

CANADA / JUDGMENT

C.Y.J. v. R.J.

2023 BCSC 140

COURT

Supreme Court of British Columbia

DECIDED

31 January 2023

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2023 BCSC 140 C.Y.J. v. R.J.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

C.Y.J. v. R.J.,

2023 BCSC 140

Date: 20230131

Docket: E55334

Registry: New Westminster

Between:

C.Y.J.

Claimant

And

R.J.

Respondent

Before: The Honourable Mr. Justice Taylor

Reasons for Judgment on Costs

The Claimant, appearing in person:

C.Y.J.

Counsel for the Respondent:

M.K. Mand

Place and Date of Hearing:

New Westminster, B.C.

January 18, 2023

Place and Date of Judgment:

New Westminster, B.C.

January 31, 2023

I. INTRODUCTION

- [1] Following my decision in this family trial, cited as C.Y.J. v. R.J., 2022 BCSC 1901 (the "Trial Decision"), the respondent Mr. J applied for costs, including costs assessed at a level of more than ordinary difficulty, double costs and special costs. The claimant, Ms. J, opposed the application.
- [2] Having considered written and oral submissions from both parties, my conclusion is that Mr. J is entitled to costs assessed at greater than ordinary difficulty up to May 3, 2021 and double costs thereafter, payable as a lump sum, but not special costs.
- [3] All references herein to defined terms are references to definitions as set out in the Trial Decision.

II. ANALYSIS

A. Costs

- [4] Rule 16-1(7) of the Supreme Court Family Rules [Rules] states that costs of a family law case must be awarded to the successful party unless the court orders otherwise. In other words, costs follow the result.
- [5] As there are often multiple issues in family law cases on which success may be divided, costs in family proceedings will generally favour the party who has achieved "substantial success": *Barnard v. Barnard*, 2017 BCSC 2162 at para. 25. Substantial success occurs when the level of one party's success is 75 percent or better: *Barnard* at para. 26; *T.E.A. v. R.L.H.C.*, 2019 BCSC 1883 at para. 8.
- [6] In *Fotheringham v. Fotheringham*, 2001 BCSC 1321 at para. 46, the Court outlined a four-step inquiry which has generally been followed in determining whether substantial success has been achieved:
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] Applying the foregoing inquiry, I am satisfied that Mr. J achieved substantial success at trial. The principal matters in dispute at trial, and the results, were as follows:
- a. Child of the Marriage: J.J. was declared a "child of the marriage". Mr. J therefore succeeded on this issue;
 - b. Divorce and Name Change: These issues were uncontested;
 - c. Date of Separation: The date of separation was found to be March 1, 2014, not December 19, 2013 or the other two dates the claimant alleged. Mr. J therefore succeeded on this issue;
 - d. Parenting time with J.J.: Ms. J's claim for parenting time was dismissed and her claim for an order removing J.J. from Mr. J's care was dismissed. Mr. J therefore succeeded on this issue;
 - e. Incomes: Mr. J's income was found to be as he asserted at trial. Mr. J was also successful in having income imputed to Ms. J. He therefore succeeded on this issue;
 - f. Retroactive and Ongoing Child Support and Section 7 Expenses: Ms. J was ordered to pay Mr. J retroactive and ongoing child support and s. 7 expenses. Mr. J therefore succeeded on these issues;
 - g. Investments/Holdings: The investments were divided in a manner consistent with the argument made by Mr. J. Mr. J was found to have proved all of his excluded property, while Ms. J was found to have proved only a relatively small portion of her excluded property. Mr. J therefore substantially succeeded on this issue;
 - h. Family Home and Adjustments: Mr. J was successful on this issue. I ordered that Mr. J has the right to purchase the Family Home at the valuation as at the date of separation, rather than requiring that the equity in the Family Home and the Burrard Property be divided equally as at the trial date;
 - i. The Joint RESP and GIC Accounts: Mr. J succeeded in obtaining reimbursement for withdrawals made by the claimant from the Joint RESP and GIC accounts;
 - j. Joint Bank Account: The joint bank account was divided in a manner consistent with the argument made by Mr. J. He therefore succeeded on this issue;
 - k. Debts: The debts were addressed in a manner consistent with the argument made by Mr. J. He therefore succeeded on this issue;

- l. CPP and Pensions: The Court ordered that the BC Hydro pension and CPP credits be equalized from the date of marriage to the Separation Date as suggested by Mr. J. This issue was not in dispute and therefore success was divided, although Mr. J succeeded on this issue in terms of dates;
 - m. Claimant's Belongings: Ms. J obtained an order requiring Mr. J to search for any of her remaining belongings in his possession (to the extent that they exist, which was not proved by Ms. J), however this order was not opposed by Mr. J. This was therefore not a contested issue;
 - n. Vehicles: The vehicles were allocated in a manner consistent with the argument made by Mr. J. He therefore succeeded on this issue;
 - o. Spousal Support: Ms. J's claim for retroactive and ongoing spousal support was dismissed. Mr. J therefore succeeded on this issue; and
 - p. Protection Order: Although Mr. J had requested a non-expiring protection order, Mr. J succeeded in obtaining an 18-month protection order. Further, the Court found that there was an ongoing pattern of family violence perpetrated by Ms. J against both J.J. and Mr. J. Mr. J therefore substantially succeeded on this issue.
- [8] It is apparent from the above analysis that Mr. J was wholly or at a minimum partially successful on all of the contested issues at trial. Mr. J was also successful on all the most important matters, including the division of the Family Home, the spousal support and child support claims and the protection order.
- [9] Thus, considering the matter globally, I am satisfied that Mr. J was substantially successful. Further, I was not presented with any compelling reason to "otherwise order" that the successful party be deprived of his costs: *Fotheringham* at para. 46. Given that the Trial Decision results in a transfer of substantial funds to Ms. J, and also the fact of the material pre-existing assets already in Ms. J's name (i.e., the Burrard Property and funds in her bank accounts), there was no evidence before me that a costs order will result in any hardship or unfairness for Ms. J.

B. Scale of Difficulty

- [10] Section 1(1) of Appendix B of the Rules states: "If a court has made an order for costs, it may determine if the family law case involves less than ordinary difficulty, ordinary difficulty or more than ordinary difficulty."
- [11] Mr. J seeks an order that trial costs be assessed at a level of more than ordinary difficulty. In my view, such an order is appropriate in this case.

- [12] In *Donnell-Vella v. Vella*, 2021 BCSC 2369, the claimant's conduct of the case, as a self-represented litigant, left the respondent with the responsibility and expense of preparing the necessary materials to address the issues at trial even though it was the claimant's responsibility. In determining that trial costs should be assessed at a level of more than ordinary difficulty, Justice Kirchner reasoned as follows:
- [7] This is an unusual case. As I said in the reasons for judgment (para. 157), Mr. Vella took a very reasonable position at trial attempting to arrive at a practical result based on the equal division of family property. His lawyers were of great assistance in presenting the case in accordance with that reasonable approach and this ultimately benefited both parties. The extensive preparation of materials for the Court was essential to the proper resolution of the issues, including those that went in Ms. Donnell-Vella's favour such as the date of separation. If it were not for counsel's approach to the trial, including taking on the task of marshalling and organizing the necessary evidence, and presenting it in a forthright manner designed to assist the Court, having regard to the fact Ms. Donnell-Vella was self-represented, the trial undoubtedly would have been longer and more challenging for the parties and the Court.
- [8] Ms. Donnell-Vella was not represented at trial. As I said in the reasons for judgment, this is not due to a lack of financial resources as demonstrated by the value of the family property that is not insubstantial and was largely divided equally between the parties. I cannot make findings on the evidence as to why Ms. Donnell-Vella was not represented by counsel. She had counsel at various times prior to the trial. However, the evidence Ms. Donnell-Vella led at trial does not support her assertion that conduct of Mr. Vella's counsel caused Ms. Donnell-Vella to lose her counsel. Mr. Vella's counsel acted with the required undivided loyalty on behalf of their client and, once Ms. Donnell-Vella was self-represented, they did so in a manner that recognized she did not have the benefit of counsel. In this respect, they presented the case as true officers of the Court. This included assisting the Court by providing well-organized documents, Scott Schedules to summarize the family property and debt, and various spousal support scenarios including some additional ones requested by the Court that were needed to fully consider and resolve the issues at hand.
- [13] Justice Kirchner concluded: "Conduct by a litigant that makes a trial more difficult is a ground for awarding costs at a scale of more than ordinary difficulty: *Kopp v. Kopp*, 2012 BCCA 140 at para. 90": *Donnell-Vella* at para. 14.
- [14] In my view, the difficulties created by Ms. J's lack of preparedness in this case, and the role assumed by counsel for Mr. J to address these difficulties as a true officer of the Court were comparable to *Donnell-Vella*. In particular, I emphasize the following facts:
- a. Mr. J took a reasonable and non-positional approach from the outset of the trial and made concessions where appropriate to facilitate the resolution of issues at trial;

- b. Mr. J's counsel was responsible for preparing the two-volume book of documents (86 tabs of documents, some of which contained multiple documents) and compiling all of the financial documents required by the Court to determine income and division of assets;
- c. Mr. J's counsel often had to provide documents to the Court that the claimant was referring to in the midst of trial;
- d. The claimant did not provide complete document disclosure. In the Trial Decision, I found as follows:
 - i. the claimant's "documentary disclosure, in particular relating to her financial accounts and holdings, was woefully inadequate, raising serious questions about the true nature of her financial position" (at para. 43);
 - ii. the claimant's "disclosure of financial and banking records during the discovery process and at trial was woefully inadequate, leaving the court with an opaque picture concerning the source of the many wire transfers she has received and essential details concerning her banking balances and activities" (at para. 95);
 - iii. the claimant had not complied with the Elwood Order;
 - iv. "due to seriously inadequate documentary disclosure from Ms. J, the account balances from 16 of those accounts were unknown and untraceable as of the date of trial, despite the Elwood Order" (at para. 170);
 - v. the claimant "did not provide an adequate explanation at trial as to why her balances in these accounts were so suddenly reduced over a short time-frame, nor as to why she was unable to provide the account balances for the other 16 accounts" (at para. 170); and
 - vi. "[d]ue to inadequate document disclosure, the balance of these accounts was unknown as of the Separation Date and thereafter" (at para. 180).
- e. The respondent had to retain an appraiser to value the Family Home as at the date of separation. The claimant took no steps to obtain an appraisal and refused to consent to a joint appraisal;
- f. Mr. J's counsel had to prepare the two-volume book of authorities for April 13, 2022 (27 authorities/tabs) and a supplemental book of authorities for April 21, 2022 (11 authorities/tabs);
- g. Mr. J's counsel had to prepare the Scott Schedules as at the date of separation (which he prepared for both dates that were alleged in the pleadings) and the date of trial as ordered by the Court at the trial management conference (the "TMC"). The claimant did not prepare these Scott Schedules even though she was ordered to do so by the Court at the TMC;
- h. Mr. J's counsel had to prepare the chronology as ordered by the Court at the TMC; and

- i. Mr. J's counsel prepared a history of proceedings, income schedules, and a summary of orders made to assist the Court.

[15] Further, in the Trial Decision I found Ms. J to be "an emotional and volatile witness, prone to making accusations and assertions unsupported by the evidence": at para. 42. This behavior materially expanded the factual scope of the trial, despite the lack of evidence supporting such an expansion, and therefore unnecessarily prolonged the trial. I also found it necessary to grant repeated adjournments during the trial to Ms. J to enable her to calm her emotions, which also prolonged the length of the proceeding.

[16] Under all the circumstances I found that Ms. J's conduct made the trial more difficult and that an award of costs at a scale of more than ordinary difficulty is therefore appropriate.

C. Double Costs

[17] Pursuant to R. 11-1(5) of the Rules:

In a family law case 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 family law case 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 family law case 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 family law case 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 party who made the offer obtained a judgment as favourable as, or more favourable than, the terms of the offer, award to the party the party's costs in respect of all or some of the steps taken in the family law case after the date of delivery or service of the offer to settle.

[18] Pursuant to R. 11-1(6) of the Rules:

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] The Court of Appeal described the purpose of double costs in *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 25:
- [25] An award of double costs is a punitive measure against a litigant for that party's failure, in all of the circumstances, to have accepted an offer to settle that should have been accepted. Litigants are to be reminded that costs rules are in place "to encourage the early settlement of disputes by rewarding the party who makes a reasonable settlement offer and penalizing the party who declines to accept such an offer" (*A.E. v. D.W.J.*, 2009 BCSC 505, 91 B.C.L.R. (4th) 372 at para. 61, citing *MacKenzie v. Brooks*, 1999 BCCA 623, *Skidmore v. Blackmore* (1995), 2 B.C.L.R. (3d) 201 (C.A.), *Radke v. Parry*, 2008 BCSC 1397).
- [20] A court may consider revoked offers: *Fines v Johnson*, 2020 BCSC 1045 at paras. 20, 26; *ICBC v. Patko*, 2009 BCSC 578 at paras. 34-36.
- [21] In considering the first factor under R. 11-1(6), the Court must determine whether it was unreasonable to refuse it at the time the offer was open for acceptance: *Cottrill v. Utopia Day Spas and Salons*, 2019 BCCA 26 at para. 30 [*Utopia Spas*]. This factor is not determined by reference to the award ultimately made, but with reference to what was reasonable during the time frame the offer was open: *Utopia Spas* at para. 29.
- [22] In *Wallace v. Pichichero*, 2021 BCSC 2347, this Court stated as follows with respect to offers to settle in family proceedings:
- [19] In *H.K. v. W.K.*, 2018 BCSC 1447, the court elaborated on the foregoing considerations as follows:
- [66] Whether an offer ought reasonably to have been accepted is not determined by reference to the award that was ultimately made at trial, but by considering whether, at the time the offer was open for acceptance, it would have been reasonable for it to have been accepted. The reasonableness is to be assessed by considering factors including the timing of the offer, whether it had some relationship to the claim as opposed to being a nuisance offer, whether it could be easily evaluated, and whether some rationale for the offer was provided: *Hartshorne* at para. 27.
- [67] In *Hartshorne*, the court concluded that the offer ought reasonably to have been accepted and awarded double costs. In particular, the court determined that the offer was presented 12 days before the commencement of trial and was comprehensive. If accepted, the offer would have resolved all outstanding disputes between the parties, obviating the need for a 10-day trial. The court also concluded that the offer was sufficiently clear, and that accepting it would not have required the appellant to completely accept the respondent's reasoning in support of it.

- [68] In considering the relationship between the offer and the result at trial, the court should determine whether the "declining" party would have been financially better off, on a global basis, if they had accepted the offer as compared to going to trial: *Kopp v. Kopp*, 2011 BCSC 889 at para. 7. The court in *Kopp* also explained that precise alignment between an offer to settle and the final judgment is not required. The court said:
- [11] It is difficult, and in my view unwarranted, to approach the costs determination by forensic comparison of every offer and counter-offer with the ultimate outcome of the application, and to apply each factor in Rule 11-1(6) to each offer. I reject that approach. The costs issue should not be the tail that wags the dog.
- [69] In *Jukic v. Luta*, 2009 BCSC 365, the court expressed a similar view somewhat differently. It concluded that, in light of the multiple issues involved in a family proceeding, it would be "virtually impossible" to match an offer to settle with the orders made and that such a high standard was not required in order to be entitled to double costs.
- [23] In *Primeau v L'Heureux*, 2018 BCSC 2200, Justice Winteringham at paras. 16-18 made it clear that the fact that a party was self-represented is not a bar to a double costs award:
- [16] I have reviewed the Offer to Settle delivered two weeks before trial. It is indeed clear and comprehensive. I have compared the positions taken at the outset of the trial to the orders pronounced at the conclusion of the trial. In other words, I have examined the matters in dispute at the trial, the importance of those matters to the parties and have determined that the Claimant substantially succeeded on each of the issues identified. Having determined that the Claimant substantially succeeded, I have asked myself whether there are reasons to otherwise order that the Claimant, as the winning party, be deprived of her costs. On this latter point, I have considered the Respondent's submission regarding hardship. I have also considered the view expressed by Mr. Justice Greyell in *Hurford v. Burgart*, 2011 BCSC 1551 at para. 18, in which he stated:

The respondent, although self-represented, must be taken to understand the Family Rules concerning an award of costs. He is as much subject to the court's rules as is a litigant represented by counsel. Simply because he is self-represented does not mean he is not required to give the same careful consideration to an offer to settle as if he had counsel.

- [17] While it may be harsh to award double costs, the Respondent did not incur substantial legal costs. On the other hand, the Claimant did, and she did so in spite of a timely and accurate offer to settle. Madam Justice Arnold-Bailey, facing a similar hardship submission, noted in *I.J.G.P.G. v. K.M.*, 2017 BCSC 261 at para. 87: "double costs are the rule rather than the exception."
- [18] Taking into account the overall circumstances of this case, I am satisfied that the Claimant is entitled to double costs from the time of the Offer to Settle

- [24] At para. 48 of Wallace, the Court states: "Where there has been an accurate and timely offer to settle high conflict litigation such as this, double costs ought to be the rule rather than the exception: *K.M. v. I.M.*, 2017 BCSC 716 at para. 16."
- [25] Taking into account the foregoing, I am satisfied that Mr. J should receive double costs against Ms. J from the date of the offer to settle made May 3, 2021. The offer to settle was delivered about seven months in advance of the trial and was open for acceptance initially for 17 days and then reissued for a second time for another two-week period. The offer to settle addressed all major matters at issue in the litigation and was sufficiently clear and comprehensive to allow Ms. J to fairly evaluate its merits (and in fact a detailed draft order was attached to the offer to settle).
- [26] If Ms. J had accepted the offer to settle, Ms. J would have received around a half million dollars in cash and investments. When the offer to settle is compared to the final order, the offer to settle was clearly superior. At trial, Ms. J was awarded a materially smaller cash award of \$315,000.00 and this award is subject to her obligation to pay ongoing child support and s. 7 expenses. Mr. J also obtained a protection order against Ms. J at trial, to which she would not have been subject under the terms of the offer to settle.
- [27] Overall, the offer to settle was in my view fair at the time it was made and it would have been reasonable for Ms. J to have accepted it, thereby enabling the parties to avoid a long and expensive trial.

D. Special Costs

- [28] Mr. J seeks special costs. Although I have identified numerous concerns with Ms. J's conduct of this litigation in these reasons, I am nonetheless of the view that an order for special costs is not merited in this case.
- [29] Special costs may be awarded under R. 16-1(1)(b) of the Rules. The British Columbia courts have made it clear that a party seeking special costs must demonstrate exceptional circumstances and that the courts should also show restraint in awarding such costs: *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352 at para. 73 [Westsea]; *Webber v. Sullivan*, 2019 BCSC 1784 at para. 9.
- [30] In the family law context, Justice Marchand in *Sebok v. Babits*, 2022 BCCA 2 at para. 62 cautioned courts to "very carefully consider" whether an award of special costs is "truly justified" in a given case, given the "fine financial balance" that may be implicated in the result:
- [62] Awards of special costs are exceptional. They can be very large. In a typical family case, they can upset the fine financial balance struck by the hearing judge. In all cases, hearing judges should very carefully consider whether an award of special costs is truly justified and endeavour to fully address the specific basis for any such award made.

- [31] In *Chapman v. Chapman*, 2020 BCSC 1896 at paras. 5-10, Justice Jackson helpfully summarized the relevant principles to be applied with regard to special costs:
- [5] Special costs are punitive and imposed to sanction a party's reprehensible conduct during the litigation, conduct from which the court seeks to disassociate itself: *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 119 D.L.R. (4th) 740 at 745, 9 B.C.L.R. (3d) 242 (C.A.) [*Garcia*]; *R.A.C. v. V.L.C.*, 2009 BCSC 1207 at para. 11. The word "reprehensible" is broad and encompasses scandalous or outrageous conduct as well as milder forms of misconduct deserving of reproof or rebuke: *Garcia* at 746-747. Improper pre-litigation conduct is excluded from consideration: *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177 at paras. 133-134.
- [6] The Court of Appeal recently reviewed the purpose underlying special costs in *567 Hornby Apartment Ltd. v. Le Soleil Restaurant Inc.*, 2020 BCCA 69, leave to appeal ref'd 39145 (1 October 2020) [*Le Soleil*]. The Court affirmed the purpose of special costs is to punish and deter litigation misconduct, not to compensate the other party: at paras. 40-42.
- [10] While not exhaustive, the types of conduct that may attract an award of special costs include delayed disclosure of or a failure to disclose documents, dissipating or not disclosing assets, depriving the other party of financial assets, disregarding the other party's interest in family assets, pursuing meritless claims and being reckless with regard to the truth, improper allegations of fraud or conspiracy, or making the resolution of an issue far more difficult than it should have been: *Hu v. Dickson*, 2015 BCSC 218 at para. 49; *McIntyre v. McIntyre*, 2018 BCSC 472 at paras. 7-8; *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914 at para. 11; see also *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352 [*Westsea*] and *D.G.S. v. J.D.S.*, 2014 BCSC 2183.
- [32] Mr. J asserts that Ms. J's conduct was "reprehensible" for the following principal reasons:
- a. Ms. J has delayed disclosure or failed to disclose documents as set out above;
 - b. Ms. J has dissipated or not disclosed assets (i.e., the Joint RESP and joint GIC);
 - c. Ms. J has pursued meritless claims and has been reckless with the truth, particularly with regard to allegations about Mr. J's sexual abuse of J.J. and fathering an illegitimate child;
 - d. Ms. J has made the resolution of the issues far more difficult than it should have been;
 - e. Ms. J did not comply with the Elwood Order;
 - f. Ms. J has sent an excessive number of (often repetitive) emails to the respondent's lawyer;
 - g. Following the trial, pending and following the release of my written reasons, Ms. J sent a lot of emails to the Court and submitted numerous requests to appear, and failed to cooperate with settling of the final order;
 - h. The family violence perpetrated by Ms. J toward J.J. and Mr. J since separation;

- i. The failure of Ms. J to pay child support to Mr. J as ordered by in the Trial Decision; and
- j. The failure of Ms. J to make good faith attempts to negotiate, mediate, or settle this matter.

- [33] I note at the outset that some of the conduct identified by Mr. J (such as some of the family violence perpetrated by Ms. J post-separation) is pre-litigation conduct and therefore must be excluded from special costs consideration: *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177 at para. 134. I also note that certain impugned conduct identified by Mr. J took place after the trial (such as the copious correspondence with the court registry). Counsel for Mr. J has advised that Mr. J is giving consideration in future to bringing a vexatious litigant application. It may be that this is the more appropriate forum to address the post-trial conduct of Ms. J.
- [34] There is no question that some of the other instances of conduct described above do fall notionally within the categories of reprehensible conduct set out in *Chapman*. However, I am not convinced that this conduct was truly intentional misconduct on the part of Ms. J as opposed to being more attributable to her being self-represented or perhaps to an apparently distorted but honestly held view of the facts and reality. For example, it was difficult to tell whether her inadequate documentary disclosure was strategic and intentional or merely arose from a misunderstanding of her legal obligations in the litigation process. Similarly, it was difficult to discern (due to the lack of banking information) whether and to what extent she had truly dissipated the joint GIC and Joint RESP or whether she had repaid the sums she alleged without proof.
- [35] In addition, although her allegations against Mr. J appeared outrageous in the trial setting due to a lack of supporting evidence, it did appear that she genuinely believes in the truth of these allegations (however distorted that belief may be in light of the facts) and that they were not made in bad faith. At para. 48 of *Westsea*, the Court refers to Justice Joyce's discussion of the proof necessary to establish reprehensible conduct in *Hung v. Gardiner*, 2003 BCSC 285 where at para. 16 the Court stated that to justify a special costs award, it "must be shown, not just that the allegation was wrong, but that it was obviously unfounded, reckless or made out of malice". This "must be considered from the point of view of the plaintiff" at the time they made the allegations.
- [36] Finally, I note that my award of double costs and costs assessed at a level of greater than ordinary difficulty already address many of the conduct issues raised by Mr. J in this context. I am conscious of the fine financial balance to be struck in cases of this nature and the need not to double-penalize Ms. J, which could upset the balance.
- [37] Accordingly, taking into account the principle that courts should show restraint in awarding special costs and that such awards are exceptional, the claim for special costs is denied.

E. Lump Sum Costs

- [38] Rule 16-1(1) of the Rules states:

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

- (c) the court awards lump sum costs for the family law case and fixes those costs under subrule (14) in an amount the court considers appropriate.

[39] Rule 16-1(14) of the Rules states:

The court may award costs

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

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

[40] Rule 1-3 of the Rules states:

Object

- (1) The object of these Supreme Court Family Rules is to:
 - (a) help parties resolve the legal issues in a family law case fairly and in a way that will
 - (i) take into account the impact that the conduct of the family law case may have on a child, and
 - (ii) minimize conflict and promote cooperation between the parties, and
 - (b) secure the just, speedy and inexpensive determination of every family law case on its merits.

Proportionality

- (2) Securing the just, speedy and inexpensive determination of a family law case on its merits includes, so far as is practicable, conducting the family law case in ways that are proportionate to
 - (a) the interests of any child affected,
 - (b) the importance of the issues in dispute, and
 - (c) the complexity of the family law case.

[41] In *Gichuru v. Smith*, 2014 BCCA 414, leave to appeal to SCC refused, 36221 (16 April 2015), the Court of Appeal held that the trial judge's discretion to order lump sum costs should be "exercised sparingly": at para. 106. An exception to that general proposition may arise where the judge is intimately familiar with the litigation or the time and costs of a registrar's

hearing cannot be justified: Gichuru at para. 107. A related concern is that the party who might have to pay the costs will prolong any assessment: Gichuru at para. 109; Buchan v. Moss Management Inc., 2010 BCSC 121 at para. 25. The considerations identified in Gichuru are in my view equally applicable in this case.

[42] Mr. J submitted a draft bill of costs with the application. The total costs claim, including double costs as awarded herein, amounts to \$68,203.20 plus the costs for the costs hearing. This total includes disbursements of \$7,163.20.

[43] I have reviewed the draft bill of costs and an affidavit justifying the disbursements and am satisfied that the costs claimed are reasonable and fair. Given the amount of court resources and time already devoted to this litigation, and the claimant's many related applications, in my view this is an appropriate case for the exercise of my discretionary power to award lump sum costs.

III. ORDER

[44] Mr. J shall have his costs at greater than ordinary difficulty up to May 3, 2021, and double costs thereafter, in the amount of \$68,203.20.

[45] Mr. J shall have his costs in the amount of \$1000 for the costs hearing.

[46] The costs shall be payable forthwith.

"M. Taylor J."

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