

CANADA / JUDGMENT

De Cotiis v. Hothi

2020 BCSC 1545

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1545 De Cotiis v. Hothi

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

De Cotiis v. Hothi,

2020 BCSC 1545

Date: 20201020

Docket: S145068

Registry: Vancouver

Between:

Vito De Cotiis

Plaintiff

And

Gurdaver Singh Hothi and Paramjit Singh Hothi

Defendants

And

Paramjit Singh Hothi and Ghassan Batal, also known as Gus Batal and Angell, Hasman & Associates Realty Ltd.

Third Parties

And

Gurdaver Singh Hothi and Paramjit Singh Hothi and Davinder Hothi

Fourth Parties

Before: The Honourable Madam Justice Burke

Reasons for Judgment

(Special Costs)

Counsel for Plaintiff:

Scott A. Griffin

Lindsay Burgess

Counsel for Defendants:

Daniel J. Barker

Counsel for the Third Parties:

John Fiddick

Place and Date of Hearing:

Vancouver, B.C.

September 23, 2020

Place and Date of Judgment:

Vancouver, B.C.

October 20, 2020

I. introduction

[1] In *De Cotiis v. Hothi*, 2018 BCSC 2271 (the "Reasons for Judgment"), this Court allowed the plaintiff Mr. De Cotiis' claim against the defendants Mr. Gurdaver Hothi and Mr. Paramjit Hothi, ordering specific performance of a contract for the sale of a property on Marine Drive in West Vancouver (the "Property").

[2] Mr. De Cotiis now applies for an order that the defendants pay special costs.

II. issues

[3] The issues are:

1. Did the defendants engage in reprehensible conduct in the litigation such that special costs should be awarded?
2. Should the amount of special costs be determined by the Trial Judge?
3. Is the plaintiff entitled to an offset for special costs against the purchase price of the property?

III. analysis

1. Did the defendants engage in reprehensible conduct in the litigation such that special costs should be awarded?
- [4] Mr. De Cotiis' position is that the defendants' conduct was reprehensible, and therefore an order of special costs is appropriate. He says the defendants engaged in many forms of misconduct, including swearing false affidavits, giving false evidence on discovery, concealing documents, breaching court orders, giving false evidence at trial, and suborning false evidence. Any one of these is sufficient for a special costs claim, but the combined effect is overwhelming.
- [5] The defendants deny their conduct during the litigation was reprehensible and oppose the order sought. They say their conduct as set out in the Reasons for Judgment does not rise to the level necessary to order special costs.
- [6] One of the main arguments of the defendants is that the facts necessary to found an award of special costs must come from the Reasons for Judgment. The defendants say that those facts, as delivered in the judgment, do not rise to the level of "reprehensible conduct". There was no finding of perjury. Rather, there were only findings of credibility, which do not by themselves lead to an award of special costs; see *Shedwill v. Clark*, [1991] B.C.J. No. 770, 48 C.P.C. (2d) 70 (S.C.).

Legal Principles

- [7] 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.
- [8] The Court of Appeal reaffirmed in *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177 that an order for special costs requires some form of "reprehensible conduct", which can include "scandalous or outrageous conduct as well as milder forms of misconduct deserving of reproof or rebuke": at paras. 57, 132.
- [9] The Court of Appeal went on to say, at para. 134: "Special costs should be reserved to punish and deter reprehensible conduct in the course of litigation." [Emphasis added.] The purpose of an award of special costs is to chastise a litigant. Such awards are meant to punish and deter bad behavior, as well as to distance the court from the conduct at issue.
- [10] The question is whether reprehensible conduct occurred in the course of this litigation. Have exceptional circumstances been demonstrated to justify an award of special costs? That is the focus of the inquiry that must be undertaken.
- [11] In *Garcia v. Crestbrook Forest Industries Ltd.*, 9 B.C.L.R. (3d) 242, [1994] B.C.J. No. 2486 (C.A.) at para. 17, Lambert J.A. identified "reprehensibility" as the standard for special costs, the meaning of which is broad in scope:

the word reprehensible is a word of wide meaning. It encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke. Accordingly, the standard represented by the word reprehensible, taken in that sense, must represent a general and all encompassing expression of the applicable standard for the award of special costs.

[12] Reprehensible conduct is found, per *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352 [Westsea] at para. 73:

in circumstances where there is evidence of improper motive, abuse of the court's process, misleading the court and persistent breaches of the rules of professional conduct and the rules of court that prejudice the applicant[.]

[13] Standing alone, failure to disclose critical documents is conduct deserving of rebuke:

"... I cannot divine what was in [the hotel owner]'s mind, and no evidence was tendered to satisfactorily explain why the private investigator reports, the employee records, and the written house policy were not disclosed early in the litigation. At worst, I can infer that there was a deliberate intention to suppress the evidence (including from the hotel's trial counsel). At best, it demonstrates foolhardy recklessness. In either case, it is the kind of reprehensible conduct that is deserving of reproof.

I conclude that this failure to disclose critical documents, standing alone, is deserving of an award of special costs against the hotel. Had this information (not just the private investigator reports) gone undisclosed, I have no doubt that the balance of probabilities would have favoured the hotel. Such non-disclosure simply cannot be condoned": *Laface v. McWilliams*, 2005 BCSC 1766 at paras. 38-39.

[14] Special costs may also be awarded where a party shows a "lack of concern for the truth" by swearing false and contradictory affidavits in an effort to advance their interests, or has otherwise deliberately provided untruthful evidence: *Mee Hoi Bros. Company Ltd. v. Borving Investments (Canada) Ltd.*, 2017 BCSC 1910 at para. 371.

[15] Special costs have been awarded especially when:

evidence was presented by the respondents that was "calculated to mislead the trial judge and jury" and [where] the lack of candour demonstrated by [a witness] in giving his evidence "cannot be condoned": *Fullerton v Matsqui (District)*, 74 B.C.L.R. (2d) 305, [1992] B.C.J. No. 2969 (C.A.) at para. 17.

[16] The line is drawn between evidence which is merely rejected by the court, not warranting an award of special costs, and evidence which is intended or designed to mislead, or is otherwise put forth for an improper motive, which does warrant the court's rebuke.

[17] Finally, in *Westsea*, Gropper J. summarized the principles for awarding special costs at para. 73:

- a) the court must exercise restraint in awarding specials costs;
- b) the party seeking special costs must demonstrate exceptional circumstances to justify a special costs order;
- c) simply because the legal concept of "reprehensibility" captures different kinds of misconduct does not mean that all forms of misconduct are encompassed by this term;
- d) reprehensibility will likely be found in circumstances where there is evidence of improper motive, abuse of the court's process, misleading the court and persistent breaches of the rules of professional conduct and the rules of court that prejudice the applicant;
- e) special costs can be ordered against parties and non-parties alike; and
- f) the successful litigant is entitled to costs in accordance with the general rule that costs follow the event. Special costs are not awarded to a successful party as a "bonus" or further compensation for that success.

Application of the Principles

- [18] I conclude that special costs should be awarded against the defendants in this matter. My reasons will be brief. The background of this matter has largely been set out in the Reasons for Judgement.
- [19] As argued by the plaintiff, throughout the litigation, the Hothis fabricated a defence based on facts they knew to be untrue. In addition, they:
- a. concealed and suppressed critical documents;
 - b. disobeyed court orders for document production;
 - c. swore false evidence in affidavits filed in the litigation; and
 - d. deliberately provided false evidence throughout the course of trial.
- [20] The defendants engaged in reprehensible conduct during the course of this litigation. They fundamentally misled the court and abused court processes in doing so. Accordingly, the conduct of Paramjit Hothi and Gurdaver Hothi in this case is deserving of rebuke in the form of an award of special costs in favour of the plaintiff.
- [21] There was voluminous evidence in this case. This included actions of the Hothis' designed to mislead this court. However, only the evidence necessary to decide the essential facts was set out in the Reasons for Judgment.

- [22] This Court found Mr. Paramjit Hothi and Mr. Gurdaver Hothi gave false evidence on all material facts relating to critical issues in this case. In addition, Paramjit Hothi effectively suborned the false evidence of his wife Davinder Hothi to paint a completely false picture of the property transaction at issue. Whether or not the Court used the technical term "perjury", the Court concluded that Gurdaver and Paramjit deliberately gave false evidence with the intention to mislead the court.
- [23] Throughout the litigation, difficult procedural issues were necessitated by the Hothis' conduct and ongoing refusal to produce documents. The defendants argue this matter was time-consuming by nature, and that Mr. Batal further contributed to the length and complexity of the trial with his "unorthodox" behaviour. I am not persuaded by these arguments. The extended length of the trial was directly caused by the defendants' actions, including what I concluded was, in effect, a fictitious law suit by Gurdaver Hothi.
- [24] Similarly, the defendants argue that this lawsuit could have been avoided had the plaintiff and Mr. Batal investigated the legal title sooner. This effectively blames the victim for both the defendants' actions and the unnecessarily difficult circumstances created directly by the defendant Paramjit's denial of the sale, which denial was buttressed by his brother Gurdaver. The court in fact found Paramjit had authority to sell the Property.
- [25] I am also not persuaded by the defendants' argument that the plaintiff should not have spent \$1.4 million in legal fees for a \$1.2 million property. The defendants created the difficulties in this litigation, which necessitated a lengthy and expensive trial. They cannot rely on the amount of legal fees alone to argue against a special costs award.
- [26] Finally, there is no authority for the defendants' position that consideration of special costs is limited to what is set out in the Reasons for Judgment. Reasons are designed to address the matters at issue at trial. The matter of special costs may arise, but is not necessarily dealt with in the Reasons as this may decrease efficiency in the court process. As set out in *Hobbs v. Warner*, 2020 BCSC 1180 at para. 5, these reasons should be read in conjunction with the Reasons for Judgement, which I turn to now.
- [27] At paras. 31 and 32 of the Reasons for Judgment, I said:
- [31] Each of the Hothi defendants had difficulty telling the truth. This unfortunately occurred throughout their evidence, especially on critical points. None of the defendants were able to make admissions adverse to their positions even when confronted with plainly contradictory evidence. This did not appear to be just a lack of recall but rather a wholesale revision of events, particularly with respect to Mr. Paramjit Hothi's evidence. The evidence of the Hothi family is inconsistent with the preponderance of probabilities and, especially on critical points, is unbelievable.

- [32] Ms. Davinder Hothi denied the suggestion from counsel that her husband Mr. Paramjit Hothi was telling her what to say in evidence. She further denied that she was trying to help him or his brothers in giving her testimony. This denial was not believable for a number of reasons, including her unwillingness to admit anything adverse to her husband's interest.
- [28] I also stated the following:
- [69] This testimony is not believable. The documentary evidence, the pleadings, and Mr. Paramjit Hothi's own actions make clear that he intended to and did give Mr. Batal his permission to market the property for sale. In fact, Mr. Gurdaver Hothi even alleges as much in his third party notice lawsuit where he contends that Mr. Paramjit Hothi did, in fact, give verbal authority to Mr. Batal to erect a sign on the Marine Drive Property. The evidence is clear that Mr. Paramjit Hothi wished to sell it for the right price.
- [106] Mr. Paramjit Hothi's evidence differs. He testified that Mr. Batal arrived at the Nelson Avenue job site that day with his son, Matt Batal. This much is true. In fact, Mr. Batal testified that Matt was in training to become a realtor and Mr. Batal was letting him shadow. Where Mr. Paramjit Hothi's testimony differs, however, is in his claim that during the meeting, Matt Batal physically pushed him and Mr. Gus Batal grabbed his hand and "forced" him to sign the offer. This was denied by both Mr. Gus Batal and his son. I conclude this did not occur. Rather, it is part of the largely fictional narrative related by Mr. Paramjit Hothi in this matter.
- [173] Mr. Paramjit Hothi's credibility is severely undermined by documents and phone records reflecting the numerous communications between himself and Mr. Batal at critical junctures in this case. When taken to the 11 calls on May 1, 2014, Mr. Paramjit Hothi denied even talking about the Marine Drive Property with Mr. Batal. As indicated, he said they were just talking about "general things." It is very unlikely that the number of calls as well as the length of many of these calls reflect conversations of a general nature. The only thing new to talk about at 7:12 p.m. that day was the recently made deal to sell the Marine Drive Property to Mr. De Cotiis.
- [29] As noted by counsel for the plaintiff, one of the central issues in the case was whether Paramjit would ever have authorized someone to sign a contract in his name. On this point, the defendants concealed evidence, filed a false affidavit, and then gave false evidence about the signed offer for the Property, which was signed with the name "Paramjit Hothi" by Davinder on Paramjit's instructions.
- [30] Paramjit and Davinder specifically and definitively continued to give false evidence about the execution of the contractual offer, and the authorization of that execution, in the face of strong contradictory evidence.
- [31] As a part of the Reasons for Judgment I noted:

- [61] This reflects adversely on Mr. Paramjit Hothi's credibility. His phone records clearly establish that he was in the Merritt area at the time he supposedly was signing the offer at UBC. His evidence is completely unbelievable on this point. It is clear that Ms. Davinder Hothi--who is employed at UBC and thus, was already there--signed the offer in his name.
- [175] As indicated, Ms. Davinder Hothi's credibility is also severely undermined. Most difficult to believe is her insistence that Mr. Paramjit Hothi signed the offer to purchase the Marine Drive Property back on April 12, 2013. Phone records clearly showed that he was out of town yet she continued to deny that she ever signed or was instructed to sign anything on his behalf. I find that she was clearly concerned about saying anything adverse to her husband's case.
- [32] In addition, documents relating to this important evidence were in the email accounts that Paramjit and Davinder concealed in this litigation. It was only through the efforts of Mr. Wilks, a forensic examiner employed on behalf of the plaintiff that these emails came to light. Mr. Wilks readily found important emails directly concerning the business and property at issue. During his testimony, he noted that in a screen shot of the Davinder Hotmail account, all the materials relating to the Property were plainly visible. Despite this, Davinder Hothi swore an affidavit saying she had neglected to check these plainly visible sub-folders. The index of the email account clearly set out a folder for 2599 Marine Drive (the Property) and numerous other Hothi Business folders such as financials and other properties.
- [33] As set out at paras. 28 and 29:
- [28] The plaintiffs have alleged that the defendants have concealed relevant documents. These appear to be valid concerns. For example, as part of a request for disclosure in this case, Ms. Davinder Hothi claims to have searched her inbox in and around January 2016 without finding any emails concerning the Marine Drive Property. In her examination, however, numerous pertinent emails concerning the Marine Drive Property and the family business were brought to her attention. These were organized email in various folders including: "2599 Marine Drive"; "Pooran"; "Gus Batal". When asked why she did not come across these emails in her search, she said she had only searched her "inbox" folder and did not realize that it would not search the separate folders.
- [29] Ms. Hothi's explanation as to why she was unable to find the emails is difficult to believe. Ms. Hothi's job at UBC requires keen organization skills. She was aware the emails existed and has no real explanation as to why she did not investigate further when none appeared in her initial search of the "inbox" folder. The folders were plainly visible in her personal email inbox as well as in the Diamond 11 business inbox. In the former, the "2599 Marine Drive" folder was third from the top. It could be seen every time she opened her email.

- [34] Davinder and Paramjit both continued to lie under oath--in affidavits and before the court at trial--about the circumstances of not disclosing the documents. This was clearly because they knew these were important documents that would adversely affect their defence.
- [35] Similar to the case of *Manning v. Dhalla*, 2019 BCSC 1514, I conclude that the defendants deliberately did not disclose highly relevant documents as ordered by the court. Those documents contradicted the defendants' evidence on crucial points. This deliberate non-disclosure was egregious in the context of this trial and supports an award of special costs in this matter.
- [36] There is no doubt that in the face of clearly contradictory evidence and documents, Davinder Hothi was prepared to lie under oath before the Court to assist the Hothi family in the lawsuit. As noted in the Reasons for Judgment, Paramjit Hothi effectively ran the Hothi family business with administrative assistance from his wife, Davinder. Her false evidence was obviously calculated to ensure her testimony was in line with the largely fictional narrative constructed by Paramjit. While Davinder was a sophisticated witness, the inescapable inference is that Paramjit pressured Davinder to give false evidence under oath--both as to the underlying facts and then again regarding the cover-up and failure to disclose documents.
- [37] Despite court orders to produce documents, the defendants maintained the position that they had none. The plaintiff was forced to obtain many of the defendants' documents themselves by, inter alia, going directly to suppliers for the defendants' business operations. After a year of failed efforts by the plaintiff to secure document disclosure, on March 8, 2016, the court finally ordered production of the defendants' laptop. It was only after this laptop was examined by the plaintiffs that many of the documents pertinent to this matter were unearthed. As noted, despite the defendants' claim that they had none--or only one or two as later noted in their document list--these documents were plainly in view and only the defendants' deceit prevented their disclosure.
- [38] This pattern of behaviour continued to the date of trial. The court dealt with and continued to deal with document disclosure issues caused by the defendants throughout the trial.
- [39] As in *Price v. 481530 B.C. Ltd.*, 2017 BCSC 1071, which references *Jogia v. Aetna Life Insurance Company of Canada*, [1999] B.C.J. No. 1502, 11 C.C.L.I. (3d) 223 (S.C.), I conclude the defendants deliberately attempted to mislead the court through fabricated evidence. Such conduct can found an order for special costs.
- [40] Moreover, the defendants' false evidence and attempts to conceal documentary evidence were not the only reprehensible conduct. Paramjit Hothi also sought to intimidate an independent witness, Mr. Yan. Mr. Yan testified that he dealt with Paramjit Hothi, who offered to sell him the Property. Paramjit sought to conceal the truth on the key issue of his having tried to sell the Property to Mr. Yan. This was critical evidence because it showed that it was Paramjit, not Gurdaver, who had authority and carriage of the marketing and sale of the Property. As set out at para. 243 of the Reasons for Judgment, Paramjit sought to

prevent the court from hearing this critical evidence:

- [243] Mr. Yan also testified that he attended the courthouse on the second day of this trial to observe because he was curious to see what happened. He testified that at that time, Mr. Paramjit Hothi was not happy to see him and told him "don't come here" and "never show up here again" or words to that effect. Mr. Yan was upset by these comments.
- [41] Lastly, I find further reprehensible conduct in the form of Gurdaver Hothi's third party lawsuit against Paramjit Hothi, in which he alleged Paramjit had attempted to sell the Property without Gurdaver's knowledge or permission. In the Reasons, I found that the Property was a family asset (para. 219), and that Paramjit Hothi had actual authority to sell the Property (para. 221). He exercised his responsibility over the Property "without question or objection from other family members" (para. 222). At para. 224 of the Reasons, I found:
- [224] Mr. Paramjit Hothi was also in constant contact with Mr. Batal over the 2013-2014 period where the property was publicly advertised as being for sale. He authorized a "for sale" sign on the property and made offers to sell to two independent parties, Mr. Khalili and Mr. Eric Yan (a.k.a. Hua Fung Yan). It is inconceivable that the other close-knit members of the Hothi family, all living together in the same house--Mr. Gurdaver Hothi included--did not know about or provide actual authority to Mr. Paramjit Hothi to sell the property.

[Emphasis added.]

[42] In light of these findings, it is clear that Gurdaver's suit was effectively fictional. Such a suit constitutes an abuse of court resources, and further supports an award of special costs.

[43] In view of all the above, the application for special costs is allowed against the defendants.

2. Should the amount of Special Costs be determined by the Trial Judge?

[44] The plaintiff submits that costs should be assessed by this Court. They submit that the circumstances described in *Gichuru v. Smith*, 2014 BCCA 414 (leave to appeal ref'd, [2014] S.C.C.A. No. 547) have arisen in this case, given the following:

- a) The defendants have consistently delayed the litigation, a pattern which is likely to continue into the costs assessment;
- b) this has been complex and protracted litigation, with which this Court is intimately familiar; and
- c) potentially significant cost and delay would arise from introducing a registrar to the long history of the proceedings.

[45] They submit that, on the facts, the trial judge is in the best position to assess costs, and to do so with the least additional delay and expense.

[46] Conversely, the defendants submit that any costs should be assessed by a registrar given the significant value of fees sought by the plaintiff. They point to the language in *Gichuru* at para. 154, which emphasizes that a judge's discretion to assess costs should be "exercised sparingly" as "[the Registrar's] knowledge and experience in assessing legal bills is extensive and seldom matched by that of a trial judge". They submit that, in this case, there is no reason to depart from this general rule.

Application of Legal Principles

[47] Rule 14-1(15) of the Supreme Court Civil Rules empowers a trial judge to determine the quantum of costs as a matter of judicial discretion.

[48] The law governing the exercise of this discretion is set out in *Gichuru* at para. 154:

The decision to fix the quantum of costs under R. 14-1(15) is a matter of judicial discretion that should be sparingly exercised. The court officer best placed to conduct an assessment is usually the registrar, whose knowledge and experience in assessing legal bills is extensive and seldom matched by that of a trial judge. An exception may arise in cases when the judge is intimately familiar with the litigation or the time and cost of a registrar's hearing cannot be justified or where the parties consent. The fact that a judge has heard the trial does not necessarily lead to the conclusion that the best use of judicial resources is for the judge to assess costs. A concern that a party who might have to pay costs will prolong the costs assessment by requiring a microscopic review of the services provided by counsel must be balanced against the right of that party to challenge the reasonableness of the proposed costs.

[49] At paras. 155-56, the court also commented on the procedure for making such an assessment: If they choose to assess costs, a judge must allow only those fees that are objectively reasonable in the circumstances. As such, they must have evidence on the amount of fees incurred. Awards must be consistent with what the registrar would award in similar circumstances, though a judge need not follow the exact same procedure.

[50] In *Gichuru*, the Court of Appeal declined to assess costs summarily due to the lack of evidence before them (at paras. 161-62). Other judges have declined to assess costs due to the large sum of fees claimed (*Hobbs v. Warner*, 2020 BCSC 1180), and where fairness dictates the party against whom costs are awarded should be able to test the amount claimed in front of a registrar (*Hobbs, Grosz v. Royal Trust Corporation of Canada*, 2020 BCSC 1083). In cases where a judge has exercised their discretion to assess costs, the simplicity of the assessment has weighed in favour of judicial assessment: see *Norris v. Burgess*, 2016 BCSC 1451, where the fees were on a contingency basis; and *Jacques v. Muir*, 2017 BCSC 2400, where special costs were only \$2,000.

[51] I conclude that in view of the large sum of costs claimed and the nature of the issues that may arise, fairness dictates that the losing party should be able to test the amount claimed in front of a registrar, as in *Hobbs* and *Grosz*. This is not a simple assessment. While I am cognizant that a registrar's hearing may cause some delay, in this case having the trial judge

undertake this task would not necessarily alleviate that delay. The Registrar has the expertise to undertake this assessment in an efficient manner. Further, the delay created by the defendants can be amply demonstrated on the record. The Registrar can certainly take that into account in setting matters so they may proceed in an orderly fashion.

[52] Ultimately, I agree with and am persuaded by the cogent comments of this Court in recent cases, in particular *Hobbs* at paras. 77-78:

[77] Although I recognize that I am "intimately familiar" with the litigation, I am of the view that the registrar is in the best position to determine if fees billed by Mr. Payne are reasonable. The registrar has extensive knowledge and experience assessing legal bills, as do judges in Ontario. I, on the other hand, do not.

[78] The award sought by Mr. Warner is substantial. Natural justice and procedural fairness require that the plaintiffs have an opportunity to test the reasonableness of the award, as in the ordinary case of a full indemnity award, before a registrar. Questions raised by the plaintiffs in their written submissions, such as the reasonableness of the premium rate charged by counsel and the number of billed hours claimed, are questions that cannot, in fairness, be assessed on a summary basis in the manner suggested by Mr. Warner. These issues demonstrate why the registrar, with his or her experience in such matters, ought to conduct the assessment in this case.

3. Is the plaintiff entitled to an offset for special costs against the purchase price of the property?

[53] The defendants consented to substantially all of the plaintiff's proposed terms regarding the order for performance, which provided for, inter alia, the offset of any costs award against the \$1,200,000 balance owing on the Property. The plaintiff was to deposit that balance pending an assessment of costs. However, the defendants objected to late submissions by plaintiff's counsel that the plaintiff's deposit should be reduced from \$1,200,000 to some lower amount, particularly if special costs are awarded. This proposed reduction would reflect the fact that the plaintiff will inevitably owe less than \$1,200,000--possibly significantly less in the case of special costs--and as a matter of practicality should not be required to put the full sum in trust pending assessment. The defendants maintained the plaintiff should be required to deposit the full amount.

[54] I agree with the plaintiff in this matter. There is no doubt the plaintiff will owe less than the outstanding balance of \$1,200,000 in view of the order for special costs. The present legal bill is over \$1,400,000 and, while subject to challenge, will likely result in a substantial special costs award. In view of these circumstances, including the 50-day length of the trial--which the defendants directly contributed to--and as a matter of practicality, the plaintiff's deposit should be reduced to \$500,000.

[55] This Court orders that:

1. Gurdaver Hothi and Paramjit Hothi on a joint and several basis pay the Plaintiff his special costs of this proceeding on a full indemnity basis;
2. The special costs payable by Gurdaver Hothi and Paramjit Hothi under this order may be set off against the purchase price of \$1,250,000 payable by the Plaintiff for the Property (the "Purchase Price");
3. Within seven days of this order Gurdaver Hothi and Paramjit Hothi shall forthwith deliver up to their counsel Daniel Baker a Form A Freehold Transfer of the Property executed by Gurdaver Hothi in the form attached to this Order as Schedule "A" (the "Form A Transfer");
4. Upon the Plaintiff depositing with the Registrar of this Honourable Court a letter of credit issued by the Bank of Nova Scotia in the amount of \$500,000, in the form attached to this Order as Schedule "B" (the "Letter of Credit"), which Letter of Credit together with the \$50,000 deposit held by Angell Hasman (the "Deposit") shall constitute payment of the net Purchase Price, if any, remaining to be paid after set off of the Plaintiff's special costs as provided in paragraph 2 of this Order,
 - a) Mr. Barker shall forthwith deliver up to McCarthy Tétrault LLP the Form A Freehold Transfer executed by Gurdaver Hothi;
 - b) Of the Deposit, after payment of the commission of \$20,000 plus GST of \$1,000 the balance of \$29,000 (the "Balance of the Deposit") shall be paid to McCarthy Tétrault LLP in trust to be dealt with in accordance with this Order;
 - c) Pending further court order or agreement of the parties, the Letter of Credit and the Balance of the Deposit will continue to represent and secure the net amount of the Purchase Price, if any, remaining to be paid after set off of the Plaintiff's special costs as provided for in paragraph 2 of this Order, subject to the assessment of the Plaintiff's special costs and any further order of this Court;
 - d) The Plaintiff is at liberty to apply for an Order releasing, varying the form of or reducing the amount of the Letter of Credit and the Balance of the Deposit, and without limiting the generality of the foregoing, to apply to reduce or release the Letter of Credit and the Balance of the Deposit in proportion to any interim or final assessment of the Plaintiff's special costs.
- [56] The Plaintiff is granted leave to apply with respect to matters arising out of the implementation of this order, including but not limited to reduction of the Letter of Credit in respect of interim determinations of amounts owed to the Plaintiff for his special costs, taxes and disbursements.

"Burke J."

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