

CANADA / JUDGMENT

Concord Pacific Acquisitions Inc. v. Oei

2021 BCSC 129

COURT

Supreme Court of British Columbia

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2021 BCSC 129 Concord Pacific Acquisitions Inc. v. Oei

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Concord Pacific Acquisitions Inc. v. Oei,

2021 BCSC 129

Date: 20210129

Docket: S158989

Registry: Vancouver

Between:

Concord Pacific Acquisitions Inc.

Plaintiff

And

Hong Leong Oei, Hong Kong Expo Holdings Ltd. and Canadian Metropolitan Properties Corporation

Defendants

Before: The Honourable Mr. Justice Voith

Reasons for Judgment

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Place and Date of Trial/Hearing:

Vancouver, B.C.

October 1 and 2, 2020

Place and Date of Judgment:

Vancouver, B.C.

January 29, 2021

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- [1] The defendants seek special costs of this proceeding, including this application, from the plaintiff Concord Pacific Acquisitions Inc. ("Concord"). This application follows the trial of a commercial action that I had case managed, and for which I was the trial judge. My reasons for judgement are indexed at 2019 BCSC 1190 ("Reasons"). I have been advised that the judgment has been appealed. The only basis for the present application is that Concord, through its principal witness Mr. Ju, fabricated evidence to advance its claim and gave false testimony in order to mislead the court.
1. Background
- [2] In the Reasons, I provided the following brief overview of Concord's claim and of the issues that arose from that claim:
- [1] On May 14, 2015, the Plaintiff, Concord Pacific Acquisitions Inc. ("Concord") and the Defendants, Mr. Hong Leong Oei and Hong Kong Expo Holdings Ltd. ("H.K. Expo"), signed a two-page document described as the Heads of Agreement (the "Heads"). The Heads addressed the purchase by Concord, or an affiliate, of a 50% interest of H.K. Expo. H.K. Expo indirectly owned a significant piece of waterfront property in downtown Vancouver. The Heads further addressed the intended joint development of those lands by the parties.
- [2] The parties, in the weeks and months that followed, sought to negotiate various agreements that would reflect these intended arrangements and that were necessary to give effect to them. They were, for various reasons, unsuccessful in their efforts. It is their respective agreements, positions and conduct in the period from shortly before May 14, 2015 to early October 2015 that underlie this action. On October 4, 2015, Concord was served with a claim by the Defendants, for breach of contract, in the High Court of Singapore.
- [3] Concord commenced this action on October 30, 2015. The action raises numerous issues. The primary issues are:
- i) Did the parties create an enforceable agreement on May 14, 2015?
- ii) In the alternative, did the parties create an enforceable agreement to negotiate?
- iii) Did the Defendants, in the circumstances of this case, owe Concord a duty to either negotiate or to perform in good faith? One of those circumstances is that Concord was not itself forthright or honest in its dealings with the Defendants.
- iv) If the Defendants did owe Concord a duty to perform in good faith, did they breach that duty?
- [3] I described the property that was the subject matter of Concord's action and its ownership:

- [7] The land or property in issue, described by the parties as the "Plaza Lands", is a large section of waterfront property in downtown Vancouver set on the eastern part of False Creek. The Plaza Lands sit adjacent to Concord Pacific Place, Concord's flagship master-planned community.
- [10] At all material times, Mr. Oei owned both shares of H.K. Expo. H.K. Expo is incorporated in Hong Kong and it owned 100% of the shares of Canada Metropolitan Properties Corp. ("CMPC") as its only asset. CMPC, in turn, held title to the Plaza Lands as its only major asset. As such, H.K. Expo indirectly owned or controlled the Plaza Lands.
- [4] I further described the scope of the Heads, the size of the intended project, and the financial significance of various issues.
- [5] I have continued to use the same defined terms in these reasons for judgment as I did in the preceding paragraphs of the Reasons.
- [6] I identified Concord and its witnesses and said:
- i. "The Plaintiff is part of the Concord Pacific Group--one of the largest residential developers in Canada": at para. 11.
 - ii. "Concord is led by Mr. Hui, its CEO and President": at para. 12.
 - iii. "Mr. Ju is a vice president of Concord": at para. 13.
 - iv. "Concord chose not to disclose any of the communications that it had with its accounting or legal advisors relating to this transaction. Instead it claimed privilege over those materials. It was entitled to make this decision. It also chose not to call any other witness from within Concord who may have been involved in this transaction. The consequence of these decisions is that Concord's direct evidence is based on, and relies on, the evidence of Mr. Hui and Mr. Ju": at para. 14.
- [7] I observed that Mr. Hui oversaw several large businesses and that he delegated most decisions to the employees of Concord. He dealt primarily with questions of strategy and key relationships, and he had estimated that only approximately 5% of his time was occupied with the Plaza Lands transaction: at para. 23. Further, I observed that it was principally Mr. Ju who ran and negotiated the transaction for Concord. He was the day-to-day face of Concord: at para. 108.
- [8] I also identified the defendants and their witnesses. Mr. Oei is a successful businessman who is in his 70's and who resides in Singapore. Mr. Chu is Mr. Oei's brother-in-law. Ms. Li is an alternate director of H.K. Expo. Mr. Henshall is a Vancouver lawyer who assisted the defendants with reviewing and drafting various agreements that were exchanged between the parties. Mr. Axworthy is a certified accountant who specializes in tax matters, and who provided advice and services to CMPC. See Reasons at paras. 15-19.

[9] I ultimately dismissed Concord's claim in its entirety: at para. 517. In the process I made a number of adverse findings in relation to the credibility of Mr. Ju and Mr. Hui. The defendants, on this application, rely on those findings only insofar as they pertain to Mr. Ju. My findings in relation to Mr. Hui's credibility have other legal significance that I will return to.

2. The Focus of the Present Application

[10] I have earlier said that the defendants seek special costs on account of the fact that Concord, through Mr. Ju, fabricated its claim and gave false evidence in an effort to mislead the court. That assertion is further narrowed in the defendants' Amended Notice of Application, where they allege that "the plaintiff--through its pleadings and through the evidence given by [Mr. Ju], both during and in advance of trial--fabricated a false narrative in order to fill in important gaps in the parties' existing negotiations". Elsewhere in that Notice of Application, the defendants argue that "Concord was driven to fabricate and pursue a false narrative in order to fill crucial gaps in the Heads of Agreement and the parties' negotiations".

[11] This particular assertion is important because Concord argues that the defendants are limited, on this application, to these particular forms of alleged wrongdoing and that they are not able to rely on any other theory or form of wrongdoing that might warrant an award of special costs. The defendants, in turn, do not resile from the narrow focus of their application.

3. Relevant Context

A. Concord's Pleadings

[12] Concord filed five different pleadings and it went to trial on the basis of its Fourth Amended Notice of Civil Claim (the "4th ANOCC"). Several aspects of these various pleadings are noteworthy. First, each pleading, on its face, relied on the Heads and on various additional oral agreements, implied terms or inferred terms.

[13] Thus, Concord's initial Notice of Civil Claim (filed October 30, 2015) alleged that the parties had negotiated an agreement "[b]etween May and August 2015", which was defined as the "Agreement": at para. 9 of that initial pleading. Concord's claim was based entirely on the "Agreement." The pleading at para. 16 also alleged that Mr. Oei reneged on the agreement the parties had made in relation to a tax issue that I will return to and that was defined as the "Deferred Tax Issue" in the Reasons.

[14] Concord's Amended Notice of Civil Claim (filed January 21, 2016) again alleged that "[b]etween May and August 2015" the parties "negotiated and concluded an agreement" that was defined as the "Agreement": at para. 26 of that pleading. The pleading expressly alleged that "[t]he Agreement was made partly in writing and partly orally": at para. 33. Still further, the pleading alleged "terms were agreed to in the various discussions that took place between May 2015 through August 2015": at para. 35. The pleading detailed the literally

dozens of "material terms of the Agreement" that were alleged to have been agreed to. Importantly, the "Agreement" was said to be captured, at least in part, in two draft agreements dated August 17, 2015.

- [15] Concord's Second Amended Notice of Civil Claim (filed September 27, 2016) alleged that the parties entered into a contract that "was made partly in writing and partly orally." That contract was defined as the "14 May Contract": at para. 26 of that pleading. The pleading also alleged, in the alternative, that between May 14 and August 19, 2015, the parties had negotiated all but one of the unresolved terms of a shareholder agreement and a share purchase agreement. That one unresolved term was in relation to the Deferred Tax Issue. This agreement was defined as the "19 August Contract": at para. 34. The extensive oral and written terms of the "19 August Contract" are detailed over five pages of the pleading: at paras. 37-40. Finally, the pleading also alleged that on October 3, 2015, Mr. Oei accepted a compromise that gave rise to a variation of the 19 August Contract. This was defined as the "3 October Contract": at para. 36.
- [16] Concord's Third Amended Notice of Civil Claim (filed October 26, 2016) again relied on a "14 May Contract" that "was made partly in writing and partly orally": at para. 26 of that pleading. It also relied on a "19 August Contract" that "was made partly in writing and partly orally": at paras. 34, 37-40. And it relied on a "3 October Contract": at paras. 36 and 41.
- [17] The 4th ANOCC (filed May 8, 2018) is the pleading that was in place at the time of the trial. The pleading relied on a "14 May Contract" that "was made partly in writing and partly orally": at para. 26 of that pleading. The pleading also relied, in the alternative, on a "14 May Agreement". The "14 May Agreement" was based on either "[e]xpress or implied terms" or on "terms referred to in, or which can be inferred from, the [H]eads": at paras. 30-32. The pleading alleged, in the further alternative, that "[b]etween 14 May and 19 August, 2015, the parties negotiated and settled the unresolved terms of the shareholder agreement and of a share purchase agreement." This was subject to the Deferred Tax Issue. This agreement was again defined as the "19 August Contract" and it was alleged to been made "partly in writing and partly orally": at paras. 38, 41-45. Finally, the 4th ANOCC relied on the "3 October Contract."
- [18] Several aspects of these various pleadings are noteworthy for the purposes of the present application:
- i. None of these pleadings expressly alleges that the Heads, without more, constituted an agreement between the parties. The closest such allegation, found for the first time in the 4th ANOCC, pertains to the "14 May Agreement," which still relies on additional implied terms or terms that can be inferred from the Heads. Still further, Concord alleged that Mr. Oei "breached" the "14 May Agreement" by, inter alia, taking the positions that he did in relation to the Deferred Tax Issue and what I defined in the Reasons as the "Fees Issue": at para. 34 of the 4th ANOCC. The pleading is not clear on how Mr. Oei could have breached the "14 May Agreement" unless the Deferred Tax Issue and the Fees Issue had somehow

otherwise been agreed to and formed part of the agreement of the parties.

ii. Each of the "Agreement," the "14 May Agreement," the "14 May Contract," the "19 August Contract," and the "3 October Contract" expressly relied on various additional oral or implied terms.

iii. Each pleading, from the outset, relied at some point on discussions or negotiations that occurred between May and August 2015.

iv. Each pleading, from the outset, alleged that the parties had agreed that the defendants would bear the tax consequences of the gain in the increased value of the Plaza Lands--this being the Deferred Tax Issue.

v. Each pleading, from the outset, alleged that the parties had agreed on the development, construction, marketing, and leasing fees that Concord would be paid for its services in relation to these activities--this being the Fees Issue.

vi. Each pleading after the Amended Notice of Civil Claim contained dozens of "material terms" that were alleged to be agreed upon and that formed the basis of what was originally the "Agreement" and later the "19 August Contract."

vii. The 4th ANOCC consisted of 61 paragraphs. This did not include the dozens of subparagraphs and sub-subparagraphs in the pleading: Reasons at para. 47. I raise this because the Heads was a two-page document while a significant part of the 4th ANOCC, as was the case with earlier pleadings, alleged numerous additional detailed oral and/or implied terms of the agreement made by the parties.

[19] It is also noteworthy that Concord delivered various particulars that were relevant to the "19 August Contract" and to other issues. It delivered a set of particulars on April 20, 2018: Reasons at paras. 128, 177, 219, 225, 257, 261. It also did so on September 2, 2016 and again on September 7, 2016: Reasons at paras. 93-95, 99, 167. Both of these latter sets of particulars were expressly based on the alleged discussions and alleged agreements of Mr. Ju and Mr. Chu.

[20] In the Trial Brief that Concord filed on August 24, 2018, it continued to rely on the existence, inter alia, of the 19 August Contract and the 3 October Contract. On October 4, 2018, five days before the commencement of trial, Concord gave notice of its intention to abandon the 19 August Contract and the 3 October Contract.

B. Several Other Matters of Context

[21] A few further matters of context are relevant to this application. The first such matter is chronological. The Heads was signed in Hong Kong on May 14, 2015. Mr. Chu and Mr. Ju had flown together, from Vancouver to Hong Kong, a few days earlier. They discussed various relevant matters while on the plane and when they landed. They joined Messrs. Hui and Oei and Ms. Li in Hong Kong. These individuals met on May 14. There was an initial private

meeting between Messrs. Hui and Oei that was then followed by a group meeting. It was during this larger group meeting that several drafts of the Heads were prepared and the Heads was ultimately signed. At trial, what was discussed in the days prior to May 14, during the different parts of the meeting on May 14, and in the hours and days thereafter, was addressed in significant detail.

- [22] Second, I have earlier identified the key issues that were raised by the parties at trial (at para. 2 of these reasons). One such central issue was whether the parties had created an enforceable contract. One aspect of that analysis necessarily addressed what the terms of that purported agreement were, and it included the question of whether the parties had agreed on the "essential" terms of their contract. These issues were also important, however, because Concord alleged that the defendants had, in the months that followed May 14, breached various oral or implied or inferred terms of their agreement. It was therefore important for Concord, for various reasons, to add content to or "put meat on the bones" of the Heads. The defendants describe this as "filling in the gaps" in the parties' negotiations.
- [23] Third, several related applications or actions were relevant. In the Reasons I said:
- [43] Furthermore, in December 2016, the Defendants sought to have this matter determined at a summary trial (the "Summary Trial Application") pursuant to R. 9-7(15). I dismissed that application in Reasons for Judgment indexed at 2017 BCSC 236. Both parties, in aid of the Summary Trial Application, filed various affidavits and undertook various cross-examinations on those affidavits. In addition, and importantly, Concord at that time relied, on an alternative basis, on a legal theory that had the parties entering into a contract on either August 19, 2015 (the "August 19 Contract") or on October 3, 2015 (the "October 3 Contract").
- [45] Finally, Mr. Oei, H.K. Expo and CMPC have commenced a separate abuse of process action in this Court, under Action Number S161950, against Concord and Mr. Hui, alleging that the instant action was commenced for the sole purpose of preventing the Defendants from selling or developing the Plaza Lands (the "Abuse of Process Claim"). Concord and Mr. Hui filed a Response and an Amended Response, respectively, to that claim.
- [24] Concord takes two positions in relation to the defendants' present application. First, it argues that, in the circumstances of this case, each party should bear their own costs. Second, it argues that, in any event and on account of various considerations, the defendants are not entitled to either special costs or ordinary costs.
4. Should Each Party Bear Their Own Costs?
- [25] Concord argues that this was a case of "divided success." This is on account of two reasons. First, Concord argues that it was successful in recovering the \$10 million that it had paid as a deposit under the Heads. Second, it argues that "the Court's alternative conclusion [was] that the defendants breached obligations of good faith".

- [26] I do not, respectfully, consider that these are serious submissions. It is necessary to have some sense of what this case was about. In the Reasons I said:
- [34] The Heads contemplated or provided for, depending on the position of the parties, the indirect sale of the Plaza Lands and the subsequent development of the Plaza Lands into a high-density mixed-use development.
- [35] In earlier applications brought before me, this development was described as a "multiyear billion-dollar development". The Plaza Lands were slightly larger than 13 acres. Various pro forma statements that were generated by the parties after May 14 contemplated a development of nearly 2,000,000 ft.² that consisted of approximately 1,400,000 ft.² of residential development, 200,000 ft.² of social housing, 350,000 ft.² of commercial development and approximately 145,000 ft.² of projects that would be for the benefit of the community such as daycare and activity centres. These early pro forma statements anticipated that the hard and soft costs of the development would approach \$1.4 billion.
- [36] Still further, the dollar value of many of the issues that the parties alleged they either did or did not agree on have significant value. Thus, a central issue at trial was what agreement the parties came to on how the gain in the value of the Plaza Lands, from the \$40M Mr. Oei originally paid to the \$500M that Concord was prepared to pay for a half interest in H.K. Expo, would be dealt with from a tax perspective. That issue, depending on what tax structuring might be achieved, had the potential of giving rise to a tax liability of more than \$100M.
- [37] Similarly, the Heads contemplated that Concord would provide the development, construction and marketing services for the project. Concord says that it came to an agreement with the Defendants, prior to and on May 14, in relation to the fees for these services. Depending on how those fees were calculated, they might, again, generate more than \$120M in revenue for Concord.
- [38] The issue of community amenity charges (CACs), which the parties accept they reached agreement on, were expected to give rise to an expense of between \$60-\$80M.
- [81] I am mindful that assessments of credibility are based on a consideration of the evidence as a whole rather than on weighing pieces of evidence individually: *McCabe v. British Columbia (Superintendent of Motor Vehicles)*, 2019 BCCA 77 at paras. 5-6. Having said this, the evidence at trial occupied more than 40 days. The parties relied on discovery and deposition evidence that covered a further 25 days of evidence. They relied on hundreds of text and WeChat communications, on a significant volume of material from other proceedings and on a relatively significant number of documents.
- [27] As it relates to the \$10 million deposit that was paid under the Heads, I said:

- [58] After the Heads was signed the parties went their ways though there was some further interaction on May 14, between Messrs. Hui, Chu and Ju that I will return to. Within three business days of the Heads being signed, Concord paid Mr. Oei the \$10M contemplated in Clause 3(a) of the Heads.
- [402] The Defendants accept, and their Amended Response recognizes, that if this action is dismissed the \$10M they received from Concord would have to be returned. This is subject to the Abuse of Process Claim that remains outstanding.
- [28] It is also relevant that Concord, in the 4th ANOCC, sought specific performance of the agreement it said it had made with the defendants. It abandoned this claim in its closing submissions: Reasons at para. 49.
- [29] Concord, in its written submissions, now argues that the "defendants held onto the \$10 million for over five years" and that it was "forced to trial to seek its recovery." This is not so. So long as Concord sought specific performance of the agreement it alleged it had made with the defendants, it was not open to it to seek the return of the \$10 million deposit. In Robert J. Sharpe, *Injunctions and Specific Performance*, loose-leaf (consulted on January 20, 2021) (Toronto: Thomson Reuters, 2012), the author notes at para. 10.730:

It has been held that if the promisee asks the promisor for restitution of benefits conferred, usually the return of his deposit, an election for that relief has been made, the contractual obligation of the promisor is at an end and specific performance is no longer available to the promisee.

- [30] This principle is supported in the Sharpe text by a number of authorities, including decisions of this court. In each case, a demand by a purchaser for the return of a deposit precluded the purchaser from later bringing a claim for specific performance.
- [31] This same principle is also recognized in the 4th ANOCC where Concord's claim for specific performance is advanced as an alternative form of relief to the return of the \$10 million deposit: Reasons at paras. 52-53.
- [32] Furthermore, the defendants, in their Second Amended Response (dated January 9, 2019) had pleaded:
4. In the event that the Plaintiff's claim for specific performance and damages are dismissed, these Defendants do not oppose the Plaintiff's claim for the return of the \$10M deposit but submit that execution be stayed, with respect to any order for the return of the \$10M deposit, pending determination of [the Abuse of Process Claim].
- [33] Thus, the defendants' Second Amended Response accepted that if Concord's contract claim was unsuccessful, the defendants would, subject to their seeking a stay in the Abuse of Process Claim, return the \$10 million deposit.

- [34] This in fact is what happened. Following the trial, the parties came back before me to deal with the \$10 million deposit. In separate reasons, indexed at 2020 BCSC 832, I said:
- [18] Though I addressed the \$10 million deposit in the Trial Reasons, I did not expressly order the return of those monies to Concord. That was an omission on my part.
- [19] Concord then brought a separate application, heard on the same day as the Defendants' present stay application, to have my order made July 19, 2019 (the day on which the Trial Reasons were issued) corrected or clarified to include the following term: "the plaintiff's claim for restitution is allowed and the defendant Oei shall return to the plaintiff the sum of \$10 million, with interest at commercial rates".
- [20] That application was not opposed by the Defendants and I made the Order in the terms requested. As a practical matter, however, counsel for Concord and for the Defendants had already agreed to parts of the Order for a stay that the Defendant sought and that I described in the first paragraph of this judgement. To be specific, counsel for the parties had already agreed to have the \$10 million paid into court pending Concord's appeal of the Main Action and further potential appeals therefrom, and pending the Defendants' application for special costs and, if successful, the determination of the amount and payment of those costs.
- [35] Accordingly, what Concord describes as one component of its "success" was relief that it could not obtain until it had abandoned its claim for specific performance at the conclusion of the trial and was, in any event, not opposed on the merits by the defendants.
- [36] The second component of its "success" is based on certain findings that I made and that were premised on my being mistaken in relation to whether the parties had formed an agreement. Thus, I said:
- [407] I have determined that none of the Heads, the 14 May Contract or the 14 May Agreement created a binding contract and that none of them created any enforceable obligation to negotiate in good faith. If I am mistaken in any of these conclusions, and if a contract did exist between the parties, the obligation of honest performance, developed in Bhasin, is relevant--at least in concept. The balance of this judgment addresses Concord's various additional allegations of bad faith or dishonest performance by the Defendants.
- [515] Accordingly, if the events of May 14 gave rise to the 14 May Agreement and based on the findings of fact that I have made, I consider that the Defendants breached their obligation of honest performance in a single respect. They were not honest in relation to the origins and status of the Loan Agreement when they met with Mr. Hui and Mr. Ju on July 15.
- [516] I also consider that if the parties formed an agreement the Defendants, for a period following July 15, breached an implied term to negotiate the details of their agreement with reasonable dispatch.

- [37] These latter two conclusions, in isolation, necessarily ignore the forms of dishonest performance on the part of Concord that I addressed in the Reasons. More importantly for present purposes, I do not consider that these findings, made in the alternative and on the basis that my central conclusions were mistaken, reflect any "success" on the part of Concord. They are, as things presently stand and subject to Concord's intended appeal, meaningless. Concord's "success" is entirely pyrrhic.
- [38] In *The Owners, Strata Plan LMS 3259 v. Sze Hang Holdings Inc.*, 2017 BCCA 346, Justice Goepel said:
- [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.
- [39] This was not a case of divided success. Instead, the defendants were successful.

5. The Defendants' Application for Special Costs

A. The Relevant Legal Framework

- [40] The general legal principles that pertain to an award of special costs are well-established and clearly understood. The parties agree with each of the following propositions.
- [41] This court has the jurisdiction to make an award of special costs pursuant to its inherent jurisdiction and Rule 14-1(1) of the Supreme Court Civil Rules: *Westsea Construction Ltd. v. 0759533 B.C. Ltd.*, 2013 BCSC 1352 at para. 25.
- [42] Special costs are an extraordinary measure and an award of special costs should be made both cautiously and sparingly: *Grewal v. Sandhu*, 2012 BCCA 26 at paras. 106-07.
- [43] In *Mayer v. Osbourne Contracting Ltd.*, 2011 BCSC 914, Justice Walker described the function and standard for special costs as follows:

- [8] Special costs are awarded where a litigant engaged in reprehensible conduct. The purpose of an award of special costs is to chastise a litigant. Special costs are punitive in nature and encompass an element of deterrence. A wide meaning is given to the word "reprehensible". The term represents a general and all encompassing expression of the applicable standard for an award of special costs. "Reprehensible" conduct includes conduct that is scandalous, outrageous, or constitutes misbehaviour, as well as milder forms of misconduct that in a court's view deserves reproof or rebuke. In determining whether the conduct of a party is reprehensible, courts may consider whether the conduct complained of is a type from which it should seek to dissociate itself
- [44] In *Westsea*, Justice Gropper identified various "thematic groups" where courts have considered that an award of special costs was appropriate. One such thematic group is "Misleading the Court": at paras. 65-72. Justice Gropper noted that "[f]raudulent claims and untruthful testimony are a particularly reprehensible form of conduct deserving of rebuke": at para. 65.

B. The Issues that Are Raised by Concord

- [45] Concord raises numerous issues in opposition to an award of special costs.
- i. Mr. Ju's evidence was not intended to mislead and was not otherwise put forth for an improper purpose
- [46] There is a significant distinction between, on the one hand, evidence that is given by a witness and is merely rejected by the court and, on the other hand, evidence that is intended or designed to mislead or is otherwise put forth for an improper purpose. Only the latter form of conduct warrants the court's rebuke: *Westsea* at paras. 70-72; *Mayer* at paras. 12-15; *Marchen v. Dams Ford Lincoln Sales Ltd.*, 2010 BCCA 29 at para. 73.
- [47] In *Brown v. Lowe*, 2002 BCCA 7 at para. 149, Justice Southin said: "To give false evidence relating to the matters in question at any stage of the proceedings is a grave matter. By 'false', I do not mean 'erroneous'; I mean knowingly untrue."
- [48] In *Marchen*, the Court of Appeal dismissed an appeal from an award of special costs made against the defendant, noting that "very shortly after this action was commenced, the appellant began to lay the groundwork for a defence that was based on facts it knew to be untrue . It persisted with this defence throughout the trial and it was rejected by the trial judge": at para. 70. The court accepted the trial judge's conclusion in that case that the defendant's "conduct was planned and deliberate and intended to mislead the court": at para. 70.
- [49] There should be no confusion arising from the findings I made at trial. This is not a case of my simply failing to accept Mr. Ju's evidence. I considered his evidence to be egregiously dishonest and I am satisfied that its purpose was to mislead the court. I also consider that this dishonesty took multiple forms. I propose to address some of the specific findings that I made in relation to Mr. Ju's credibility when I address some of the other issues that are

raised by Concord. For present purposes, however, I note that aspects of Concord's various pleadings were based on material facts that were known by Mr. Ju to be untrue. This was so from at least January 21, 2016--the date the Amended Notice of Civil Claim was filed. Concord's particulars from September 2 and September 9, 2016, which were dishonest, were prepared on the basis of his instructions. So too were aspects of the April 20, 2018 particulars. Mr. Ju swore false affidavits, he gave false evidence at his examination for discovery, and he gave false evidence at trial in relation to numerous issues.

- [50] Concord argues that I did not, in the Reasons, make any findings that the evidence of Concord or its representatives was advanced to mislead the Court. It further argues that there is no basis in the Reasons from which an inference of an intention to mislead can be drawn.
- [51] These assertions are not entirely accurate and they are further answered by the issue of relevance and the principle of judicial restraint. The notion of judicial restraint has different components. One such component pertains to what a court says; another pertains to how things are expressed. There was no principled reason to make findings at trial about why Mr. Ju gave false evidence. That specific finding was not material, or not relevant, to the issues that were raised at trial. It is material on this application.
- [52] Similarly, it is common for courts, when addressing a witness's credibility, to use language that is restrained or temperate. This is appropriate. A witness's reputation, professional and otherwise, can be harmed by an adverse finding of credibility. Accordingly, what is necessary is that the court distinguish between issues of reliability and credibility and that it explain the basis for any adverse findings on credibility. The Reasons were directed to these two objects.
- [53] Having said this, I consider that the tenor and language used in the Reasons to describe Mr. Ju's false evidence is stern. I expressed a concern with "diluting the concerns that I [had] with Mr. Ju's evidence" and I described those concerns as "pervasive": at para. 85. I described Mr. Ju's evidence as "dishonest" and as advancing a "fiction". I did so repeatedly. I expressed concern with the honesty of Concord's evidence early in the Reasons, and I did so at the end of the Reasons: at paras. 85, 100, 508.
- [54] In addressing Mr. Ju's evidence, I started by saying:
- [85] There are pervasive difficulties with the evidence and conduct of Mr. Ju. His evidence, both during the course of these proceedings and at trial, was, in numerous respects, dishonest. Furthermore, his interactions with the Defendants were, in multiple respects, dishonest. I intend to address some of the details of both these forms of dishonesty in the specific context where they arise. Doing so, however, has the prospect of diluting the concerns that I have with Mr. Ju's evidence. Accordingly, I have started by addressing some of the broader difficulties that arise with that evidence.

- [86] Mr. Ju was cross-examined for approximately three days. In that time he was taken to his earlier sworn evidence, in the form of either his evidence at his examination for discovery or earlier affidavit evidence, or to Concord's particulars that were based on information from Mr. Ju, dozens of times. This was done primarily to impugn the evidence he had given in his direct testimony.
- [87] On dozens of occasions during the course of his evidence and, in particular, his cross-examination, Mr. Ju testified that he had no memory of any of the circumstances of an event, or meeting, or conversation. He did not recall, even in general terms, what had been said. He did not recall where the conversations occurred and whether they occurred in person or by phone. He did not recall anything about the context or circumstances of these conversations. Notwithstanding this lack of memory, he often purported, however, to recall some agreement or concession that he said Mr. Chu had made with him or to him.
- [88] Conversely, at other times, Mr. Ju purported to have a memory of some statement or event that was not shared by any other witness. Or, at other times, he purported to have a specific memory of what was said to him, generally by Mr. Chu, when no one else was present. The specific recollections almost always sought to advance one of Concord's various positions.
- [55] I would also observe that para. 88 of the Reasons does provide a foundation from which inferences can be drawn about why Mr. Ju gave false evidence. See also paras. 221, 264.
- [56] Furthermore, a review of the Reasons reveals the number and diverse nature of the various adverse findings of credibility that I made in relation to Mr. Ju and his evidence. Those findings speak to a consistent pattern of dishonesty. The various topics in relation to which Mr. Ju was not honest, and the importance of those topics to the litigation before the court, speak to his intention to mislead the court. The nature of many of the specific issues he was not honest about, which often sought to advance and establish terms in the alleged agreement of the parties, speaks to an intention to "fill in the gaps in the parties' negotiations."
- ii. Mr. Ju's evidence did not serve to "fill in gaps" in the parties' negotiations
- [57] Concord argues, on various bases, that Mr. Ju's evidence was not necessary, and thus could not have been intended to address or fill in deficiencies in the Heads, in the parties' agreement, or in the parties' negotiations. It argues that Mr. Oei commenced an action based on the Heads in Singapore. It also argues that I found, on an objective basis, that "both parties believed, on May 14, that they had entered into a binding contract": Reasons at para. 329.
- [58] These realities and findings militate, Concord argues, against any finding that Concord, through Mr. Ju, was aware of the difficulties with enforcing the Heads or of any need to fabricate false evidence to bolster or "fill in the gaps" in Concord's claim.

- [59] These submissions confuse the relevant legal inquiry. The fact that Mr. Oei, subjectively and "as a businessman", believed that the Heads was binding or gave rise to a contract did not make that so: Reasons at paras. 316, 402. So, too, my finding that the parties, on May 14, and on an "objective basis", believed that they had entered into a binding contract did not make it so: Reasons at para. 331. The trial of this action was overwhelmingly focused on whether the parties had, on or around May 14, or thereafter, agreed on various terms that supplemented the Heads or that gave rise to an enforceable contract. I have also said that a significant part of the trial addressed whether the parties had agreed on various oral or implied terms, not reflected in the Heads, that the defendants were alleged to have breached. These are the very issues that were raised by Concord's earlier pleadings and by the 4th ANOCC.
- [60] Further considerations support these conclusions. Concord would like to place the date of the relevant inquiry at May 14. The relevant date, for the purposes of this application, is when Concord commenced its action in October 2015 and in the months and years that followed as its pleadings, particulars, and evidence evolved.
- [61] In October 2015, Concord did not rely, on a standalone basis, on the Heads. This remained true thereafter. My earlier review of Concord's various pleadings confirms this. So too does the fact that Concord's initial counsel formally advised the court, on at least two occasions, that the parties agreed that the Heads was not a binding agreement: Reasons at para. 403. Still further, Concord, in the Abuse of Process Claim, had taken the position in its pleadings that the Heads was not binding: Reasons at para. 403. See also the reasons for judgment arising from the defendants' unsuccessful summary trial application, indexed at 2017 BCSC 236 at para. 25 (the "Summary Trial Reasons").
- [62] Even at trial it was not apparent to me, or apparently to the defendants, that Concord was also advancing a claim based on the Heads alone without any further oral or other terms. Thus, when Concord sought in its final submissions to advance a position that the Heads "on its own" constituted a binding contract, the defendants objected: Reasons at paras. 42, 307-309.
- [63] Still further, at the hearing of this application, Concord argued that its opening statement at trial had foreshadowed that it would argue that the Heads, without more, created a binding contract. Respectfully, I have reviewed that opening statement and I do not understand Concord to have advanced that position. Instead, Concord's repeated position in that statement was that the parties had agreed to various terms giving rise to a contract on May 14. Those terms, however, included various other oral terms there were alleged to have been agreed upon on or before May 14. Thus, Concord, in its opening statement, described the legal issue the court would have to resolve as: "What binding legal obligations were assumed through [the] Heads and surrounding events?"

- [64] Finally, even if Concord had, indirectly or otherwise, taken the position that the Heads "on its own" constituted a contract, it clearly advanced various alternative legal theories. Those alternative theories required the court to make additional findings. Those findings were necessarily based on the evidence of the parties and the negotiations that took place between them.
- [65] Accordingly, I am satisfied that at all times Concord, and Mr. Ju, appreciated that the success of Concord's claim was contingent on it being able to establish the existence of a binding contract that would include at least some of the material terms that it advanced in its pleadings and that Mr. Ju sought to support in his evidence.

iii. Concord abandoned its reliance on the 19 August Contract and the 3 October Contract

- [66] I have said that Concord abandoned its reliance on the 19 August Contract and the 3 October Contract shortly before the trial commenced. Concord now argues that, although I found that Mr. Ju's evidence at trial in relation to the 19 August Contract and the 3 October Contract was not honest, it cannot be said that Concord relied on such evidence to "fill in gaps" in its claim. It also argues that my findings of dishonesty on the part of Mr. Ju were expressed most strongly in relation to the 19 August Contract and the 3 October Contract, and that my remaining findings of dishonesty on the part of Mr. Ju do not warrant an award of special costs.
- [67] There are several factual and principled difficulties with this position. First, on a principled basis, special costs are not available for dishonest pre-litigation conduct: *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177 at para. 134. No part of these reasons for judgment address questionable conduct on the part of Concord that took place prior to the commencement of litigation between the parties.
- [68] Special costs are available, however, in respect of various forms of reprehensible behaviour that arise during the course of litigation but prior to trial: see e.g. *American Creek Resources Ltd. v. Teuton Resources Corp.*, 2015 BCCA 170 at paras. 54-68.
- [69] In this case Concord, through Mr. Ju, relied on and advanced the 19 August Contract and the 3 October Contract for several years. It did so in its various pleadings. It relied on the 19 August Contract in its particulars dated September 2 and September 7, 2016: Reasons at paras. 93-95. Mr. Ju swore false affidavits in support of the existence of both the 19 August Contract and the 3 October Contract: Reasons at paras. 89-90. He gave false evidence at his examination for discovery. Concord relied on its pleadings (at the time the Third Amended Notice of Civil Claim) and more importantly on Mr. Ju's false affidavit at a summary trial application that occupied five days and that the defendants brought in December 2016: Reasons at paras. 43, 90-91. The Summary Trial Reasons address the 19 August Contract and the 3 October Contract at paras. 18, 19(d), 19(e) and 21.

- [70] Accordingly, the fact that Concord abandoned its reliance on this aspect of its claim on the eve of trial does not obviate the wrongfulness of its earlier behaviour or the wrongfulness of its earlier reliance on a "fiction" to address the deficiencies in its claim: Reasons at para. 100.
- [71] Furthermore, while it is true that I said Mr. Ju's evidence in relation to the 19 August Contract and the 3 October Contract was the "clearest example" of Mr. Ju giving evidence that was not forthright (Reasons at para. 89), the Reasons address his lack of candour on multiple occasions and in respect of multiple issues. Indeed, I opened my discussion of Mr. Ju's evidence by saying: "There are pervasive difficulties with the evidence and conduct of Mr. Ju. His evidence, both during the course of these proceedings and at trial, was, in numerous respects, dishonest": Reasons at para. 85.
- [72] Thereafter I addressed the various additional terms that Concord alleged it had agreed on with the defendants. I did this sequentially and, in each instance, I reviewed the evidence that had been provided by the parties in relation to the specific issue. In some instances Concord relied on the evidence of Mr. Ju alone. In other instances Mr. Ju sought to support evidence that Mr. Hui had given. I started my analysis of these various alleged contractual terms with the following statement:
- [112] Concord alleges that the 14 May Contract and the 14 May Agreement contain numerous terms that are not expressly contained in the Heads. Whether the parties agreed on such additional terms and, if so, what those terms were, is relevant to whether the Heads created an enforceable contract.
- [73] The foregoing statement recognizes the importance of the additional terms that Concord sought to rely on and is consistent with the defendants' central position on this application--that is, that Concord, through Mr. Ju, knowingly relied on false evidence to "fill in the gaps" that were necessary for it to make out its contract claim.
- a. The Fees Issue
- [74] The first body of evidence that I addressed in the Reasons related to the Fees Issue. Aspects of this evidence related to Mr. Ju's and Mr. Chu's flight from Vancouver to Hong Kong; aspects pertained to their arrival in Hong Kong but prior to the May 14 meeting; aspects pertained to what occurred at the May 14 meeting; and aspects pertained to what followed the May 14 meeting: Reasons at paras. 115-124.
- [75] Apart from what Concord alleged had been agreed to prior to or at the meeting on May 14, it is relevant that Concord, in the various draft agreements that it provided to the defendants thereafter, deviated from what it alleged it had first agreed to. These deviations, Mr. Ju testified, were based on subsequent agreements that he and Mr. Chu had come to: Reasons at para. 151. Concord thereafter sought to rely on some of these changes in support of its assertion that the parties had agreed on the Fees Issue.

[76] In dealing with the Fees Issue, I repeatedly rejected the evidence of Mr. Ju: Reasons at paras. 129-131, 151-159, 169-170, 173. It is patent from these various references that I considered Mr. Ju's evidence, at his examinations for discovery and at trial, to be dishonest. I also concluded that Mr. Ju unilaterally, rather than on the basis of any agreement with Mr. Chu, changed the amount of fees that the defendants were to pay for various services in the various draft agreements Concord prepared: at paras. 173-174.

b. The Deferred Tax Issue

[77] A further central issue at trial was whether the parties had come to agreement on the Deferred Tax Issue. Once again the evidence of the parties pertained to discussions that took place between Mr. Ju and Mr. Chu while en route to Hong Kong and prior to May 14, as well as when all the parties were present at the May 14 meeting. Once again I reviewed that evidence and once again I rejected the evidence of Concord broadly and the evidence of Mr. Ju specifically: Reasons at paras. 199-200, 207-208, 217-222. It is clear in a number of these paragraphs that I am addressing issues of honesty or probity on the part of Concord and Mr. Ju.

[78] A clear example of this is found in the following paragraphs:

[219] Nevertheless I wish to address the evidence that Concord relies on in support of its position that a term, that the Defendants would be responsible for the Deferred Taxes, can be implied into the Heads. I do so because this evidence reflects a further lack of candor on the part of Concord. This particular thesis finds support in the 4th ANOC and in the April 20 Particulars and, specifically, in the assertion that "any value increments or decrements between the value of the Lands and the value of the Expo shares were to Oei's account. This by necessity required Oei to assume responsibility for the Land Profit Tax".

[220] This thesis was developed, in the evidence of Mr. Hui and Mr. Ju, on the basis that the agreement of the parties contemplated "a clean balance sheet". I have earlier said that each of Mr. Hui, in the context of the private meeting, and Mr. Ju, in the context of the larger meeting, stated that there had been some discussion of "balance sheets" or "clean balance sheets".

[221] Concord's evidence of an agreement based on "fresh balance sheets" is one of several examples of Concord advancing a narrative in its direct evidence that was intended to support a legal thesis advanced in its pleadings, but that fell apart on cross-examination. Both Mr. Hui and Mr. Ju resiled, in their cross-examinations, from the suggestion that there was any explicit discussion of either "balance sheets" or "clean balance sheets" on May 14. Furthermore, each of Mr. Oei and Mr. Chu denied there was any discussion, on May 14, of the working capital or the balance sheets of either H.K. Expo or CMPC. Finally, there was no expert or other evidence that suggested that, as of May 14, the future contingent tax liability of CMPC would be considered a balance sheet item in a financial statement.

- [222] I do not accept that the parties ever discussed or agreed that the Heads would be governed on the basis of CMPC having a clean balance sheet. Nor is there any other foundation in the evidence for the implied term that Concord seeks to import into the Heads.
- c. The defendants agreed they would not negotiate with others
- [79] At trial, Concord argued the defendants had agreed they would not negotiate with any other developer in connection with the Plaza Lands. I addressed the respective positions of the parties: Reasons at paras. 229-232. I rejected the position of Concord and the evidence of Mr. Ju: at paras. 233-247. I determined that the evidence of Mr. Ju, stating that Mr. Oei had agreed he would only meet with other developers "socially," was dishonest: at paras. 231, 236, 240-247.
- d. Mr. Oei agreed to sign a shareholders agreement
- [80] Concord, through the evidence of Mr. Ju, asserted that Mr. Oei had repeatedly said he would sign any shareholders agreement that Concord wanted if Concord paid him the \$40M required under the Heads and he was not disadvantaged by the Deferred Tax Issue. This evidence was relevant to what terms the parties had initially agreed to. I observed that an aspect of this assertion was advanced in the particulars from September 2, 2016: Reasons at para. 263. I said:
- [264] The evidence of Mr. Hui and Mr. Ju, as well as the foregoing Particular, appears to have been advanced in recognition of the fact that the various draft shareholders agreements and tax structures that Concord prepared and delivered to the Defendants consistently deviated, in fundamental respects, from the Heads. This is a further instance where the evidence of Mr. Hui and Mr. Ju was strategic, in that their evidence sought to advance a thesis, and was not forthright.
- e. The \$40 million payment
- [81] The Heads required a payment of \$40 million within "sixty (60) business days after the execution" of the Heads. Concord did not make that payment for various reasons. In the Reasons, I said: "In addition, Concord's insistence on having a tax structure and a shareholders agreement in place before it made the \$40M payment is relevant to the issue of whether the Heads, in and of itself, constituted a contract": at para. 289. After addressing the evidence that pertained to this issue, I then concluded that aspects of Mr. Ju's evidence on this issue, both at his examination for discovery and at trial, were not forthright: at para. 304(c)-(e).

[82] The foregoing summary reveals a number of issues that Mr. Ju gave evidence about and that I consistently concluded that his evidence was not honest. I am satisfied that that dishonesty was pervasive, that its object was to support various legal theories or purported terms in notional contracts that had no basis, and that Mr. Ju's purpose in giving such false evidence was to mislead the court. Such conduct warrants the Court's rebuke and an award of special costs.

iv. Concord is not responsible for Mr. Ju's dishonesty

[83] Next, Concord argues that Mr. Ju's dishonesty does not support an award of special costs against Concord. Concord says that, absent some form of knowledge of or accedance to Mr. Ju's dishonesty by others within the corporate entity, it would be wrong to visit an award of special costs on Concord.

[84] Concord relies on *FFS HK Ltd. v. P.T. 25 (Ship)*, 2011 BCSC 1418 in support of this assertion. In that case, special costs were awarded against the corporate defendants for advancing an employee's evidence that the company knew to be unreliable, and using that evidence as "the centrepiece" of its defence: at para. 36. The action arose from a large oil spill from the plaintiff's ship. Justice Wedge found at trial that Mr. Randell, the ship's bargeman, concocted a version of events in a typewritten statement he had made some time after speaking with a Transport Canada Officer. He provided the statement to the defendants, and the defendants advanced that version of events as true throughout the proceeding. On the special costs application, Wedge J. said:

[29] The defendants clearly made the decision shortly after the spill to advance Mr. Randell's typewritten statement as the true version of events. No one from the ranks of management of the corporate defendants testified at trial. As a result, they gave no explanation as to why they accepted one version of events offered by Mr. Randell over the other, or, for that matter, why they accepted either version of events he offered. That is particularly troubling when it was obvious first, that Mr. Randell had been untruthful on at least one occasion, and second, that on the application of basic mathematics neither version of events was plausible. Further, in light of the obvious questions raised by the timing of the preparation of the statement, and the stark inconsistencies between it and the statement given to Transport Canada, it was incumbent on the defendants to call evidence from someone in its management ranks to testify as to when Mr. Randell provided the statement to them, and why they accepted it as true.

[36] This is not a case of an employee whose credibility was successfully challenged at trial. This is a case of defendants who adopted an employee's version of events they must have known to be manifestly unreliable, and advanced it as the centrepiece of their defence to the exclusion of any other version of events. They did so at great cost to the plaintiff.

- [85] I do not consider that the broad proposition Concord seeks to advance is supported by the relevant case law. Nor do I consider that FFS, which is in some respects different from of this case, supports Concord.
- [86] First, special costs are awarded against corporate entities, often with little or no discussion of whether the dishonest or reprehensible behaviour of its witnesses can be attributed to the entity itself. See e.g. *Equus v. Sage*, 2003 BCSC 1783; *Marchen v. Dams Ford Lincoln Sales Ltd.*, 2010 BCCA 29; *XY, Inc. v. International Newtech Development Incorporated*, 2012 BCSC 319, *aff'd* 2013 BCCA 352; *Binary Environments Ltd. v. Batyka*, 2014 BCSC 919; *American Creek Resources Ltd. v. Teuton Resources Corp.*, 2014 BCSC 2214, *aff'd* 2015 BCCA 170; *Imbamar S.A. v. Coutinho & Ferrostaal GmbH*, 2015 BCSC 2218; *Otal v. Azure Foods Inc.*, 2019 BCSC 1510.
- [87] The issue that Concord seeks to raise was, however, squarely addressed in *International Hi-Tech Industries Inc. v. FANUC Robotics Canada Ltd.*, 2007 BCSC 1724. In that case, Justice Ballance awarded special costs against both the corporate plaintiff ("IHI") as well as personally against its chief operating officer, Dr. Abi-Rached, who was not a named party. In awarding special costs against IHI for Dr. Abi-Rached's misconduct, Ballance J. said:
- [18] they are warranted on account of IHI alleging and pursuing its utterly baseless and fabricated allegations of fraudulent misrepresentation, conspiracy and similar acts of deceitful wrongdoing on the part of the defendants. I emphasize that this is not an instance of a plaintiff pursuing, with uncompromising zeal, a claim of little or dubious merit; this is a case where the allegations of fraudulent misrepresentation, conspiracy and the like, which encompassed accusations of deliberate falsification of documents, extortion and the creation of an illicit partnership, did not have a shred of real evidence. They were the product of a spree of dishonesty by IHI and the cunning of its representative and primary lay witness on liability, Abi-Rached.
- [22] One of IHI's arguments is that it was entitled to pursue its claim for fraudulent misrepresentation based on the evidence of Abi-Rached, its chief operating officer, which it says was not inconsistent with certain relevant documents. What IHI appears to be arguing is that the willingness of its high ranking officer to fabricate self-serving testimony to support its bogus claims should somehow shield the company from liability for special costs. That is an untenable proposition.
- [88] Dr. Abi-Rached's role as chief operating officer and "primary/principal" witness is similar, in some respects, to Mr. Ju's role as a vice president of Concord and as someone who oversaw much of the negotiation of the transaction for Concord both before and after May 14. In the Reasons, I noted that it was Mr. Ju "who negotiated the Fees", who was "[t]he architect" of various amendments to what the parties had agreed to on May 14, who "ran and negotiated [the] transaction for Concord", and who "was the day-to-day face of that entity": at para. 108. This case is thus different from FFS, where the defendants' witness appears to have been a low-level employee and the court was troubled by the failure of management to provide any

explanation for why they relied on that evidence in circumstances where there were patent difficulties with it. This case is similar to FFS in that Mr. Ju's evidence was, in relation to several key issues, the "centrepiece" of Concord's case.

[89] A further point is relevant. I have said that the defendants do not rely, on this application, on any adverse findings of credibility that I made against Mr. Hui in the Reasons. There were, however, several instances where Mr. Ju and Mr. Hui gave the same evidence and where I concluded that neither had been forthright: see e.g. Reasons at paras. 220-221. There is therefore some basis to infer or conclude that Mr. Hui, Concord's president and CEO, was aware that at least some aspects of Mr. Ju's evidence were not honest.

[90] Additionally, the defendants argue, and I have concluded, that aspects of Concord's pleadings, including its particulars, were not honest; in these reasons for judgment at paras. 10 and 49. Concord can hardly seek to distance itself from its own pleadings.

[91] I am satisfied that in the circumstances of this case, the dishonest evidence of Mr. Ju, a senior officer of Concord and one of its two primary witnesses at trial, can properly be attributed to Concord.

v. The defendants' conduct disentitles them to special costs

[92] Concord argues that the defendants' own conduct disentitles them to an award of special costs.

[93] The relevant authorities establish that the conduct of an applicant can be a basis for denying special costs: *Lu v. Mao*, 2006 BCSC 1119 at paras. 30-35; *Luu v. Wang*, 2012 BCSC 626 at paras. 22, 33-37, 61-62; *Gould v. Gould*, 2013 BCSC 168 at paras. 124-125; *Kim v. Hong*, 2013 BCSC 2248 at paras. 20-21.

[94] Concord argues that various aspects of the defendants' document production were either so deficient or dishonest as to justify denying them an award of special costs. This submission has various components, aspects of which I do not accept.

[95] For example, Concord relies on the fact that the defendants, through Mr. Chu, swore two affidavits of documents, and that they thereafter produced numerous further documents. The first such affidavit of documents was sworn on June 6, 2016 and the second was sworn on June 10, 2016. It is not clear to me why the two affidavits were prepared within days of each other.

[96] In any event, two things are noteworthy. The first is that the affidavits were prepared relatively early in the litigation. Concord amended its pleadings three more times after these affidavits were prepared. Those amendments expanded the issues that were raised by the litigation. Inevitably, and necessarily, they would have expanded the scope of document production. Thus, Concord argues in its written submissions that the defendants' initial document production did not contain any documents in respect of Deutsche Bank, a further issue or relationship that was relevant at trial. The original Notice of Civil Claim and the

Amended Notice of Civil Claim, in place at the time that Mr. Chu swore these affidavits, contained no reference to Deutsche Bank. The first explicit reference to Deutsche Bank appears in the 4th ANOCC filed May 8, 2018. Concord's written submissions also indicate that it began to request documents in relation to the "Deutsche Bank loan" on May 17, 2018. It is not clear to me why the defendants should have produced such documents at an earlier date.

- [97] Concord also argues that "the defendants' initial list of documents did not contain any documents in respect of Westbank." It later argues that the "defendants' initial list of documents did not contain any documents in respect of the Aquilini Group." Both Westbank and the Aquilini Group are developers. The defendants' interactions with other developers, as I have said, were an issue at trial. Once again, however, that issue was not raised in Concord's initial Notice of Civil Claim or its Amended Notice of Civil Claim. These were the pleadings in place when Mr. Chu swore his two affidavits. The issue of the defendants not interacting with other developers did not appear in Concord's pleadings until its Second Amended Notice of Civil Claim. The names Westbank and the Aquilini Group did not appear until the 4th ANOCC. Once again, based on Concord's pleadings, it is not apparent to me why the defendants would have been required to produce documents relating to their interactions with other developers in their "initial lists of documents".
- [98] The second matter that arises from these affidavits is that in both affidavits, Mr. Chu deposed that "[t]o the best of [his] knowledge," all documents had been produced. In the second affidavit, Mr. Chu also deposed that he was "not aware of the existence of any other relevant documents." In such circumstances, the production of further documents does not mean that Mr. Chu swore a "false affidavit" or even that the defendants' earlier production had been delinquent.
- [99] There is a further factor that detracts from the force of Concord's submissions. There was evidence at trial from Mr. Chu, and further evidence filed on this application by Mr. Chu, that explained at least one aspect of the defendants' difficulties with document production. Mr. Chu explained that he was the person charged with collecting documents from the defendants in Vancouver, Hong Kong, and Singapore and providing those documents to counsel for the defendants.
- [100] If I understood his evidence at trial properly, he had, with Mr. Oei's agreement, retained experts to assist with obtaining documents from various electronic sources. He had also made inquiries from those individuals who might have relevant documents. He later learned of a difficulty. In his affidavit dated October 16, 2018, he explained:

4. During a meeting in September 2018 with Mr. Nathanson and members of his firm, it became apparent that a complete version of an email string from my cell phone did not transmit to Mr. Nathanson's office when I attempted to forward that string from my phone; for some reason, only a portion of the email string was received by Mr. Nathanson's office. I did not know, and do not know, what caused this incomplete transfer of documents to Mr. Nathanson's office.
 5. By reason of the production of documents from other parties containing communications with the defendants which had not been produced to Mr. Nathanson or his firm, I sought and obtained instructions from Mr. Oei and authorized counsel for the defendants to retain a third party service provider, Deloitte LLP ("Deloitte"), to collect documents from my Telus and Gmail accounts, Ms. Li's email account (in Hong Kong), and Bee Choo Lee's computer (in Singapore). It is my understanding that any gaps in production that may have resulted from the unknown issue with emails forwarded from my cell phone would also be addressed and resolved through Deloitte's collection from my Telus and Gmail accounts.
 6. In light of the above, and in light of the results of Deloitte's collection process, to the best of my knowledge, all relevant documents in the possession or control of the defendants have been provided to counsel for the defendants. I am not aware of any other relevant documents.
- [101] Concord, on this application, submits that the defendants had, on October 1, 2018, "delivered a 14th Supplemental List of Documents containing 64 emails obtained from Mr. Chu's email accounts which had not previously been produced." I understand this reference to pertain to the further documents that were uncovered following the technical difficulties that Mr. Chu identified. While these difficulties were unfortunate, and while they were uncovered late in the day, they do not appear to reflect conduct that warrants criticism, much less any form of censure.
- [102] Concord also argues that the defendants deliberately mis-described a key document. One of the issues at trial pertained to the defendants' interactions with Deutsche Bank: Reasons at paras. 443-492. Those interactions were a foundation for Concord's pleading that the defendants had acted in bad faith and engaged in the dishonest performance of their contract with Concord. A particular document produced by the defendants appeared to contain the terms of a loan. The document was prepared by Mr. Oei and Ms. Li: Reasons at paras. 481-483. The defendants' list of documents indicated that it had been prepared by Deutsche Bank.
- [103] Concord argues that the document was intentionally mis-described so as to hide the defendants' improper behaviour. Concord made the same argument at trial and I did not, at that time, accept that submission: Reasons at paras. 485-488. Instead, I was satisfied that Mr. Chu, who assisted with preparation of the defendants' various lists of documents, actually believed or understood that the document in question had been prepared by Deutsche Bank.

- [104] Still further, Concord argues that the defendants should have produced documents relating to the sale of a portion of the Plaza Lands in 2017 or 2018. This issue was the subject matter of an application that was contested by the defendants, who took the position that the documents were not relevant. In reasons for judgement that are indexed at 2018 BCSC 2390, I disagreed. This, however, reflected a principled objection by the defendants. Both parties, at different times, brought applications for different categories of documents. Sometimes the applicant was successful and sometimes it was not. The fact that I disagreed with the position being advanced by the defendants on this particular application does not mean that the defendants' conduct or subsequent production warrants criticism or some broad cost consequence.
- [105] One last point of context is relevant. I do not know how many documents were produced by the parties. This was a relatively sophisticated and complex piece of litigation. It was apparent to me that hundreds if not thousands of emails, telephone records, WeChat messages, and text messages had been downloaded, transcribed, and in many cases translated. The exercise of document production requires great care. It is a cornerstone of the discovery and trial process. And yet it is not an exercise, with the best of intentions, of mathematical precision.
- [106] Having said all of this, there are aspects of the defendants' document production that are troublesome and of some concern. There are three such broad concerns. The first arises from the fact that Concord obtained documents from Westbank and the Aquilini Group in August 2018 that pertained to communications between those entities and the defendants. Some of those documents included communications that had not been produced by the defendants.
- [107] Second, counsel for Concord and the defendants had various further communications about certain documents. This appears to have occurred primarily in September and October 2018, though there were some such communications both before and after these dates. Concord would initially be told that there were no such documents or only a few such documents, and it would thereafter be provided with additional documents. This appears to have occurred with sufficient frequency to be a concern.
- [108] Third, Ms. Li's email account contained no relevant emails from May 1, 2015 through October 30, 2015. For practical purposes, this is the entire period that was at issue in the action. Ms. Li played a comparatively minor role in this litigation, though she was present at the May 14 meeting and she had more extensive involvement with Deutsche Bank. She clearly received and sent emails, at least in relation to Deutsche Bank. The defendants provided no explanation for why Ms. Li had not retained any such emails, though they note that she attended trial, that she was not asked about her documents, and that there was no suggestion put to her that she had done anything improper with the documents that were in her possession.

- [109] This court has the ability to award special costs for all or only part of the proceeding; see Rule 14-1(1)(b). This can arise, for example, where the party being awarded special costs has contributed to a delay or other issue in the proceeding.
- [110] In *Gichuru v. Smith*, 2014 BCCA 414, the Court of Appeal noted:
- [91] Special costs are usually intended to indemnify a successful litigant, fully or at least substantially: *Everywoman's Health Center Society* (1988) v. *Bridges* (1991), 54 B.C.L.R. (2d) 294 (C.A.) at 297; *Lee (Guardian ad litem of) v. Richmond Hospital Society*, 2005 BCCA 107 at para. 45 [Lee]. While special costs are usually awarded for the whole proceeding, it is open to a judge to make a partial award if of the view that it would be disproportionate to award special costs for the entire proceeding: *Muncaster v. Nunnenmacher* (1996), 76 B.C.A.C. 211; *Romfo v. 1216393 Ontario Inc.*, 2007 BCSC 1772; *A.S.P. v. N.N.J.*, 2013 BCSC 2377.
- [111] In *Abakhan & Associates Inc. v. Golden Arch Resources Ltd.*, 2012 BCSC 346 at para. 12, Ballance J. awarded the defendant by counterclaim with 80% of their special costs, on the basis that the plaintiff by counterclaim had raised unfounded accusations of fraud worthy of rebuke, but the defendant had also given "needlessly problematic testimony" on an issue at trial.
- [112] In the circumstances of this case, I would award the defendants 80% of their special costs of the proceeding and of the trial. I consider that this addresses both the egregious nature of Concord's conduct and the deficiencies in the defendants' document production. I also consider that the defendants should receive the costs of this application on the usual basis. There is nothing that would warrant or justify an award of special costs against Concord in relation to this application.
- [113] Finally, in an earlier application, that I dismissed, Concord sought to adjourn this special costs application. In reasons for judgement, indexed at 2020 BCSC 368, I determined that the costs of that application would be addressed as part of this application; at paras. 31-40. I would, accordingly, also award the defendants the costs of that earlier application on the usual basis.

"Voith, J."

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