

CANADA / JUDGMENT

Buchner v. Longenecker

2025 BCSC 1402

COURT

Supreme Court of British Columbia

DECIDED

23 July 2025

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2025 BCSC 1402 Buchner v. Longenecker

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Buchner v. Longenecker,

2025 BCSC 1402

Date: 20250723

Docket: S10744

Registry: Courtenay

Between:

Frank Gordon Buchner and Diana Buchner

Plaintiffs

And:

Charles Longenecker and Deirdre Longenecker

Defendants

Before: The Honourable Madam Justice D. MacDonald

Reasons for Judgment Re: Costs

Counsel for the Plaintiffs:

J. Lebbert

Counsel for the Defendants:

Z. White

Written Submissions of the Plaintiffs Received:

June 16, 30, and July 7, 2025

Written Submissions of the Defendants Received:

June 20 and 27, 2025

Place and Date of Judgment:

Courtenay, B.C.

July 23, 2025

I. Introduction

- [1] On April 30, 2025, I rendered my judgment in this matter. My reasons are indexed as 2025 BCSC 804 ("Reasons"). At paragraph 128 of my Reasons, I stated that if there were matters relevant to costs which the parties wished to bring to my attention, they were at liberty to submit written submissions. The parties have done so.
- [2] This matter was heard over five days in January 2025 (the "Hearing"). Two separate proceedings were heard together at the Hearing:
- a) Buchner v. Longenecker, Action No. S10744, Courtenay Registry (the "Action"); and
 - b) Longenecker v. The Owners, Strata Plan VIS6595, Action No. S99524, Nanaimo Registry (the "Petition").
- [3] For the reasons that follow, I find that the Longeneckers are entitled to ordinary costs of the Action, and double costs after December 20, 2024 when the Buchners rejected their offer of settlement. The Buchners are entitled to their costs of the Longeneckers' counterclaim. I find that all parties should bear their own costs of the Petition. Finally, I conclude that the costs should be apportioned evenly between the Action and the Petition.

II. BACKGROUND

- [4] The plaintiffs, Frank and Diana Buchner, and the defendants, Charles and Deirdre Longenecker, reside in the same strata development in Bowser, B.C. A dispute arose after the Longeneckers began building an extension to their dwelling (the "Extension") outside of their 'Building Envelope' designated by the strata's Building Scheme. On August 24, 2023, the Buchners filed the Notice of Civil Claim requesting a mandatory injunction to remove or reduce the Extension for breaching the Building Scheme. The Longeneckers originally filed a Counterclaim, but this was discontinued once it was determined that the relief sought should have been initiated by petition. On February 20, 2024, the Longeneckers filed the Petition seeking to cancel or modify the Building Scheme.

- [5] The matter was decided by way of summary trial. In my Reasons, I dismissed the Action on the basis that, through their own breaches of the same sections of the Building Scheme and their acceptance of breaches by numerous other strata owners, the Buchners had acquiesced to the Longeneckers' breach. I concluded that several sections of the Building Scheme were unenforceable and/or were widely being ignored by the strata owners. In particular, I found that the exception allowing for movable structures within certain dimensions (the "Small Structure Exemption"), which was relied on by the Buchners and numerous other strata owners, was in violation of a plain reading of the Building Scheme. As such, I declined to grant the injunction sought by the Buchners.
- [6] With regard to the Petition, I found that at least one of the grounds set out in s. 35(2) of the Property Law Act, R.S.B.C. 1996, c. 377 [PLA] was met and I extended the Building Envelope on the Longeneckers' property to two inches past the Extension. I adjourned the Longeneckers' request for cancellation or amendment of several sections of the Building Scheme and gave the Longeneckers leave to reappear before me after a year if no solution had been reached between the strata owners.

III. Positions of the parties

- [7] The Longeneckers seek costs against the Buchners in both the Action and the Petition, and double costs against the Buchners after the date of the Longeneckers' settlement offer on December 20, 2024, onwards. The Longeneckers also seek full recovery of the reasonable disbursements they incurred as a result of filing the Petition against the Buchners.
- [8] The Longeneckers agree that some costs of their discontinued counterclaim are payable as a set off from their costs in the Action, pursuant to R. 9-8 of the Supreme Court Civil Rules [Rules]. However, they dispute the balance sought by the Buchners.
- [9] The Buchners concede that they should pay the Longeneckers' costs relating to the Notice of Civil Claim in the Action. However, they object to an order entitling the Longeneckers to double costs after December 20, 2024. Regarding the Counterclaim, the Buchners submit that the Longeneckers' discontinuance of the Counterclaim should result in a costs order in the Buchners' favour.
- [10] The Buchners oppose any order that they be liable for the Longeneckers' costs or disbursements relating to the Petition. They submit that all parties should bear their own costs of the Petition.

IV. Action

A. Notice of Civil Claim

[11] In my Reasons, I recognized that the Longeneckers had been substantially successful on the Action: para. 126.[1] Pursuant to R. 14-1(9) of the Rules, the costs of a proceeding are assumed to be awarded to the party who has achieved substantial success: *Fotheringham v. Fotheringham*, 2001 BCSC 1321 at para. 46; *Harras v. Lhotka*, 2016 BCCA 246 at paras. 45-49. The Buchners concede that this presumptive Rule applies to the costs related to the Notice of Civil Claim.

[12] I conclude that the Buchners are to pay ordinary costs related to the Notice of Civil Claim.

B. Double Costs

[13] On December 20, 2024, the Longeneckers sent an offer to settle (the "Offer") to the Buchners. The Offer proposed \$2,500.00 in "general damages" to the Buchners in exchange for settlement of the Action. The basis for the Offer was explained as follows:

Upon review of your clients' summary trial materials, and their acknowledgement that they are in breach of the exact same section of the building scheme, to a greater extent, than m[y] clients, we are confident that a Court will dismiss your clients' action.

[14] The Offer did not attempt to resolve the Petition.

[15] The Offer states that given "the short turnaround until this matter goes to a final hearing", it would remain open to be accepted until 4:00 pm on December 24, 2024. The Buchners did not accept the Offer.

[16] Rule 9-1 of the Rules governs offers to settle. It enables a court to consider an offer to settle in making a costs decision:

Definition

- (1) In this rule, "offer to settle" means
- (c) an offer to settle made after July 1, 2008 under Rule 37B of the former Supreme Court Rules, as that rule read on the date of the offer to settle, or made under this rule, that
- (i) is made in writing by a party to a proceeding,
- (ii) has been served on all parties of record, and
- (iii) contains the following sentence: "The .[party(ies)] , ..[name(s) of party(ies)] ., reserve(s) the right to bring this offer to the attention of the court for consideration in relation to costs after the court has pronounced judgment on all other issues in this proceeding."

Offer may be considered in relation to costs

- (4) The court may consider an offer to settle when exercising the court's discretion in relation to costs.

Cost options

- (5) In a proceeding in which an offer to settle has been made, the court may do one or more of the following:
 - (a) deprive a party of any or all of the costs, including any or all of the disbursements, to which the party would otherwise be entitled in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle;
 - (b) award double costs of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle;
 - (c) award to a party, in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle, costs to which the party would have been entitled had the offer not been made;
 - (d) if the offer was made by a defendant and the judgment awarded to the plaintiff was no greater than the amount of the offer to settle, award to the defendant the defendant's costs in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle.

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[17] I find that the Offer complies with the formal requirements in R. 9-1(1)(c).

[18] Rule 9-1(6) sets out the considerations that the court may consider in determining whether to make an award for double costs:

Considerations of court

- (6) In making an order under subrule (5), the court may consider the following:
 - (a) whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or served or on any later date;
 - (b) the relationship between the terms of settlement offered and the final judgment of the court;
 - (c) the relative financial circumstances of the parties;
 - (d) any other factor the court considers appropriate.
- [19] This Court has the discretion to consider any factors it considers appropriate. Nevertheless, the discretion regarding whether to award double costs should be "exercised in a just, principled, and consistent way": *Giles v. Westminster Savings and Credit Union*, 2010 BCCA 282 at para. 88.

[20] I note first that the relationship between the terms of the Offer and the final judgment of the court favours an award of double costs. The Offer was more favourable to the Buchners than my ultimate judgment. Second, there is nothing in the relative financial circumstances of the parties to affect the result. Therefore, I turn to an assessment of the reasonableness of the Offer.

C. Should the Buchners have reasonably accepted the Offer?

[21] The Buchners' objection to double costs focused on this factor; the Buchners disagree that the Offer was one that "ought reasonably to have been accepted".

[22] The issue of reasonableness in a party's rejection of an offer is not determined by reference to the award that was ultimately made. Rather, it is assessed by reference to the circumstances existing at the time the offer was open for acceptance: *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 27; *Yip v. Saran*, 2014 BCSC 1593 at para. 17.

[23] In *Hartshorne*, the Court of Appeal identified several factors to consider when determining whether a settlement offer was reasonable:

- a) The timing of the offer;
- b) Whether the offer had some relationship to the claim or was instead a nuisance offer;
- c) Whether the offeree could easily have evaluated the offer; and
- d) Whether the offeror provided some rationale for the offer.

[24] The Buchners highlight the fact that the Offer included limited rationale and did not acknowledge their argument that the Small Building Exemption may apply to certain types of structures. They argue that, while this argument was ultimately unsuccessful, it cannot be said that between December 20 and 24, 2024 it was in any way clear or obvious that the argument was vexatious or without merit. The Buchners further submit that the timing of the Offer (on the eve of Christmas holidays and a month out from the Hearing date) rendered it unreasonable.

[25] In my view, the rationale included in the Offer does not make it unreasonable. While I am conscious not to conduct a "hindsight analysis" as Justice Hinkson, as he then was, cautioned against in *Bailey v. Jang*, 2008 BCSC 1372 at para. 24, I note that the rationale in the Offer focused on the fact that the Buchners were violating the same sections of the Building Scheme. I recognize that the Buchners would not have known for certain that this argument would have succeeded at the Hearing, yet the terms of the Building Scheme should have raised concerns about the Buchners' own breaches of the Scheme. At the time of the Offer, the Buchners ought to have known that the plain language of the Building Scheme and the Small Structure Exemption could be problematic to their claim. There is no need for an offer to address every potential argument that the offeree could raise. Simply not knowing the outcome is insufficient to rebut double costs: *Tham v. Bronco Industries Inc.*, 2018 BCSC 240 at para. 16.

- [26] Second, there is no rule of general application regarding the timing of an offer to settle; each case must be judged on its own facts: *Dodge v. Shaw Cablesystems Ltd.*, 2009 BCSC 1765 at para. 14. While I recognize that four days is not a substantial amount of time, I do not think it makes it unreasonable in this case. Both parties were represented and the Offer period, while close to the winter holidays, did not fall over any statutory holidays: see e.g. *Brewster v. Li*, 2014 BCSC 463 at paras. 26-29; *Johal v. Radek*, 2016 BCSC 1170 at para. 51. This was not an offer delivered on the eve of the hearing; the matter was not set to be heard until the end of January. There was no evidence before me that counsel for the Buchners was away at that time and there was no evidence that the Buchners requested more time to consider the Offer.
- [27] To encourage settlements, the Court of Appeal has held that a plaintiff who rejects a reasonable offer to settle should face some sanction in costs, even in circumstances in which it cannot be said that the plaintiff should have accepted the offer: *Wafler v. Trinh*, 2014 BCCA 95 at para. 81. The importance of certainty and consequences was emphasized by the Court of Appeal in *Evans v. Jensen*, 2011 BCCA 279:
- [41] This conclusion is consistent with the importance the Legislature has placed on the role of settlement offers in encouraging the determination of disputes in a cost-efficient and expeditious manner. It has placed a premium on certainty of result as a key factor which parties consider in determining whether to make or accept an offer to settle. If the parties know in advance the consequences of their decision to make or accept an offer, whether by way of reward or punishment, they are in a better position to make a reasoned decision. If they think they may be excused from the otherwise punitive effect of a costs rule in relation to an offer to settle, they will be more inclined to take their chances in refusing to accept an offer. If they know they will have to live with the consequences set forth in the Rule, they are more likely to avoid the risk.
- [28] In these circumstances, I find that it would further the goals of Rule 9-1 to order double costs against the Buchners after the date of the Offer.

D. Counterclaim

- [29] Rule 9-8(4) of the Rules addresses the cost consequences of the discontinuance or withdrawal of an action:

Costs and default procedure on discontinuance or withdrawal

(4) Subject to subrule (2), a person wholly discontinuing an action against a party or wholly withdrawing the person's response to civil claim filed in response to a notice of civil claim of a party must pay the costs of that party to the date of service of the notice of discontinuance or the notice of withdrawal, as the case may be, and if a plaintiff who is liable for costs under this subrule subsequently brings a proceeding for the same or substantially the same claim before paying those costs, the court may order the proceeding to be stayed until the costs are paid.

- [30] The parties agree that R. 9-8(4) applies as the Longeneckers' Counterclaim was brought in error and was ultimately discontinued. However, the Longeneckers argue that they were substantially successful on their December 11, 2024 application related to the Counterclaim and costs for that hearing should be payable by the Buchners to the Longeneckers.
1. December 11, 2023 application
- [31] The Longeneckers brought an application on December 11, 2023, seeking to amend the Counterclaim to include the remaining property owners in the strata as well as Todsen Design & Construction ("Todsen"). Associate Judge Dick ordered that the remaining homeowners be added as Defendants but adjourned the issue of adding Todsen as a party.
- [32] The Longeneckers argue that they were partially successful on this application and the balance of the relief was adjourned, not dismissed. Accordingly, they submit that costs for the hearing should be payable by the Buchners to the Longeneckers or, alternatively, each party should bear their own costs. The Buchners submit that they are entitled to all costs stemming from the Counterclaim, regardless of the varied success of any interlocutory application that would not have been necessary but for the filing of the Counterclaim.
- [33] Neither party provided case law on this issue. I note, however, that the entitlement to costs under R. 9-8(4) is non-discretionary and arises automatically by operation of the Rule: *Lim v. Zhu*, 2019 BCSC 88 at paras. 156-160; *Scuccato v. Almazan*, 2007 BCSC 1314. In my view, it would undermine the purpose of R. 9-8(4) if the costs of applications related to the discontinued action were each adjudicated separately. As the Buchners correctly point out, the December 11, 2023 hearing would not have occurred at all if not for the discontinued Counterclaim. Thus, the Buchners are entitled to all costs related to the Counterclaim, regardless of the success of any individual interlocutory application.
- [34] The Longeneckers also object to the amount sought by the Buchners in their Bill of Costs; specifically, they argue that 12 Units under Item #2 is excessive in light of the minimal steps that had been taken during that time. The assessment of whether costs were proper or reasonably necessary is a matter for the Registrar: Rules, R. 14-1(2). It appears that the Registrar has assessed costs and I am not prepared, based on the thin submissions before me and lack of compliance with R. 14-1(29), to disturb the Registrar's findings. If there are issues regarding the accuracy of the Bill of Costs, the parties may raise this with the Registrar.

V. petition

- [35] In my Reasons, I recognized that the Longeneckers had been substantially successful on the Petition: para. 126. As previously stated, pursuant to R. 14-1(9), the costs of a proceeding are assumed to be awarded to the party who has achieved substantial success. The Buchners, however, rely on the following statement from the Court in *Tri-X Timber Corporation v. Rutherford*, 2010 BCSC 1001 [Tri-X], to argue that an application under s. 35(2) of the PLA should not result in costs to the successful petitioner if the respondents were defending

their property rights in good faith:

- [41] The Canadian Encyclopedic Digest, 4th ed., Vol. 30 (Toronto: Carswell, 2008) "Real Property" at para. 566, states "[i]f an owner of land seeks to be freed from legally binding restrictive covenants, those who in good faith insist upon their rights ought not to be subjected to any expense whatever." There is no evidence that the respondents were not acting in good faith. As a result, even though the petitioners were substantially successful, there will be no order for costs.
- [36] The rationale in *Tri-X* was followed by Justice Norell in 1128485 B.C. Ltd (Re), 2023 BCSC 2090:
- [48] A petition had to be brought, and no one who responded to the petition created the situation that required it. They all have property rights they reasonably wish to protect. In *Tri-X* BCSC at para. 41, Justice MacKenzie declined to order costs where a landowner sought to have a restrictive covenant removed, and other landowners in good faith insisted upon their rights associated with the restrictive covenant. In my view, the same situation exists here.
- [37] The Longeneckers accept that there are situations where each party bears their own costs in a petition brought under s. 35 of the PLA but submit that the presumption remains that the successful party is entitled to an award of costs: *Zhang v. Nanaimo Airport Commission*, 2024 BCSC 2061. Moreover, they argue that an order that parties bear their own costs is only appropriate when the respondents acted in "good faith", which they submit is not the case at hand. As evidence of bad faith, they point to the fact that the Buchners sought special costs for the discontinuance of the counterclaim and that, in their Petition Response and summary trial application, the Buchners claimed the Longeneckers were abusing the Court's process, intentionally misleading the Court, and bringing the Petition for an improper motive.
- [38] The Longeneckers raise several cases wherein costs were awarded to the successful party in a petition brought under s. 35 of the PLA: *Zhang*; *Thornton v. The Owners, Strata Plan VIS7092*, 2021 BCSC 2553; *BC Transportation Financing Authority v. Rastad Construction Ltd.*, 2020 BCSC 2064.
- [39] While I recognize that it may not apply to every petition brought under s. 35 of the PLA, I find that the logic expressed by Justice Norell above is apt here. The Building Scheme contained a number of uncertainties and a petition needed to be brought to clarify the requirements for building additional structures in the strata. However, the Buchners reasonably disagreed with the changes sought by the Longeneckers and believed they would interfere with their property rights. Notably, numerous other strata owners also opposed the Petition. None of the strata owners, including the Buchners, were themselves responsible for the uncertain situation that had been created; this arose by virtue of the language of the Building Scheme itself and subsequent unclear and contradictory steps taken by the developers of the strata. The Buchners' claims regarding abuse of process do not change the fact that they were opposing the Petition in good faith motivated by the promotion of their

own property rights. In this context, it is appropriate for both parties to bear their own costs.

[40] The Buchners made several other submissions regarding costs for the Petition which I do not address given my conclusion above.

2. Other Interlocutory Applications

[41] There are three interlocutory applications related to the Petition for which the parties made costs submissions: two were heard together on December 5, 2024 and the other on December 19, 2024. All three applications were brought by the Longeneckers and the orders sought at both hearings were granted. The Buchners did not formally oppose any of the orders that were ultimately sought at the hearings.[2] The Longeneckers submit, however, that the Buchners' application responses and comments at the December 19 hearing amounted to an opposition to the relief sought and made the hearing more complex than necessary.

[42] The December 5 order included costs in the cause. The December 19 order was silent as to costs. Where reasons on an application do not address the issue of costs, the default rule in R. 14-1(12) of the Rules is engaged, effectively making costs in the cause: *Stelmaschuk v. The College of Dental Surgeons of British Columbia*, 2017 BCSC 806 at para. 21.

[43] Despite the Longeneckers being substantially successful with respect to the Petition, as I already determined the rationale of *Tri-X* applies to the Petition. The Buchners asserted their rights associated with the Building Scheme in good faith; this logically includes the steps taken on the Petition before the Hearing. The parties shall therefore bear their own costs of all three interlocutory applications.

VI. APPORTIONMENT

[44] With respect to the Hearing, the next question is how combined costs should be apportioned between the two proceedings, given that there was considerable overlap in terms of the facts and the regulatory framework.

[45] Rule 14-1(15) of the Rules provides the authority for the court to award costs for the whole or part of a proceeding. The Buchners argue that the combined Hearing costs should be allocated 40 percent to the Action and 60 percent to the Petition.

[46] Extra time was spent on the Petition due to the number of other respondents who made oral submissions. Nevertheless, in my view, the issues on the Action were more complex. I conclude that legal work that related to both the Action and the Petition should be split 50/50.

VII. Disposition

[47] For the reasons above, I order as follows:

- a) The Longeneckers are entitled to ordinary costs associated with the Action, and double costs after December 20, 2024;
- b) the Buchners are entitled to all costs related to the Counterclaim, including any interlocutory applications;
- c) the parties will each bear their own costs associated with the Petition, including the interlocutory applications; and
- d) any costs attributable to both proceedings will be split 50/50 between the Action and the Petition.

"D. MacDonald J."

- [1] I note that "Application" in this paragraph refers to the application for a summary trial for the Action.
- [2] The Buchners did file an Application Response opposing the order sought by the Longeneckers to convert the Petition to an action, but the Longeneckers ultimately abandoned this request.

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