the authorities which have considered the relationship between unproven allegations of fraudulent conduct and special costs is an obvious one: a recognition that such allegations are potentially damaging to those accused of practising such deception and, accordingly, should not be made lightly.

- [11] Deliberately provided untruthful evidence may attract an award of special costs. The cases illustrating the circumstances when deliberate untruthful evidence will result in an award of special costs were listed by Williams J. in *Schwabe v. Dr. Lisinski*, 2005 BCSC 1284 at para. 25, and referred to in *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914 at paras. 13-14, and in *Steinebach v. Fraser Health Authority*, 2011 BCSC 1369 at para. 28. Williams J.'s summary is:
- a. *Chu v. Chu*, [2001] B.C.J. No. 2593 (S.C.) - An order of special costs was made against a plaintiff in a family law proceeding who was found to have deliberately lied to the Court on multiple occasions.
 - b. *S.S.G. Trucking Ltd. v. Standard Building Maintenance Ltd.*, [2000] B.C.J. No. 1042 (S.C.) - The Court awarded special costs on the basis that the conduct of the personal defendant in giving untruthful testimony and concocting evidence in an attempt to mislead the Court was reprehensible.
 - c. *Chan Estate v. Hwang*, [1999] B.C.J. No. 875 (S.C.) - The Court ordered special costs on the basis that, in addition to disbelieving the defendant's testimony, it found that the defendant had presented forged documents to support his defence and had failed to call witnesses who purportedly supported his evidence.
 - d. *Unternaher v. Wheat Sheaf Inn Ltd.* [1998] B.C.J. No. 2568 (C.A.) - The Court of Appeal held that an order of special costs was justified on the basis that the defendants' employees had lied and had attempted to mislead the Court on the issue of liability. Esson J.A. noted in concurring reasons that the decision of whether to award special costs was very much at the discretion of the trial judge and that that particular case should not be taken as authority for the proposition that special costs should be awarded simply because the Court finds that the witnesses on one side were untruthful. That case had been a special situation where the trial judge had expressly found that there had been a deliberate concoction of evidence intended to avoid liability.
 - e. *Lee v. Kuo*, [1996] B.C.J. No. 1858 (S.C.) - Special costs were awarded against two of the personal defendants on the basis that their actions in fabricating a self-serving story, being argumentative, evasive and equivocal, and in constructing evidence to suit their purposes constituted reprehensible conduct.
 - f. *Fullerton v. Matsqui (District)*, [1992] B.C.J. No. 2969 (C.A.) - The Court of Appeal ordered special costs in circumstances where a police officer who testified for the defence gave evidence at trial that "was calculated to mislead the trial judge and the jury". In the Court's view, that evidence and the deliberate non-disclosure in the face of repeated public inquiries made the award of special costs appropriate to signal its disapproval of the defendants' conduct.
- [12] The defendant's first Statement of Defence alleged that the plaintiff was a user of non-prescription drugs and that the plaintiff's allegation of the trust, which was ultimately found by this Court, was a contrivance and a fraud. The Amended Statement of Defence said that

the Amended Statement of Claim was "replete with factual allegations fabricated by the Plaintiff and ... John Bradshaw out of whole cloth" (para. 2), that the allegations of trust "are a concoction and fabrication" (para. 17), that the plaintiff and John Bradshaw "concocted and fabricated a scheme whereby they claimed some purported form of beneficial interest in the Property" (para. 32), and that the trust was a "sham transaction designed to defraud mortgage lenders" (para. 38). These allegations were repeated in the Counterclaim where the conduct of the Bradshaws was alleged to be a "fraudulent and unlawful interference" in the defendant's ownership rights (para. 7). These allegations were obviously unfounded and recklessly made. The defendant knew from the start that she was the instrument of Justyn Stenner's plan to do their 'friend', the plaintiff, a favour in arranging for a mortgage when the Bradshaws could not obtain financing and were in danger of losing their home. The defendant held the Peachland property in trust for the plaintiff while the Bradshaws continued to reside in the home and pay the mortgage. The allegations were designed by the defendant to deliberately cheat the plaintiff out of her rightful property after the value had risen and Kimberley Stenner's goal of building condominiums on the site was frustrated.

- [13] The defendant then went on to deliberately lie throughout her testimony and to enlist Justyn Stenner and Barbara Lerner to also give untruthful evidence, probably unknowingly in Barbara Lerner's case. This is very similar to the circumstances in *Bruhn v. Rawlick*, 1997 CanLII 4212 (B.C.S.C.), where the defendants had maintained the position that they had purchased the property for the value of the mortgages after a transfer of the property. The Court rejected their evidence and said in awarding special costs at para. 13 that there was no escaping the fact that the defendants knew from the outset that their defence was untrue, and that the case went beyond the usual issues of credibility related to differences in recollection or opinion. Here, the defendant went so far as to accuse her lawyers of losing documents and the plaintiff of fabricating documents. As stated in the judgment at para. 2, the extent that the defendant attempted to mislead this Court was astonishing.
- [14] The elaborate deception advanced by the defendant led to a much longer trial than necessary. The defendant went to the extent of attempting to have plaintiff's counsel dismissed from the case with absolutely unfounded allegations of professional impropriety.
- [15] The conduct of Kimberley Stenner is deserving of specific rebuke. The plaintiff and the defendant by counterclaim shall have special costs throughout. The only question is whether this Court should summarily assess special costs.
- [16] There is no doubt that this Court has jurisdiction, summarily or otherwise, to fix a lump sum as special costs, although the power should be exercised sparingly (*ICBC v. Eurosport Auto Co. Ltd.*, 2008 BCSC 935 at paras. 6-8 (*ICBC v. Eurosport*); *Graham v. Moore*, 2003 BCCA 497 at paras. 45-46. Chief Justice Bauman confirmed this view in *Buchan v. Moss Management Inc.*, 2010 BCSC 121 at paras. 15-22, *aff'd* 2010 BCCA 393 (*Buchan*), and then went on to say at para. 21 that an assessment of a lump sum should be carried out in light of the considerations set out in Rule 57(3), now Rule 14-1(3). In summarily assessing special costs, the "rough and ready" approach adopted by Madam Justice Southin which fixed costs at \$5,000 per half day

is sometimes right (*Interclaim Holdings Limited v. Down*, 2002 BCCA 632 at para. 40, leave to appeal to SCC refused (2003), 201 B.C.A.C. 320 (note) (*Interclaim Holdings Limited*); *Buchan* at para. 25).

- [17] There is no bill of special costs before the Court here. The plaintiff maintains privilege, similar to the situation in *ICBC v. Eurosport* (at para. 12). However, actual legal costs that had been allowed by the Court of Appeal at a specific sum in that case assisted the Court in the assessment of an appropriate amount. In the circumstances here, given the nature and extent of the accusations made by the defendant and the general conduct of the litigation, there appears good reason to maintain privilege in the face of a pending appeal and a self-represented defendant. It can be foreseen that the defendant would relentlessly insist upon detailed information about subjects discussed with counsel and advice and instructions given. The failure to produce a bill of special costs should not bar summary assessment in the circumstances here.
- [18] There is some indication of the extent and nature of costs here in the preliminary bill of costs of the plaintiff formulated for party and party costs. The bill totals \$191,352, including taxes. Taxable disbursements are an additional \$22,945, and non-taxable disbursements are \$1,075. The total party and party tentative bill is \$215,372.
- [19] Considering the factors in Rule 14-1(3), I note that this matter has been excessively lengthy due to the defendant's misconduct. Credibility was factually complex and required detailed examination by counsel which was very skillfully and thoroughly undertaken by Mr. Angus, plaintiff's counsel at trial. The matter was bitterly fought with substantial amounts at stake and character put in issue. Elaborate deception by the defendant greatly extended the time required for trial. There have been lengthy proceedings after judgment and the portent is that a hearing before a registrar would also be protracted with the defendant acting for herself except at crucial hearings.
- [20] I apply the considerations that were in the mind of Southin J.A. when she thought that applying judicial resources to an assessment of special costs was a waste of judicial time in the circumstances of *Interclaim Holdings Limited* (at para. 38). Although the judgment in this matter is detailed, it would take considerable time for a registrar to tax a bill and the likelihood is that this matter will take on an even longer life, when it should come to an end.
- [21] Summary assessment is appropriate here. But, the amount claimed of \$465,000 is so substantial as to give pause. There have been large amounts summarily assessed in other cases. The plaintiff and defendant by counterclaim do not seek amounts for discoveries, chambers applications, or case management conferences. The Bradshaws seek \$465,000 based upon the \$5,000 per half day accepted in *Interclaim Holdings Limited* and applied in *Buchan*. The Bradshaws claim this amount "all in", inclusive of taxes and disbursements. While this amount is large, so were the days of trial (51). There were also 18 other days or half days spent on applications or trial management. In this circumstance, the amount, large as it seems, is reasonable.

[22] Special costs are awarded and assessed summarily in the amount of \$465,000.

Payment of Hearing Fees

- [23] In any event, the amount awarded for special costs does not include court hearing fees which are the sole responsibility of the defendant who filed the notice of trial. Item 14, Schedule 1, Appendix C to the Rules of Court, B.C. Reg. 221/90, the "old rules" applicable to this case by Rule 24-1(14), provides that the fees payable to the Crown for hearing a trial are payable by the party who files the notice of trial, unless the court orders payment by another party. The defendant filed the notice of trial on December 27, 2007. Included in the Form 35 notice was an undertaking by the defendant's solicitor on behalf of the defendant to pay all hearing fees (see *Campbell Inc. v. Towers*, 2006 BCSC 1030).
- [24] This Court has ordered direct payment of hearing fees before. The party that filed the notice of trial was ordered to pay the fees at the demand of the Crown in *D. v. D.*, 2008 BCSC 1260. An order that the hearing fees be paid directly was left in place by the Court of Appeal in *Carrier v. Tate*, 2009 BCCA 183 at paras. 43 and 49.
- [25] The defendant is ordered to pay the court fees directly. At present, those fees total \$33,048. This amount payable shall be paid forthwith to the Crown from accounts presently frozen under Order Nos. 1, 2 and 3 of October 15, 2010. The defendant had been granted leave to release a sum from those accounts for payment of costs related to the defendant's appeal of this matter. It is appropriate that court fees already payable be paid from these accounts as the defendant is unlikely otherwise to pay those amounts willingly. It is unfair that the defendant should continue to use the court system without accepting responsibility for the fees that she has already incurred. Order Nos. 1, 2, and 3 of October 15, 2010 shall remain in effect until the court fees are paid.

Punitive Damages

- [26] The plaintiff claimed punitive damages and seeks an award in the range of \$200,000 to \$350,000 because of the nature of the defendant's misconduct in breach of her duties as trustee, because of the manufacture and falsity of evidence, and because of the "scorched earth" nature of the litigation. The defendant replies that the plaintiff also miscondacted herself by failing to pay the mortgage as agreed, regardless of the trust arrangement after receiving an amount in excess of the amount required to discharge the original mortgage, and in continuing in this behaviour after the judgment. The defendant goes so far as to accuse the plaintiff of an offence under s. 385 of the Criminal Code. The defendant asserts that the plaintiff is prevented by this behaviour from seeking the assistance of the Court in obtaining punitive damages.

[27] At the outset, it is notable that the defendant obviously fails to appreciate that the focus here is on her own misbehaviour and not on the behaviour of the plaintiff. This defiant, irrepressible attitude that exhibits greed, little insight into the breach of trust, and ill spirit that fostered this case has been pervasive throughout these proceedings.

[28] The general principles applicable in consideration of an award of punitive damages were described by the Supreme Court of Canada in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at paras. 196-197 as follows:

196 Punitive damages may be awarded in situations where the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency. Punitive damages bear no relation to what the plaintiff should receive by way of compensation. Their aim is not to compensate the plaintiff, but rather to punish the defendant. It is the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant. They are in the nature of a fine which is meant to act as a deterrent to the defendant and to others from acting in this manner. It is important to emphasize that punitive damages should only be awarded in those circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence.

197 Unlike compensatory damages, punitive damages are not at large. Consequently, courts have a much greater scope and discretion on appeal. The appellate review should be based upon the court's estimation as to whether the punitive damages serve a rational purpose. In other words, was the misconduct of the defendant so outrageous that punitive damages were rationally required to act as deterrence?

[29] These principles were elaborated upon in *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595. While any summary of the principles and factors enunciated there would necessarily be inadequate, here is a brief statement of understanding for purposes here:

1. Circumstances that warrant punitive damages in addition to compensation in a civil claim must be rationally determined in the sense that the award is a rational and measured response to the facts of the case.
2. The general objectives of punitive damages are punishment, deterrence of the wrongdoer and others, and denunciation.
3. Punitive damages should be resorted to only in exceptional cases and with restraint.
4. Pejorative exclamatory language is unhelpful, as a principled, logical approach should prevail.
5. The court should ask how an award would further the objectives of the law in this particular case and what is the lowest award that would achieve that purpose.
6. There is no formula to the calculation of an award as many variables come into play in assessment of the misconduct.

7. The governing rule for quantum is proportionality so that the overall award should be rationally related to the objectives of retribution, deterrence or denunciation as the case may be.
- [30] How would punitive damages further the objectives of punishment, deterrence or denunciation here? The circumstances of this case may be colloquially described as "friends gone awry over money". It is not particularly exceptional that when money matters are mixed with friendship, differences arise. The community would not generally be interested in these matters, especially when this was a grand arrangement to forestall foreclosure proceedings by the defendant purporting to purchase the property, but in trust for the plaintiff, and securing a mortgage which the plaintiff would pay. The defendant is relatively unsophisticated and rough, just as the arrangement was between the parties. Deterrence is not a significant consideration in this context.
- [31] The circumstance giving rise to consideration of punitive damages here is the deceit of the defendant both to this Court and to the plaintiff. There is no doubt that this conduct is highly reprehensible and greatly departs from ordinary standards of decent behaviour. However, I am mindful that punitive damages are exceptional. While they may be awarded in this circumstance, I have decided to exercise considerable judicial restraint and deny the claim.
- [32] The substantial award of special costs was founded upon the defendant's reckless pleadings and deliberate lies to this Court. In my view, this award, although compensatory, is sufficiently punitive in nature as to adequately accomplish the goals of punishment, specific deterrence, and denunciation here. The defendant has not gained a profit through this exercise. Fairness to both sides tells me that an award of punitive damages is not warranted at the end of the day.

Equitable Set-off

- [33] The plaintiff seeks to set off the final accounting amount of \$117,500 payable by the plaintiff to the defendant against the special costs awarded in the amount of \$465,000.

- [34] Section 10 of the Law and Equity Act, R.S.B.C. 1996, c. 253, states:

10 In the exercise of its jurisdiction in a cause or matter before it, the court must grant, either absolutely or on reasonable conditions that to it seem just, all remedies that any of the parties may appear to be entitled to in respect of any legal or equitable claim properly brought forward by them in the cause or matter so that, as far as possible, all matters in controversy between the parties may be completely and finally determined and all multiplicity of legal proceedings concerning any of those matters may be avoided.

The goal after any trial is that all matters are resolved between the parties in such a manner as to avoid further proceedings.

- [35] Whether there may be equitable set-off of a costs award against other orders for payment was considered in *Jamieson v. Loureiro*, 2010 BCCA 52 (*Jamieson*) in the unique context of a set-off of costs against an order for past and future child support. Madam Justice Kirkpatrick considered the law of equitable set-off generally and specifically approved of the principles examined and described in *Holt v. Telford*, [1987] 2 S.C.R. 193 at 212 where the Supreme Court of Canada approved the principles established in *Coba Industries Ltd. v. Millie's Holdings (Canada) Ltd.* (1985), 20 D.L.R. (4th) 689 (B.C.C.A.). Kirkpatrick J.A. said at paras. 35-36 of *Jamieson*:
- [35] The Court in *Holt* examined the availability of equitable set-off in the context of an assignment of debt. The Court cited at 212, with apparent approval, the decision of this Court in *Coba Industries*, in which Macfarlane J.A. reviewed the English authorities and drew from them the following principles:
1. The party relying on a set-off must show some equitable ground for being protected against his adversary's demands: *Rawson v. Samuel* (1841), Cr. & Ph. 161, 41 E.R. 451.
 2. The equitable ground must go to the very root of the plaintiff's claim before a set-off will be allowed: *British Anzani [(Felixstowe) Ltd. v. Int. Marine Mgmt (U.K.) Ltd.]*, [1979] 2 All E.R. 1063].
 3. A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross claim: *Federal Commerce [and Navigation Ltd. v. Molena Alpha Inc.]*, [1978] Q.B. 927, [1978] 3 W.L.R. 309, [1978] 3 All E.R. 1066 (C.A.).
 4. The plaintiff's claim and the cross-claim need not arise out of the same contract: *Bankes v. Jarvis*, [1903] 1 K.B. 549 (Div. Ct.); *British Anzani*.
 5. Unliquidated claims are on the same footing as liquidated claims: *[Nfld. v. Nfld. Ry. Co.]*, [1888] 13 App. C. 199 (P.C.).
- [36] The ultimate analysis in *Holt* has been criticized: see Law Reform Commission Report, at p. 51 and K.R. Palmer, *The Law of Set-Off in Canada* (Canada Law Book, 1993) at p. 136. Nevertheless, the summary of principles from *Coba Industries* has been cited and applied on many occasions. The difficulty in any given case is in the application of the principles to the circumstances of the particular case.
- [36] The task in equitable set-off is to distinguish separable and independent claims and cross-claims from those which equity and justice cannot countenance separating (*Jamieson* at para. 37; *Cam-Net Communications v. Vancouver Telephone Co.*, 1999 BCCA 751, 71 B.C.L.R. (3d) 226 at para. 46). The "connection test" requires a two-step analysis as described in *Place Concorde East Ltd. v. Shelter Corp. of Canada Ltd.* (2003), 43 B.L.R. (3d) 54 (Ont. S.C.J.), rev'd on other grounds (2006), 270 D.L.R. (4th) 181 (Ont. C.A.) and approved for British Columbia in *Jamieson* at para. 43 as follows:

[43] More recently, this Court, in 918339 Alberta Ltd. v. 569244 British Columbia Ltd., 2005 BCCA 371, 43 B.C.L.R. (4th) 118 at para. 18, quoted with approval obiter from Place Concorde East Ltd. v. Shelter Corp. of Canada Ltd. (2003), 43 B.L.R. (3d) 54 (Ont. S.C.J.), varied on other grounds (2006), 270 D.L.R. (4th) 181 (Ont. C.A.). The full quotation from Place Concorde, dealing with the imprecision in language in the area of equitable set-off and proposing a simple two-step test, reads:

[261] Obviously there is some difference in terminology in the applicable case law. Telford v. Holt, PIA Investments and Algoma Steel both speak of a close connection as opposed to an inseparable connection as in Newfoundland Railway Company and Bim Kemi. Telford v. Holt and Lord Justice Goth in Federal Commerce speak of unfairness rather than manifest injustice as in Algoma Steel, Lord Denning in Federal Commerce and Bim Kemi. While an argument may be made that the manifestly unjust and inseparable connection language imports a higher standard than fairness and close connection, I do not believe that these linguistic nuances are materially different. On balance, it seems to me that the respective terms may be used interchangeably. In keeping with the most recent appellate Canadian case law, I propose to use the terms close connection and manifest injustice. I also conclude, based on the case law, that the test for equitable set-off involves two questions; one on the issue of close connection and the other on the issue of manifest injustice. Both components of the test should be addressed. One criterion does not prevail over the other.

[Underline emphasis in Jamieson.]

[37] The question, then, is whether the plaintiff has established that the claims are closely related and that it would be manifestly unjust not to order set-off. The claim to set-off arises from the same matter. There is a nexus between the accounting for mortgage and other costs payable by the plaintiff to the defendant and special costs, when the plaintiff at all times was prepared to pay the accounting amounts once tallied and had to assume costs of litigation to establish the amount rightfully due and payable in the circumstance proven by the plaintiff as beneficial owner of the Peachland property. The defendant has told this Court on numerous occasions that she does not work and has limited means. It would be manifestly unjust for the accounting amount to be enforced against the plaintiff without taking into account the amount payable as special costs. Therefore, the plaintiff is allowed to set-off the accounting amount of \$117,500 against the \$465,000 award for special costs.

Conclusion

[38] By consent, the plaintiff is ordered to pay \$117,500 to the defendant pursuant to an agreed accounting. This Court orders that the defendant shall pay special costs to the plaintiff in the amount of \$465,000. The plaintiff is entitled to set-off the accounting amount against the award for special costs, resulting in the net amount of \$347,500 to be paid by the defendant to the plaintiff. The defendant shall pay court hearing fees in the amount of \$33,048 forthwith from the bank accounts that are the subject of Order Nos. 1, 2, and 3 dated October 15, 2010. Order Nos. 1, 2, and 3 dated October 15, 2010 shall remain in effect until

the court hearing fees are paid.

"Dillon J."

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