

CANADA / JUDGMENT

Cao v. Chen

2023 BCSC 1766

COURT

Supreme Court of British Columbia

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2023 BCSC 1766 Cao v. Chen

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Cao v. Chen,

2023 BCSC 1766

Date: 20231011

Docket: E100233

Registry: Vancouver

Between:

Weihong Cao a.k.a. Wei Hong Cao

Claimant

And:

Yongchang Chen a.k.a. Yong Chang Chen and Chao Chen

Respondents

- and -

Docket: S194328

Registry: Vancouver

Between:

Chao Chen

Plaintiff

And:

Yong Chang Chen also known as Yongchang Chen and Jie Chen

Defendants

Before: The Honourable Madam Justice Forth

Reasons for Judgment re Costs

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B.H.Y. Blake

Place and Date of Trial:

Vancouver, B.C.

May 23, 2023

Place and Date of Judgment:

Vancouver, B.C.

October 11, 2023

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Introduction

- [1] These reasons address costs issues arising in two actions. The first proceeding is a family law action filed on January 22, 2010 (the "Family Law Proceeding") between the claimant, Weihong Cao (the ex-wife), and the respondents Yongchang Chen (the ex-husband) and Chao Chen (Yongchang Chen's son from a previous marriage). To distinguish between the respondents, I will refer to Yongchang Chen as Mr. Chen and to Chao Chen by his full name.
- [2] The second proceeding is a breach of contract action filed on April 10, 2019 by Chao Chen against Mr. Chen and Jie Chen (the "CC Action"). Jie Chen is Chao Chen's half sister and the eldest daughter of Ms. Cao and Mr. Chen.
- [3] These costs reasons address:

- The costs of the first trial heard in May and November 2019 which dealt with the issue of whether the Chinese Judgment should be recognized in British Columbia and whether this Court should assume jurisdiction on the remaining issues to be resolved between the parties (the "First Trial");
- The costs of the second trial heard on various dates in October and November 2021, as well as January, February, and March 2022, which dealt with issues in the Family Law Proceeding (the "Second Trial"); and
- The costs of the CC Action which was heard as part of the Second Trial.

- [4] The issues in the First Trial were dealt with in my reasons pronounced May 13, 2020 and indexed at 2020 BCSC 735 (the "First Reasons"). In the First Reasons I stated at para. 220 that the costs of the hearing would be in the cause.
- [5] The issues in the Second Trial were addressed in my reasons pronounced November 30, 2022 and indexed at 2022 BCSC 2083 (the "Second Reasons").
- [6] I will now provide an overview of the positions of each party respecting costs.

Position of the Claimant

- [7] The claimant seeks special costs against Mr. Chen for the Family Law Proceeding, including but not limited to the two trials, except where costs have already been dealt with by cost orders in previous applications, and with a 10% discount of the costs of the Second Trial, to account for the CC Action. She claims that she was successful against Mr. Chen at the Second Trial and mostly successful at the First Trial. She asserts that Mr. Chen's conduct in this litigation meets and exceeds the threshold requirement for an order of special costs.
- [8] The claimant also seeks special costs against Chao Chen for all or part of the Family Law Proceeding on the grounds that his misconduct and the numerous interlocutory steps taken amount to exceptional circumstances giving rise to the Court's appropriate exercise of its discretion to award costs against a successful party. She submits that Chao Chen's conduct in this litigation amounted to a deliberate attempt to defeat the lawful prosecution of her case against Mr. Chen and Chao Chen, therefore warranting an award of special costs. In the alternative, the claimant seeks an order that no costs be awarded against her in respect of her claim against Chao Chen.
- [9] The claimant also seeks an order that, in respect of the CC Action, there be no costs as between Jie Chen and Chao Chen, given the divided success in that proceeding and counsel's agreement, stated on the record, that there be no costs.

- [10] Finally, the claimant seeks an order directing the assessment by a registrar of any costs awarded to the claimant, with those costs payable forthwith upon assessment to the claimant from the funds held in trust by counsel for Chao Chen, in trust to Forrester and Company Law Corporation. She submits that this payment should be made in priority to any costs payable to Chao Chen by Mr. Chen in the Family Law Proceeding, as well as to the judgment that Chao Chen holds against Mr. Chen in the CC Action.

Position of Mr. Chen

- [11] Mr. Chen takes the position that the claimant is not entitled to any costs, including special costs, in the Family Law Proceeding against any party, since she was not "substantially successful" on the contested issues. He asserts that no special costs should be made in favour of or against him, since he was also not substantially successful nor unsuccessful on the contested issues.
- [12] In the CC Action, Mr. Chen submits that Chao Chen should not be awarded further costs against Mr. Chen since the damage assessment in this action was straightforward, not time-consuming, and not opposed. Further, Chao Chen only obtained the assessment he sought in the alternative, not his principal position.

Position of Chao Chen

- [13] Chao Chen seeks special costs against the claimant in the Family Law Proceeding, including but not limited to the two trials, except where costs have already been dealt with by cost orders in previous applications, and with a 10% discount of the costs of the Second Trial, to account for the CC Action.
- [14] In the alternative, if special costs are not awarded to Chao Chen, he asserts that the claimant should pay regular costs before September 10, 2020 and double costs after September 10, 2020, based on an offer to settle, except where costs have already been dealt with by cost orders in previous applications, and with a 10% discount of the costs of the Second Trial, to account for the CC Action.
- [15] Chao Chen suggests various formulas on how the costs awards would be paid.
- [16] Chao Chen also submits that there be no costs in the CC Action between himself and Jie Chen.
- [17] Finally, he seeks an order that Mr. Chen pay Chao Chen costs for the default judgment and for 1.9 days of the Second Trial for assessing damages in the CC Action.

Issues

- [18] I will address the following issues:

1. Did the claimant achieve substantial success in the First and Second Trials?

2. What costs should be awarded to the claimant against Mr. Chen in the Family Law Proceeding?
3. Should Mr. Chen pay a fine of \$5,000 for his failure to disclose required information?
4. What costs should be awarded against or to Chao Chen in the Family Law Proceeding?
5. Which party should pay the costs of the expert reports of Prof. deLisle and his attendance at the First Trial?
6. What costs should be awarded in the CC Action?
7. In what priority should the costs claims be paid out of the monies held in trust by Chao Chen's counsel?

Issue 1: Did the Claimant Achieve Substantial Success in the First and Second Trials?

Legal Principles

- [19] Pursuant to R. 16-1(7) of the Supreme Court Family Rules, B.C. Reg. 169/2009 [Family Rules] and R. 14-1(9) of the Supreme Court Civil Rules, B.C. Reg. 168/2009 [Civil Rules], costs should be awarded to the successful party unless the court orders otherwise. It is accepted that "success" in this context means "substantial success" in both civil and family law cases: *Trainor-Degirolamo v. British Columbia (Ministry of Forests, Lands, Natural Resource Operations and Rural Development)*, 2021 BCSC 1601 at para. 62; *D.N. v. M.R.*, 2020 BCSC 475 at para. 12.
- [20] While substantial success may be assessed purely on the basis of whether liability was established in matters concerning a single cause of action, it is generally the case that a more flexible approach is required where the litigation concerns multiple causes of action. The Court of Appeal addressed this distinction in *The Owners, Strata Plan LMS 3259 v. Sze Hang Holdings Inc.*, 2017 BCCA 346 [Sze Hang]:
- [90] At its most basic, the successful party is the plaintiff who establishes liability under a cause of action and obtains a remedy, or the defendant who obtains a dismissal of the plaintiff's case: *Loft v. Nat*, 2014 BCCA 108 at para. 46.
- [91] Different considerations, however, arise when the litigation concerns multiple causes of action. In such cases, the more flexible "substantial success" test will usually be more appropriate. The "substantial success" standard was described by Bouck J. in *Fotheringham v. Fotheringham*, 2001 BCSC 1321 at para. 45:
- [45] Gold now seems to say that substantial success in an action should be decided by the trial judge looking at the various matters in dispute and weighing their relative importance. The words "substantial success" are not defined. For want of a better measure, since success, a passing grade, is around 50% or better, substantial success is about 75% or better. That does not mean a court must descend into a meticulous mathematical examination of the matters

in dispute and assign a percentage to each matter. Rather, it is meant to serve as a rough and ready guide when looked at all the disputed matters globally.

- [21] As noted in *Sze Hang*, the standard test was set out in *Fotheringham v. Fotheringham*, 2001 BCSC 1321. At para. 46 of *Fotheringham*, Justice Bouck set out a four-step process that the Court should apply when deciding whether or not to award costs after a trial:
- a) First, consider the "matters in dispute" at trial. These may or may not include the "issues" explicitly mentioned in the pleadings.
 - b) Second, assess the relative weight or importance of these matters to the parties.
 - c) Third, with respect to all the matters in dispute at trial, determine on a global basis whether any party was "substantially successful".
 - d) Finally, if one party has met this threshold, consider whether there are reasons to "otherwise order" that the successful party be deprived of their costs.
- [22] In *Belpacific Excavating & Shoring Limited Partnership v. Crown and Mountain Creations Ltd.*, 2022 BCSC 412, Justice Burke applied the *Fotheringham* test and stated:
- [9] Courts should avoid a purely arithmetical analysis in applying these factors whereby the issues or awards are simply counted-up and success is determined on the basis of which party prevailed on the most issues or earned the greatest damages award: *Reid v. Reid*, 2017 BCCA 191 at paras. 7-11. Rather, where there are multiple issues at trial, the court should identify which issues were of the greatest importance to the parties and determine, on a global basis, whether any litigant obtained substantial success on these grounds. As the Court stated in *Aschenbrenner v. Yahemech*, 2010 BCSC 1541, "[s]ubstantial success is not determined by counting up the number of issues and allocating success on each, or by comparing dollar amounts, but by assessing success in the major issues of substance": at para. 17.
- [23] As noted in *D.N.*, the following cost principles apply in family law cases:
- [12] A succinct summary of the legal principles respecting costs in family law cases was provided by Justice Bernard in *S.A.M. v. J.A.M.*, 2017 BCSC 2348 at para. 7:
- (a) The costs of a family law case must be awarded to the successful party, unless the court otherwise orders (Rule 16-1(7)) of the Supreme Court Family Rules [Rules];
 - (b) The "successful party" is the party who has achieved substantial success at the trial/hearing (*Fotheringham v. Fotheringham*, 2001 BCSC 1321; *Marquez v. Zapiola*, 2014 BCCA 35);

- (c) The court's discretion to "order otherwise" must be exercised judicially, bearing in mind a non-exhaustive list of factors that includes hardship, earning capacity, the purpose of the particular award, the conduct of the parties in relation to the litigation, and the importance of not upsetting the balance achieved by the court in relation to the substantive issues (*Gold v. Gold* (1993), 106 D.L.R. (4th) 452 (B.C.C.A.));
 - (d) The party who asks the court to "order otherwise" bears the onus to persuade the court why it should do so (*S.D.W. v. C.W.W.*, 2006 BCSC 162);
 - (e) Financial hardship, without more, is not a sufficient basis for the court to exercise its discretion to depart from the usual rule that successful parties are entitled to their costs (*S.D.W. v. C.W.W.*, *supra.*; *K.D.P. v. A.R.K aka R.K.*, 2012 BCSC 1025; *Brown v. Kucher*, 2016 BCSC 194);
 - (f) Where an offer to settle a family case has been made, the court may award double costs for all or some of the steps taken after the date of delivery or service of the offer (Rule 11-1(5) of the Rules);
 - (g) As a general rule, an award of double costs should be made against a party who did not accept an offer to settle that should, in all the circumstances, have been accepted (*Hartshorne v. Hartshorne*, 2011 BCCA 29); and,
 - (h) In determining whether a double costs order should be made, the court may consider any factor the court considers appropriate, including whether the offer was one that ought reasonably to have been accepted upon receipt or at any later date, the relationship between the offer and the judgment, and the relative financial circumstances of the parties (Rule 11-1(6) of the Rules).
- [24] The discretion to "order otherwise" is a discretion to deprive the winning party of their usual costs entitlement. It has not been interpreted to mean a discretion to award costs to an unsuccessful party: *Fotheringham* at paras. 46, 53.

Analysis

[25] I will now consider whether the claimant was substantially successful in the First and Second Trials.

i) The First Trial

[26] I find that the claimant was substantially successful in the First Trial.

[27] In the First Reasons the following issues in dispute were identified:

[46] The pleadings, evidence, and submissions raise the following issues:

- a. Should the admissions made in the pleadings by the respondent husband be permitted to be withdrawn?

- b. Should the claimant be estopped from challenging the forum?
- c. Does this Court have territorial competence?
- d. Should the Court decline to exercise its territorial competence?
- e. Should the Chinese Judgment be recognized by this Court?

- [28] The first issue, raised by Chao Chen, related to whether certain statements made by Mr. Chen in the pleadings should be considered admissions, and if so whether they could be withdrawn. Mr. Chen made no submissions on this issue. The claimant succeeded on this issue against Chao Chen since I determined that Mr. Chen's statements were judicial admissions and could not be withdrawn.
- [29] The second issue related to whether the claimant should be estopped from challenging the forum. This issue was also raised by Chao Chen. Mr. Chen made no submissions on the issue but my understanding of Mr. Chen's position was that he agreed that British Columbia was the appropriate forum to deal with the child custody and child support issues. I found that the claimant was not estopped from challenging the forum. The claimant therefore succeeded on this issue against Chao Chen.
- [30] Relating to the third and fourth issues, I found that this Court did have territorial competence over the matters raised in the Family Law Proceeding. Chao Chen argued that since Mr. Chen and the claimant had agreed that China was the proper jurisdiction to adjudicate issues relating to divorce, custody and child support, spousal support, and the division of property located in China, the Court should decline to exercise territorial jurisdiction on all matters that had been decided in the Chinese Judgment.
- [31] Mr. Chen made no submissions at the First Trial on these issues but did raise the issue of jurisdiction in his pleadings and in his response to amended family claim filed August 22, 2017, in which he asserted that the parties were divorced and that the Chinese court dealt with custody, child support, spousal support, and division of assets.
- [32] As noted, I found that the Court did have territorial competence over the matters raised in the Family Law Proceedings, and that British Columbia was the appropriate forum, except as to family property in China. The claimant was successful on this issue.
- [33] The final issue was whether the Chinese Judgment should be recognized by the Court. The claimant took the position that only the divorce and the division of family property in China should be recognized. Chao Chen's counsel made submissions, as an officer of the Court, that the Chinese Judgment should be recognized. because there was a real and substantial connection between the issues and China, the Chinese Judgment was final, and no defences applied. Although the position of Mr. Chen was difficult to ascertain, he stated in his closing submissions that the Chinese Judgment was correct.

[34] On this final issue, concerning whether the Court should recognize the Chinese Judgment, I determined that:

- a. The divorce in the Chinese Judgment was recognized;
- b. The custody order in the Chinese Judgment was not recognized;
- c. The child support order in the Chinese Judgment was not recognized, particularly as it was not a final order; and
- d. The refusal of spousal support in the Chinese Judgment should be recognized.

[35] In respect to the issue of spousal support, I noted in the First Reasons, as follows:

[213] I would add that this finding does not preclude the claimant from making any arguments at the trial on the division of the British Columbia properties that the denial of spousal support is a relevant factor to be considered in the appropriate division of the British Columbia properties.

[36] The recognition of the Chinese Judgment was an important issue since in the applications leading up to the First Trial, Chao Chen had taken the position that the Chinese Judgment should be recognized and given effect by the British Columbia Supreme Court: First Reasons at para. 27.

[37] In my view, the claimant was overall successful in the First Trial, in that I found that the issues of child custody and support were to be determined in British Columbia, and although her claim for spousal support was rejected, she was still entitled to rely on an argument that the denial of spousal support was a relevant factor in the appropriate division of the British Columbia properties.

ii) The Second Trial

[38] I find that the claimant was substantially successful on all issues in the Second Trial, except the issue dealing with the trust claim against Chao Chen.

[39] The disputed issues in the Second Reasons were as follows:

[33] The following issues arise:

1. What is Mr. Chen's income and should income be imputed to him?
2. What is Ms. Cao's income and should income be imputed to her?
3. For what time period should the retroactive child support be paid?
4. What is the appropriate amount of retroactive child support that should be paid by Mr. Chen?
5. What assets registered under the name of Mr. Chen are family assets?
6. What are the value of the family assets?

7. How should the family assets be divided?
8. Are the Five Properties held in trust by Chao Chen for Mr. Chen?
 - a. If so, are they family assets?
 - b. If so, how should they be apportioned between the parties?
9. Should there be an order relating to parenting time and ongoing child support made at this time?
10. Should an order for costs be made in the Family Law Proceeding?

[40] The first four issues deal with the claimant's request for retroactive child support and how it should be calculated. The claimant was successful in having an income of \$750,000 imputed to Mr. Chen from 2009 to 2021. No income was imputed to the claimant for the years prior to the litigation. The third issue concerned what date the retroactive child support should commence. A factor in this analysis was that Mr. Chen's behavior came within the "expansive view" of blameworthy behavior: Second Reasons at para. 154. The fourth issue was the amount to be paid for retroactive child support after deducting the amounts Mr. Chen had already paid. The result was that the claimant had been overpaid child support by \$170,153.

[41] In my view the child support issue was an important one due to the difficulty in calculating Mr. Chen's income to determine his support obligations. Mr. Chen was taking the position, even in the First Trial, that he had been paying thousands of dollars per month in child support to the claimant: First Reasons at para. 120. As a result the income imputed to Mr. Chen to establish his child support obligations was a significant financial issue between the parties.

[42] In my view, the claimant was substantially successful on this issue. Although the claimant provided an incorrect calculation for the amount of child support owed to her, she was successful in arguing the imputed income of Mr. Chen, based upon which the correct figure could be reached. She was also successful in arguing that Mr. Chen's conduct came within the purview of blameworthy behavior for the purpose of determining when retroactive child support should commence. Therefore, on the whole, I find that the claimant was substantially successful on the issues relating to child support.

[43] The fifth, sixth and seventh issues deal with the identification of and division of family property. The claimant was successful in having 100% of two of the properties allocated to her, arising from her failure to receive any award of spousal support. Although she was seeking a 100% allocation of the third property to her as well, this was divided equally between her and Mr. Chen. The other family assets were equally shared. The claimant was unsuccessful in seeking to be appointed as a director of Canada Rockies. In light of the dubious value of this business, this was not an important issue at trial.

- [44] In my view, the claimant was substantially successful on the fifth, sixth and seventh issues, relating to division of family assets, in light of the values of the two properties she obtained outright.
- [45] On the eighth issue, being whether the five properties were held by Chao Chen in trust, the claimant was wholly unsuccessful. I accept that this issue was the one most heavily contested, time-consuming, and of the highest value.
- [46] The ninth issue dealt with the ongoing parenting time which was adjourned to a later date as requested by the claimant. Mr. Chen was unsuccessful in seeking to obtain custody of the children.
- [47] I find that on all issues except for the trust claim the claimant was substantially successful.

Issue 2: What Costs Should be Awarded to the Claimant Against Mr. Chen in the Family Law Proceeding?

- [48] I find that the claimant should be awarded costs against Mr. Chen for the Family Law Proceeding, except for those matters dealing with the trust claim in the Second Trial.
- [49] Rule 16-1(14) of the Family Rules provides that the court may award costs of a family case that relate to some particular application, step, or matter "in or related to the family law case". This subrule permits the court to apportion costs in appropriate cases: *Sandhu v. Sandhu*, 2011 BCSC 853.
- [50] In *Sutherland v. The Attorney General of Canada*, 2008 BCCA 27, the Court of Appeal set out the following three-step test for an apportionment of costs at para. 31:
- (1) the party seeking apportionment must establish that there are separate and discrete issues upon which the ultimately unsuccessful party succeeded at trial;
 - (2) there must be a basis on which the trial judge can identify the time attributable to the trial of these separate issues;
 - (3) it must be shown that apportionment would effect a just result.
- [51] I am of the view that in this Family Law Proceeding there were two very separate and distinct claims being advanced: the first being the claimant's claims against Mr. Chen arising from the dissolution of their marriage (the "Family Law Claims"), including the issues heard in the First Trial, and the second being the trust claim made against Chao Chen (the "Trust Claim"). I accept that the claimant should be awarded costs against Mr. Chen in the Family Law Proceeding. However, for the items relating to the preparation for and attendance at the Second Trial, the costs awarded will be restricted to the time spent on the Family Law Claims.

- [52] In the unique circumstances of this proceeding, I find that the claimant should be awarded her costs against Mr. Chen for the Family Law Claims and that she should be denied her costs relating to the unsuccessful Trust Claim. The cost of the Trust Claim should be borne by the claimant, as it was her decision to bring Chao Chen into the Family Law Proceeding, whose involvement was unnecessary to resolve the Family Law Claims.
- [53] The claimant submits that the amount of time spent at the Second Trial on the Trust Claim should be allocated at 25%. I disagree. When considering the time spent for Chao Chen and his witnesses to testify, along with the needed direct and cross-examination of the claimant and Mr. Chen on the purchase of the five properties, as well as the extensive submissions on the Trust Claim, this is a disproportionately low estimate.
- [54] I would allocate the time spent at the Second Trial as follows:
1. 35% for the Family Law Claims;
 2. 55% for the Trust Claim; and
 3. 10% for the CC Action
- [55] Section 9(1) of Appendix B of the Family Rules states: "if a court has made an order for costs, it may determine if the family law case involves less than ordinary, ordinary difficulty or more than ordinary difficulty."
- [56] In my view, this Family Law Proceeding involved matters of more than ordinary difficulty. I have been managing this proceeding since September 2017, when I ordered that the issue of the recognition of the Chinese Judgment be severed from the main trial and tried separately. The added challenges in this Family Law Proceeding included having to deal with the recognition of the Chinese Judgment, the expert evidence on Chinese law, the complexity of the corporate arrangements and admissibility of the corporate records, the number of properties at issue, and the significant time and effort that the parties went to gathering and proving facts.
- [57] The further challenge was dealing with Mr. Chen as a self-represented litigant which made the conduct of both trials very difficult. As stated in *C.Y.J. v. R.J.*, 2023 BCSC 140 at para. 13: "Conduct by a litigant that makes a trial more difficult is a ground for awarding costs at a scale of more than ordinary difficulty".
- [58] In my view, the difficulties and challenges that arose as a result of Mr. Chen choosing to act on his own behalf and his behavior during the Second Trial merits elevating the scale of costs to the higher level. I do note that throughout both trials counsel G. Forrester and B.H.Y. Blake did their best to assist Mr. Chen in court procedures and locating documents and resisted responding to his insults and inflammatory language against them. They both acted as true officers of the Court and I was indebted to them for their able assistance in dealing with Mr. Chen.

[59] I accept that where there has been a specific order made as to costs in prior interlocutory applications, then those costs should be assessed as ordered in those applications: 567 Hornby Apartment Ltd. v. Le Soleil Restaurant Inc., 2020 BCCA 69 at para. 101.

[60] In respect to taxable disbursements, it is my view that the claimant should only be denied recovery of those taxable disbursements that were solely related to the Trust Claim. She is not restricted to recovering only 35% of the disbursements incurred for the Second Trial. Hopefully, the parties can agree on this issue. If not, they have leave to attend before me to further address this issue by way of an application.

[61] I turn now to consider whether special costs should be awarded against Mr. Chen.

Legal Principles on Special Costs

[62] The applicable legal principles were summarized by Justice Milman in *Yusufi v. Yusufi*, 2022 BCSC 900 at para. 60:

[60] The circumstances in which this Court has in the past awarded special costs in matrimonial litigation were conveniently summarized by Warren J. in *Hu v. Dickson*, 2015 BCSC 218, as follows:

[46] Special costs are awarded where a party's litigation conduct can be characterized as "reprehensible". In this context the word reprehensible encompasses both scandalous and outrageous conduct and also milder forms of misconduct deserving of reproof or rebuke. This does not mean that all forms of misconduct justify a special costs order - rather, the misconduct must be such as to be deserving of reproof or rebuke.

[47] The purpose for this high level of costs is punitive and intended to express the court's disapproval of the party's conduct. It is not necessary that all aspects of a party's conduct in the litigation be reprehensible in order to make an award of special costs that applies to the entire action. However, pursuant to Rule 16-1(14) of the Supreme Court Family Rules, the court has the discretion to award costs that relate to only certain aspects of a proceeding and may do so where it would be disproportionate to award special costs of the entire proceeding.

[48] The court must exercise restraint in awarding special costs and as such the party seeking special costs must demonstrate exceptional circumstances to justify a special costs order.

[49] In *Kim v. Hong* Justice Griffin quoted extensively from the judgment of Justice Williams in *Schwabe v. Dr. Lisinski* where he summarized a number of cases in an effort to discern the kinds of conduct that had been characterized as reprehensible and thus warranting an award of special costs. Justice Griffin also categorized the conduct that had been found to justify an award of special costs in a number of family cases. From her reasons, it is apparent that the kinds of conduct that warrant an award of special costs include the following:

- acting with an improper motive, such as to intimidate, exhaust or financially drain the other party in the hopes that they will give up or soften their position in the litigation;
- dissipating and/or not disclosing assets;
- abusing the court's process by, among other things, failing to disclose documents, delaying in disclosing documents, failing to respond to reasonable requests, causing unnecessary interlocutory applications, and breaching the Rules of Court in a manner that prejudices the other party;
- misleading the court, through outright fabrications or through evasive and/or equivocal responses; and
- disobeying a court order.

[Citations omitted.]

Analysis

- [63] I have no hesitation in finding that Mr. Chen's conduct during the Second Trial merits an award of special costs against him for the rationale set out in the Second Reasons at paras. 38-52. It was clear to me that Mr. Chen made every effort to derail the trial, refused to cooperate, made misleading statements, attempted to intimidate both Ms. Cao and Chao Chen, failed to make proper financial disclosure, failed to produce key documents, and disobeyed my court order.
- [64] His conduct throughout the Second Trial was deserving of rebuke. However, I am not persuaded that the special costs award should apply to the whole Family Law Proceeding. I would restrict the special costs to cover Ms. Cao's preparation and attendance for only the Family Law Claims at the Second Trial. To require Mr. Chen to pay special costs for the time spent at the Second Trial relating to the Trust Claim would be disproportionately severe and impose an unjust result.
- [65] Throughout the First Trial, Mr. Chen, for the most part, made no attempt to cross-examine witnesses or make any submissions. It was Chao Chen that lead the opposition with Mr. Chen, for the most part, remaining silent. The claimant submits that Mr. Chen "feigned illness" during the First Trial. It was not clear to me that Mr. Chen was faking feeling ill. I am not persuaded that Mr. Chen should pay special costs of the First Trial. He will only be responsible for those costs arising as a matter of more than ordinary difficulty.
- [66] Since I have found that the Family Law Claims related only to 35% of the Second Trial, the claimant is restricted to claiming 35% of her special costs for the preparation and attendance at the Second Trial. There will be a reference to the registrar to determine this amount.

Issue 3: Should Mr. Chen Pay a Fine of \$5,000 for his Failure to Disclose Required Information?

[67] The claimant submits that she is entitled to an additional award of \$5,000 pursuant to s. 92 of the Family Relations Act, R.S.B.C. 1996, c. 128 for Mr. Chen's failure to disclose required information. This section provides:

92 (1) If a person fails to comply with rules respecting disclosure information in proceedings under this Act that are made under the authority of the Court Rules Act, the court may order an amount not exceeding \$5,000 for the benefit of the spouse, parent or child on whose behalf the request was made.

(2) The award under subsection (1) is additional to and not in place of any other remedy.

[68] I would not exercise my discretion and order a further fine be assessed against Mr. Chen. In my view, the costs awarded, including special costs for a portion of the Second Trial, are sufficient to address the failures of Mr. Chen in this Family Law Proceeding.

Issue 4: What Costs Should be Awarded Against or To Chao Chen in the Family Law Proceeding?

[69] Chao Chen was successful in defending the Trust Claim against him. The normal rule would be that he is entitled to his costs. However, submissions were made on the following issues:

1. The claimant seeks an award of special costs against Chao Chen;
2. Chao Chen seeks an award of special costs against the claimant; and
3. The claimant seeks an order denying Chao Chen of any costs.

Special Costs Against Chao Chen

[70] The claimant seeks an award of special costs against Chao Chen. In support of this claim, the claimant refers to cases in Ontario, Alberta, and New Brunswick, where courts have awarded costs against a successful party where that party behaved unreasonably

[71] I note that in Ontario there is a specific rule, being Family Law Rules, O Reg. 114/99, rule 24(4), that permits trial judges to award costs against a successful party who has behaved unreasonably: *Wright v. Wright*, 2010 ONCA 102 at para. 48. No such rule exists in the British Columbia Family Rules.

[72] In *Gichuru v. York*, 2012 BCSC 1385, an unsuccessful plaintiff sought special costs against the successful defendant on the basis of alleged reprehensible conduct in the litigation. After noting that there appeared to be no authority to support such an award, Justice Bernard stated:

- [20] Even if the conduct of the defendant, or her counsel, could reasonably be characterized as reprehensible, it remains that the plaintiff was wholly unsuccessful in the litigation. The law does not support an award of special costs to the unsuccessful party. The relief for an unsuccessful party, where there has been reprehensible conduct by the successful party, is an order disallowing the usual order of costs to the successful party. For reasons already given, the plaintiff has failed to establish that such an order is appropriate.
- [73] Even if in British Columbia I could make such an award, I am not persuaded that in the circumstances of this case, Chao Chen has behaved in such a manner that would require him to pay special costs to the claimant. There would need to be proven some serious misconduct on behalf of the successful party, of the kind found in *Lu v. 421688 B.C. Ltd.*, 2020 BCSC 1001, for a consideration to be given to award costs against him. In *Lu*, it had been discovered that one of the defendants was giving cues from the courtroom gallery to witnesses under direct and cross-examination, which led to a lengthy adjournment of the trial and several additional hearings and submissions on the defendant's misconduct. I am not prepared to find that, in Chao Chen's case, serious misconduct arising to this level has been proven. This is not one of those exceptional cases.

Special Costs Against the Claimant

- [74] Chao Chen sought to have special costs awarded to him by the claimant. When asked during the submissions what conduct of the claimant warranted a special costs award, counsel for Chao Chen provided the following rationale:

- The claimant was present when Mr. Chen broke into Chao Chen's home;
- The claimant asked for multiple adjournments of the trial;
- She called Mr. Chen as an adverse party at the commencement of the Second Trial which was entirely unnecessary;
- At the commencement of the Second Trial, the claimant was still in quarantine after returning from China; and
- That Chao Chen suffered his own marriage break-down as a result of this litigation.

- [75] None of these factors support an award of special costs against the claimant for the following reasons. It was Mr. Chen that "broke" into Chao Chen's home. The evidence supports that the claimant did not stay at that home.

- [76] The claimant did ask for a number of adjournments and each one of them were assessed on its merits. It is my understanding the following took place:

- The first trial date was set for September 29, 2014. The adjournment of this trial was granted by Justice Groves on September 19, 2014. He also ordered document disclosure by Mr. Chen and Chao Chen at this time. The claimant was awarded costs at Scale C.

· The next trial date was set for September 18, 2017. I heard the claimant's adjournment application. I granted the second adjournment since I found that an adjournment was necessary to ensure a fair trial on the merits: *Cao v. Chen*, 2017 BCSC 1851 at para. 47.

· The next trial date was set for June 11, 2018. On June 11, 2018, the claimant appeared before me without counsel. I adjourned the trial. I ordered that the next trial date be set on a peremptory basis against the claimant and ordered that the respondents be entitled to their costs thrown away from the adjournment of the trial.

· The next trial date was set for May 6, 2019. The First Trial commenced on that date.

[77] There is no support that as a result of the adjournments of the trial dates that the claimant should be paying special costs.

[78] The claimant's trial strategy in calling Mr. Chen as an adverse witness was prudent. There was a considerable risk that Mr. Chen may not have given evidence and a further risk that he might not have continued to attend the trial. The strategy, in all of the circumstances, made sense and there is no basis to support the position that the claimant should not have done so.

[79] The fact that the claimant was still in quarantine at the commencement of the Second Trial did not delay the trial. She was available to testify after Mr. Chen was called. There is no merit in seeking special costs against her for this.

[80] While it is unfortunate that Chao Chen has had marital difficulties and that his wife decided to bring a divorce action against him, I see no basis to hold the claimant responsible for these marital difficulties. I have no doubt that this Family Law Proceeding has caused significant stress on all the parties. However, that is not a basis to award special costs against the claimant.

[81] There is no merit in Chao Chen's submissions that an award of special costs payable by the claimant is warranted. The claimant was entitled to bring the court proceeding against Chao Chen. The fact that she was unsuccessful does not merit a special costs award. The claimant did not engage in any reprehensible conduct during the course of this Family Law Proceeding.

[82] Chao Chen's claim for special costs against the claimant is dismissed.

What Costs Should be Awarded to Chao Chen?

[83] The claimant seeks, in the alternative, that Chao Chen not be awarded costs against her. In support of this position she relies on the *Lee v. Lee Estate* (1993), 84 B.C.L.R. (2d) 341, (sub nom. *Lee v. Horne*) 1993 CanLII 2368 (B.C.S.C.) decision that allows for judicial discretion to be exercised when there is a reason to depart from the normal rule of costs.

[84] I find that Chao Chen should be awarded only a portion of his costs from the claimant for defending the Trust Claim against him.

[85] The onus of displacing the normal rule of costs is on the claimant: *Grassi v. WIC Radio Ltd.*, 2001 BCCA 376 at para. 24. It has been described as a "substantial one": *Gill v. Canada (Minister of Transport)*, 2014 BCSC 2235 at para. 17.

[86] The denial of costs from a successful party in litigation has been made in the following circumstances:

- Where a failure to make full document disclosure during the litigation, resulting in the need for numerous orders and document production during the trial and mid-trial amendments to the pleading, was conduct which the court found deserving of rebuke: *Sew Cozzi Ventures Inc. v. Apex Outdoor Innovations Corp.* 2017 BCSC 2228 at para. 31;
- When a successful party is found to have lied in court, involved in "calculated deceit under oath", and failed to comply with court orders demanding production of documents: *Craiggs v. Owens*, 2012 BCSC 511 at paras. 15 and 19;
- Where there is a failure to produce relevant documents, this can result in a reduction of the costs awarded to the successful party: *LeClair v. Mibrella Inc.*, 2011 BCSC 533 at paras. 29 and 35;
- Where there has been misconduct including dishonest, reprehensible, discreditable, unmeritorious, unwarranted, callous, or reckless conduct: *L(R.L.) v L.(R.)*, 2001 BCCA 386 at paras. 31-32;
- Where a successful party has engaged in misconduct which might bring the administration of justice into disrepute, by failing to disclose any defences and presenting facts to the court in a misleading manner: *Royal Bank of Canada v. Azkia et al*, 2019 ONSC 5894 at paras. 83-86;
- When a successful party fails to produce relevant documents until days before the commencement of the trial thereby frustrating the potential settlement of the action: *Forsyth v. Pender Harbour Golf Club Society*, 2006 BCSC 1108 at paras. 69 and 72;
- Where a court concludes that a party has intentionally or deliberately sought to mislead the court by deliberately exaggerating a claim using misleading or false evidence: *Medeiros v. Vuong*, 2001 BCSC 326 at paras. 2 and 12; and
- Where the plaintiff failed to produce important records prior to a summary trial, resulting in wasted time and the need for post-hearing evidence and submissions, his costs were limited to 50%: *Ghuman v. ICBC*, 2019 BCSC 1380 at paras. 53-54.

[87] The claimant argues that the following conduct of Chao Chen merits a denial of costs to him:

1. Commencing in 2014, Chao Chen embarked on a strategy, in concert with Mr. Chen, to have the Family Law Proceeding dismissed based upon false sworn affidavit evidence, applied to bifurcate the trial, argued *res judicata*, and ultimately was unsuccessful at the First Trial in dismissing the Trust Claim;

2. Findings were made in the Second Trial that he led evidence inconsistent with his prior false statements and was found to have failed to disclose relevant documents;
 3. A departure was made in the Second Trial by Chao Chen from his sworn evidence that he purchased the five properties using the proceeds from the sale of the Special Line Railway Company; and
 4. Chao Chen withheld important records and documents, the disclosure of which would have reduced hearing time and forced submissions, therefore contributing to additional time-consuming steps in the proceedings.
- [88] Chao Chen disputes that he provided false evidence in his affidavits but suggests that his affidavits were not a complete account of what happened since they were made for motions. He further submitted that since his native language is Mandarin, some nuance and meaning have been lost in translation.
- [89] I reject the submission that due to Chao Chen's native language being Mandarin something has been lost in translation. Ms. Blake, Chao Chen's lawyer, speaks Mandarin and as such there should not have been any issue with the two of them communicating with each other. I further note that Chao Chen clearly understands English and has lived in British Columbia off and on since May 2007. He also attended university in New Zealand. In my view, the affidavit evidence that was contradicted at trial was clear and I see no support for the suggestion that there was any issue of translation.
- [90] Chao Chen may continue to dispute that he gave false evidence in his affidavits but my findings in the Second Reasons were that:
- [98] Chao Chen testified that the source of the funds to buy the Five Properties came from funds from the Special Railway Line Company. He also testified that some monies came from Hainan Baifucheng and other companies. This appeared to contradict his Affidavit #6 sworn September 16, 2014, in which he stated that he bought the Five Properties in 2009 with the funds he made from the Special Railway Line Company.
- [100] Chao Chen testified that he had no direct knowledge and did not cooperate with his father in respect to the Chinese divorce proceeding. This was directly contradicted in his Affidavit #5 sworn on July 22, 2014, where he stated:
3. I have been personally involved in the Chinese family litigation between Yongchang Chen and Weihong Cao, and as such I have personal knowledge of the facts deposed to.
 4. My personal involvement included retaining a lawyer for Mr. Yongchang Chen, assisting the collection of documents, and discussing with Mr. Yongchang Chen and his lawyer Tao Ding. Sometimes, I acted as his agent to discuss the case with Mr. Tao Ding.

Chao Chen agreed the evidence in his affidavit was all true. This contradiction was also never addressed.

- [101] I also find Chao Chen's evidence respecting the Special Railway Line Company unbelievable. In particular, that it was his idea to form the company and that he provided the idea to his father. I prefer Ms. Cao's evidence that it was Mr. Chen who started this company and developed it.
- [102] I further find that Chao Chen's statement in his Affidavit #5 sworn on July 22, 2014 was misleading. He states:
13. My connections helped me to set up the Railway Special Line Company. I was the main shareholder (about 99.7%), and Mr. Yongchang Chen was a minor shareholder (about 0.3%).
 14. I gave 0.3% to Mr. Yongchang Chen because he was my father.
- [103] I accept that at the time the Special Railway Line Company was incorporated, Chao Chen was not a 99.7 percent shareholder. It was not until November 2007 that he obtained that percentage. I further accept that at no time did Chao Chen give Mr. Chen, his father, 0.3 percent. This raises a concern in my mind that Chao Chen is prepared to give incorrect evidence when it suits his needs.
- [91] I further found that Chao Chen had failed to disclose relevant documents:
- [95] At trial, Chao Chen testified that he did file tax returns in New Zealand. His discovery was put to him in which he testified that he did not file tax returns in New Zealand. Although, later in the same discovery, he claimed he had filed tax returns every year. Chao Chen never produced these tax returns.
- [96] It is also a concern that Chao Chen was unable to produce any documents supporting the income he earned in New Zealand. He was also unable to produce any land title documents confirming the sale of the New Zealand townhouse. Chao Chen has known since January 2010 of his involvement in the Family Law Proceeding. It appears that he did not take seriously his obligation to produce documentary evidence.
- [97] Chao Chen was asked to provide documents at his discovery conducted in November 2021. Chao Chen testified that he authorized a lawyer to try and obtain the documents back in November 2021. These records were not produced in the proceeding. Chao Chen's explanation for this is that he failed to provide the documents to his lawyer. This is an unsatisfactory explanation.
- [92] The issue is whether my findings that Chao Chen provided misleading sworn evidence in affidavits which contradicted his evidence at trial and failed to disclose relevant documents is sufficient to deny him costs when he was wholly successful in defending the Trust Claim against him.
- [93] Chao Chen's misleading affidavit evidence related to a key issue in the Trust Claim regarding how he had obtained the funds to purchase the five properties in British Columbia. I am not persuaded by Chao Chen's submission that this was a collateral issue. For many years he maintained the funds came from the sale of his interest in the Special Line Railway

Company. This position changed at trial. The swearing of a false affidavit on a key issue in a proceeding is one that should not be sanctioned by the court. I further accept that Chao Chen deliberately failed to disclose relevant documents which may have assisted the claimant in proving her claim. This is also deserving of rebuke.

- [94] In addition, the positions taken by Chao Chen at the First Trial were all unsuccessful and, in my view, lengthened the trial time.
- [95] However, I am not persuaded on the totality of the evidence that Chao Chen should be deprived of all his costs. I adopt the approach taken in the LeClair and Ghuman decisions that a 50% reduction is appropriate. This percentage recognizes the considerable time that was spent addressing the issue of where the funds came from to purchase the five properties and Chao Chen's involvement in the Special Line Railway Company. In addition, a 50% figure makes it clear to Chao Chen that his conduct was improper and signals the Court's expectation that parties must not behave in the manner which he did.
- [96] Chao Chen is entitled to recover 50% of his costs assessed on a proceeding of more than ordinary difficulty in the Family Law Proceeding.
- [97] I turn now to consider the issue of the settlement offers made by Chao Chen during the Family Law Proceeding.

Legal Principles on Offers to Settle

- [98] Rule 11-1 of the Family Rules governs the costs rules that apply in a family action where a party has delivered a formal offer to settle. Pursuant to Rule 11-1(4), the court may consider an offer to settle in exercising its discretion in relation to costs. Where a formal offer has been delivered, Rule 11-1(5) provides that 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.

- [99] 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 that should have been accepted: *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 25.
- [100] The factors that a court must consider in making an order under Rule 11-1(5) are set out in Rule 11-1(6):
- (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.
- [101] The first factor, whether the offer ought reasonably to have been accepted, is not determined by the award that is ultimately made but whether at the time the offer was made it would have been reasonable for it to have been accepted: *Hartshorne* at para. 27.

Relevant Facts

- [102] There were two offers to settle made by Chao Chen to the claimant that were relied on in Chao Chen's submissions. The first offer was made on September 10, 2020 and was open for acceptance for five days, expiring on September 15, 2020 at 4:00 p.m. Chao Chen offered to sell 6200 Semlin Court, Richmond ("6200 Semlin") and 1064 Eyremount Drive, West Vancouver ("1064 Eyremount") and after paying all sale-related expenses, paying off the existing mortgages on the two properties, which was approximately \$1,165,000, and after taking \$1.2 million of the sale proceeds for himself, the remaining sale proceeds would be paid to the claimant. All claims would be dismissed against Chao Chen and the claimant and Chao Chen would bear their own costs.
- [103] The second offer was made on February 25, 2021, the day of a mediation between the parties. The offer was only available for acceptance on that date. The offer was that Chao Chen would transfer 6200 Semlin and 1064 Eyremount to the claimant. The claimant would agree to remove the certificates of pending litigation ("CPL") on 570 Southborough Drive and 11480 Granville Ave. to allow for their sale. Chao Chen would be permitted to use the proceeds from the sale of one of these properties to pay off the mortgages on the 6200 Semlin and 1064 Eyremount properties. The claimant would sign documents as suggested by Chao Chen's accountant regarding the capital gain on the property sold to acknowledge that the gain was used to pay off the mortgages of the two properties. There was no reference to the issue of costs.

Analysis

- [104] I do not find that any costs order should be made regarding the claimant's rejection of Chao Chen's offers to settle.
- [105] I accept the submissions of the claimant that the first offer was not open to acceptance by her since her claim was that the five properties were family assets. If any of the properties were family assets, that offer then required Mr. Chen's involvement in respect to whether the properties could be sold. There is no evidence that supports that Mr. Chen would have been prepared to agree to sell any of the properties. I note that both 6200 Semlin and 1064 Eyremount are properties that Mr. Chen claimed were held in trust by Chao Chen in the 2021 action that he commenced: Second Reasons at para. 31.
- [106] The second offer was made at mediation. The claimant's counsel explained that at mediation the claimant learnt of the divorce action that Meng Lu had commenced against Chao Chen and that Ms. Lu had placed a CPL against the properties, including 6200 Semlin and 1064 Eyremount, such that Chao Chen was not in a position to transfer title to the claimant. In my view, making such an offer when Chao Chen did not have the ability to transfer the properties to the claimant does not support that this offer ought reasonably to have been accepted.
- [107] As such, I do not find that either offer ought reasonably to have been accepted and no award of double costs should be made.

Issue 5: Which party Should Pay the Costs of the Expert Reports of Prof. deLisle and his Attendance at the First Trial?

- [108] Mr. Chen initially retained Prof. deLisle to prepare reports dated July 1, 2017 and February 21, 2018 and Chao Chen requested a rebuttal report dated May 6, 2019.
- [109] The costs for this expert were paid for by Chao Chen since Mr. Chen had failed to pay for the reports. Chao Chen's position is that either Mr. Chen or the claimant should be reimbursing Chao Chen for this disbursement.
- [110] Since Chao Chen has been awarded his costs of the Family Law Proceeding at 50% from the claimant, he will be recovering 50% of those disbursements from the claimant. In my view, Mr. Chen should be paying the other 50% since he was the individual that initially retained Prof. deLisle and then failed to pay that expert.
- [111] In reply submissions, the claimant referenced *Bakker v. Nahanee*, 2012 BCSC 825 which addresses when a Bullock order should be made.
- [112] A Bullock order requires a claimant to pay the costs of the successful respondent, but allows the claimant to recover those costs against the unsuccessful respondent: *Century 21 Coastal Realty Ltd. v. 0863846 B.C. Ltd.*, 2019 BCSC 5 at para. 22. Rule 16-1(17) allows for such an order to be made in a family law proceeding.

[113] It appeared to me that claimant's counsel was seeking an order that if the claimant is found responsible for any of the expert fees incurred by Chao Chen then she should be able to claim that disbursement from Mr. Chen in the form of a Bullock order.

[114] However, a Bullock order requires "some conduct" on the part of the unsuccessful defendant to justify the award, such as acts which caused the successful defendant to be brought into the litigation: Bakker at paras. 44-45. In this case, the claimant chose to bring Chao Chen into this action. There was nothing that Mr. Chen did that would warrant having to reimburse the claimant for this expense. Mr. Chen did not assert that Chao Chen was the culprit in the case, nor was he the one to bring him into the litigation. I am not persuaded that a Bullock order would be just and fair in the circumstances. As such I see no basis for granting a Bullock order.

[115] Mr. Chen and the claimant are still permitted to challenge the entitlement to this disbursement in accordance with R. 16-1(4) of the Family Rules.

Issue 6: What Costs Should be Awarded in the CC Action?

[116] The CC action concerned a loan agreement between Chao Chen and Mr. Chen. Jie Chen took the position that there was never any loan and that any such agreement was a fabrication between Mr. Chen and Chao Chen. The parties agree that no costs should be awarded against or for Jie Chen

[117] Chao Chen was successful in obtaining a default judgment against Mr. Chen in respect of the loan agreement. Mr. Chen did not apply to set aside the default judgment. I declined to set aside the default judgment in the Second Trial. The parties agree that 10% of the Second Trial was consumed by issues relating to the CC Action.

[118] Chao Chen was ultimately successful in obtaining a judgment against Mr. Chen for the loan that was made. Although Chao Chen was not successful in respect to the interest he claimed I do not see this as a basis to reduce his costs.

[119] Chao Chen is entitled to costs of the CC Action against Mr. Chen on tariff B with the adjustment that only 10% of the Second Trial related to the CC Action.

Issue 7: In What Priority Should the Costs Claims be Paid out of the Monies Held in Trust by Chao Chen's Counsel?

[120] To ensure there is no confusion, I have already ordered that the claimant is entitled to the payment of her costs awarded in the Family Law Proceeding out of Mr. Chen's share of the net sale proceeds of 6650 Wiltshire. After that payment has been made, Chao Chen is entitled to have his judgment and his costs award in the CC Action paid out of the remaining net proceeds.

[121] Chao Chen seeks an order that no monies be paid out to the claimant until the amount of costs she owes Chao Chen is assessed. I am not prepared to delay the claimant in getting her costs paid by Mr. Chen. Ultimately, she will have to pay Chao Chen's costs. I will leave it for the claimant to decide whether she will use the money from the net proceeds to do this.

Conclusion

[122] The following orders are made:

1. Ms. Cao is entitled to costs of the Family Law Proceeding from Mr. Chen on the following basis:
 - a) The costs of the various items for a case of more than ordinary difficulty;
 - b) The costs of the proceeding pursuant to appendix B of the Family Rules except in respect to the Second Trial;
 - c) The costs of the Second Trial, for preparation and attendance at trial, to be assessed as special costs but restricted to 35% of special costs;
 - d) The amount of the special costs to be assessed by the registrar; and
 - e) Ms. Cao cannot recover for any disbursement related solely to the Trust Claim but is entitled to claim for all other reasonable and necessary disbursements. If the parties cannot agree on this issue, they can return before me on an application to determine this issue.
2. Chao Chen is entitled to 50% of the costs of the Family Law Proceeding from Ms. Cao as a case of more than ordinary difficulty.
3. Where there has been a costs order made in a previous application that costs order continues to apply.
4. The reasonable expert fees of Prof. deLisle incurred by Chao Chen will be paid 50% by Ms. Cao as part of her costs owing for the Family Law Proceeding and 50% by Mr. Chen.
5. There is no costs award made against or for Jie Chen in the CC Action.
6. Chao Chen is awarded costs from Mr. Chen in the CC Action on Scale B.
7. The time spent on the CC Action during the Second Trial was 10%.
8. The total net proceeds from the sale of 6650 Wiltshire, with accrued interest ("Net Proceeds"), shall be split equally between Mr. Chen and Jie Chen.
9. Mr. Chen's share of the Net Proceeds will be first used to pay for Ms. Cao's costs award in the Family Law Proceeding and the remainder paid to Chao Chen towards the CC Action judgment and costs award. The payment of Ms. Cao's costs owed by Mr. Chen will be paid out of the Net Proceeds in trust to Mr. Forrester's trust account.
10. Ms. Cao's application for a fine of \$5,000 payable by Mr. Chen is dismissed.

"The Honourable Justice C. Forth"

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