

CANADA / JUDGMENT

Gibson v. F.K. Developments Ltd.

2018 BCSC 437

COURT

Supreme Court of British Columbia

DECIDED

20 March 2018

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2018 BCSC 437 Gibson v. F.K. Developments Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gibson v. F.K. Developments Ltd.,

2018 BCSC 437

Date: 20180320

Docket: 14-1052

Registry: Victoria

Between:

Geraldean Elizabeth Gibson

Plaintiff

And:

F.K. Developments Ltd., Fritz G. Karger,

John Doe Tree Cutting Company,

Richard Rose

Defendants

Before: The Honourable Mr. Justice Punnett

Reasons for Judgment

(On Costs)

Counsel for the Plaintiff:

C.L. Pagé

Counsel for the Defendants:

F.K. Developments Ltd.

and Fritz G. Karger

E.M. Regehr

Written Submissions of the Plaintiff:

December 27, 2017

Written Submissions of the Defendants:

January 9, 2018

Reply Submissions of the Plaintiff:

January 16, 2018

Place and Date of Judgment:

Victoria, B.C.

March 20, 2018

Introduction

[1] The plaintiff, Ms. Gibson, seeks special costs for her successful claim for damages arising from the defendants cutting a tree on her residential property. Reasons for judgment on damages are indexed at 2017 BCSC 2153. The parties were granted liberty to make written submissions on costs. Those submissions have now been received.

Background

[2] The plaintiff is a former Mayor of Colwood. Prior to this litigation Ms. Gibson and the defendant Mr. Karger, a developer operating at the time as F.K. Developments Ltd., had a contentious relationship.

[3] I summarized the factual background of this claim in the above reasons:

[2] In 1998 the plaintiff and her husband purchased a residence in a residential neighbourhood on the east side of Triangle Mountain located at 3376 Haida Drive, Colwood, B.C. They purchased this specific property in part because of its natural environment and wild life. The homes behind the plaintiff's property are considerably higher than the homes on Haida Drive. At the back of the plaintiff's property were four mature Douglas Fir trees, providing shade and privacy to the plaintiff's back yard. Those trees were higher than the homes on the street above.

- [3] The defendants F.K. Developments Ltd. and Mr. Karger owned the lands above and behind the plaintiff's property. Mr. Karger was a developer and eventually developed an area above the plaintiff's property known as Vista Estates. He also became the owner of one of the homes immediately behind the plaintiff.
- [4] Shortly after her move to Colwood, the plaintiff was elected mayor. She served a term from 1999-2002. In her capacity as mayor, matters related to developments in Colwood fell within the purview of her and City Council. She said that as mayor she was perceived as "anti-development", something she denies. Mr. Karger apparently was of that view and when she ran for office again, Mr. Karger emailed her criticizing her views and personally attacking her including making allegations respecting her psychological health.
- [5] In 2006 the plaintiff's husband died. As their yard was important to him she has continued to maintain it in her late husband's memory.
- [6] Mr. Karger originally owned the subdivision lands above the plaintiff's property and at some point before or near 2010 it was transferred to the corporate defendant. Mr. Karger remained the company president until 2015. The corporate defendant in 2010 or 2011 commenced development of the subdivision known as Vista Estates. Those lands are at an elevation substantially above the plaintiff's property and as a result there is a view over the plaintiff's lot and her property's common area extending to the ocean. The tree in question blocked a portion of that view and the view from the home of Mr. Karger located at 3419 Karger Terrace.
- [7] In February of 2011 Mr. Karger approached the plaintiff and asked for her permission to trim or top the trees in her backyard. She did not give him permission but suggested he return in the spring to show her what he intended to do. He never returned.
- [8] Unbeknownst to the plaintiff at some time prior to July 9, 2012 Mr. Karger began to reside at 3419 Karger Terrace. The plaintiff only became aware he was living there around November 2012.
- [9] Mr. Karger did not testify at this trial due to his ill health. The defence did call Mr. Toby Summers who is the principal of a corporation called Skana Developments Ltd. which was engaged in a joint venture with F.K. Developments Ltd. in the development of Vista Estates. Mr. Summers became the president and sole shareholder of F.K. Developments Ltd. in late 2015.
- [10] According to his testimony, a few days prior to September 8, 2012, Mr. Karger instructed Mr. Summers to take action with respect to the plaintiff's tree allegedly because it posed a danger to Mr. Karger's home. Mr. Summers testified that the authority to cut the plaintiff's tree belonged to F.K. Developments Ltd., but could not explain why the company would be concerned about any alleged danger to the property at 3419 Karger Terrace as the Corporation did not own that property.

- [11] Mr. Summers testified that because this decision devolved to him, he provided the instructions to Mr. Parsons who is a tree cutter from Eager Beaver Tree Service. Mr. Summers testified that on Friday, September 7, 2012, he showed Mr. Parsons which tree was to be cut the following morning. Mr. Parsons was instructed to cut the plaintiff's tree that was furthest from the Karger's residence at 3419 Karger Terrace. Mr. Summers testified that he instructed Mr. Parsons to take the "sail" off the tree, and confirmed that he did not specify how much of the tree was to be removed. He further testified that the sail meant the portion of the tree that was caught by the wind. Although Mr. Summers testified that he thought he had pictures of the tree blowing in the wind, he did not disclose the pictures in the course of the litigation.
- [12] It is not in issue that on September 8, 2012 F.K. Developments Ltd. and Mr. Karger instructed their agents to enter upon the plaintiff's property and to cut at least one of the plaintiff's large fir trees. Those two defendants have also admitted that the other previous unnamed defendants were acting on their instructions and they accept responsibility for them. As a result, the unnamed defendant contractors have not taken part in this action. The defendants were also aware that the plaintiff and her neighbours would be opposed to the proposed cutting.
- [13] Early on the morning of Saturday, September 8, 2012 then counsel for the defendants (not counsel before me) based on instructions from Mr. Summers on behalf of the defendants, came to the home of the plaintiff and two of her neighbours. With him was an individual who video recorded his attendance. He delivered documents to the residents at 3378, 3376 and 3374 Haida Drive, advising that F.K. Developments Ltd. was intending to exercise its alleged right to cut the trees under the Statutory Building Scheme registered against the properties. The affected properties were the plaintiff's and the properties on either side of her property. At each residence he left a copy of the Statutory Building Scheme and his business card. The only home where someone answered the door was the home of Mr. Rhode and Ms. Smith, the plaintiff's neighbours.
- [14] At the same time a mobile crane and falling crew were setting up their equipment at the street above the plaintiff's and the Smith and Rhode's lots and shortly thereafter that crew commenced removing the top of the tree located on the plaintiff's property.
- [15] The plaintiff realized what was occurring, and from her yard, pleaded with the defendants' crew to stop what they were doing so she could obtain legal advice. Her neighbour Ms. Smith also indicated her opposition to what was occurring by standing under the tree and calling to the fallers. The cameraman video recorded them. The crew however ignored their protests and proceeded to cut down a portion of the fir tree.
- [16] The police were called. Then counsel for the defendants informed the police (incorrectly) that the cutting was being legally conducted pursuant to the terms of a Statutory Building Scheme that the plaintiff had agreed to when she and her husband purchased the property. He indicated that trimming would continue and informed the police that this was a civil

matter and they risked being sued if they intervened. Shortly thereafter the City of Colwood's bylaw officer and its planning officer attended as a result of calls from the RCMP. The interactions between counsel, the police and the representatives from the City of Colwood were video recorded as well. It was only after the intervention of the City officials that the defendants agreed to cease cutting.

- [17] By then the tree had been cut back to approximately 45 percent of its former size with 95 percent of its living branches removed. The plaintiff's expert, arborist Verna Mumby, opined that the tree would have to be removed.
- [4] Allegations of misconduct in the litigation by the defendants form the basis for the special costs claim.
- [5] The notice of civil claim was filed March 18, 2014. The defendants' Response and Counterclaim were filed May 16, 2014. The plaintiff's Reply was filed May 23, 2014. The plaintiff's Response to the Counterclaim was filed July 16, 2014. An Amended Notice of Civil Claim was filed July 14, 2015. On July 16, 2015, the plaintiff issued a Notice of Trial and Notice Requiring Trial by Jury setting the trial for March 29, 2016. This was done without notice to the defendants, without consulting with them respecting the trial date or allowing them to file amended pleadings responding to the amended Notice of Civil Claim. Plaintiff's counsel immediately acknowledged to the defendants' then counsel she should not have filed those notices without giving the defendants time to file their amended pleadings in response and advised him the plaintiff consented to the defendants filing appropriately amended pleadings.
- [6] On July 28, 2015 plaintiff's counsel applied to have then defence counsel removed as counsel of record because of his presence and actions at the time of the tree cutting. The application asserted that counsel would be a material witness. Mr. Justice Wong dismissed the application.
- [7] The defendants filed an Amended Response and Counterclaim. In the Amended Counterclaim damages were sought for \$700,000. The original Counterclaim was for \$10,000. Madam Justice Loo ordered that the Amended Response and Counterclaim be struck in their entirety. In her reasons she guided then defence counsel on how to properly amend the defendants' pleadings. Then counsel ignored that advice and repeatedly filed offending pleadings subsequently struck by judges of this court. In total the defendants made five unsuccessful attempts to file amended pleadings that were struck.
- [8] After liability was resolved by summary trial the defendants replaced their counsel and retained present counsel. He discontinued the counterclaim in June 2017.
- [9] The trial of damages was heard on September 18-21, 2017. Damages of \$35,150 were awarded to the plaintiff consisting of \$10,000 in general damages, \$5,150 in special damages against the defendants jointly and \$10,000 in punitive damages against each defendant severally.

Position of the Plaintiff

[10] The plaintiff initially sought an order that the defendants pay:

- a. special costs of \$114,821.28 to January 24, 2017;
- b. ordinary costs of \$8,993.60 for the remainder of the action; and
- c. disbursements of \$13,421.42.

[11] After receipt of the defendants' written submission the plaintiff correctly conceded that once costs were determined their assessment was a matter for the Registrar.

[12] The claim for special costs arises from the conduct by the defendants and their former counsel up to January 24, 2017 when present counsel was retained. In particular special costs are claimed based on the defendants' numerous attempts to amend their counterclaim and allegations that the defendant Mr. Karger failed to make himself available for discovery resulting in delays and excessive expense to the plaintiff in pursuing her claim. In addition, allegations in affidavits, correspondence and submissions by both the defendants and their counsel attacking the plaintiff and her counsel also form the basis for the special costs claim. The plaintiff says that such conduct was reprehensible.

Position of the Defendants

[13] The defendants submit that they should pay costs at Scale B along with reasonable and necessary disbursements up to their offer to settle of August 29, 2017 except for special costs ordered December 12, 2016 respecting the defendants' application for leave to further amend their amended counterclaim and amended response to civil claim. The defendants further submit that the parties bear their own costs for steps taken after their offer.

Law

[14] The British Columbia Court of Appeal most recently summarized the law on special costs in *Smithies Holdings Inc. v. RCV Holding Ltd.*, 2017 BCCA 177:

[156] Special costs are typically awarded when there has been some form of reprehensible conduct on the part of one of the parties: *Young v. Young* [1993] 4 SCR 3 at 134-138. Special costs are not compensatory; they are punitive: *Grewal v. Sandhu*, 2012 BCCA 26 at para. 106. They are awarded when a court seeks to disassociate itself from some misconduct: *Fullerton v. Matsqui (District)* (1992), 74 B.C.L.R. (2d) 311 (C.A.) at para. 23. There are circumstances where special costs may be ordered where there has been no wrongdoing: *Gichuru v. Smith*, 2014 BCCA 414 at para. 90. These reasons are not concerned with such types of cases.

- [57] The leading authority on special costs is this Court's decision in *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 (C.A.). There, Mr. Justice Lambert, writing for the Court, set out that the threshold for special cost awards is "reprehensible conduct". He noted the continuum of circumstances in which special costs could be awarded, ranging from "milder forms of misconduct deserving of reproof or rebuke" to "scandalous or outrageous conduct":
- [17] Having regard to the terminology adopted by Madam Justice McLachlin in *Young v. Young*, to the terminology adopted by Mr. Justice Cumming in *Fullerton v. Matsqui*, and to the application of the standard of "reprehensible conduct" by Chief Justice Esson in *Leung v. Leung* in awarding special costs in circumstances where he had explicitly found that the conduct in question was neither scandalous nor outrageous, but could only be categorized as one of the "milder forms of misconduct" which could simply be said to be "deserving of reproof or rebuke", it is my opinion that the single standard for the awarding of special costs is that the conduct in question properly be categorized as "reprehensible". As Chief Justice Esson said in *Leung v. Leung*, 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. [Emphasis added.]
- [15] Madam Justice Gropper in *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352, considered the application of the law of special costs. She noted that the key unifying feature of special costs awards is that they are an exceptional remedy to be used in exceptional circumstances (see para. 34). She described four such exceptional circumstances at paras. 42-72 as:
- a. Meritless Claims and Improper Motive [emphasis in original];
 - b. Abuse of the Court's Process;
 - c. Sharp Practice Derogating from the Rules of Professional Conduct and Rules of Court; and
 - d. Misleading the Court.
- [16] Madam Justice Gropper noted that "[p]oor advocacy alone will not attract special costs", referring to *Gichuru v. Smith*, 2010 BCCA 352, where the Court of Appeal overturned an award of special costs that arose from the trial court's finding that the plaintiff's pleadings were "woefully inadequate" (para. 26). Similarly, taking a position, with legal advice, that proves to be unsound is insufficient to attract an award of special costs where the conduct is not reprehensible: *Webber v. Dulai Roofing Ltd.*, 2006 BCCA 501 at para. 18.
- [17] However, other behaviour can support an order for special costs. In *Casses v. Canadian Broadcasting Corp.*, 2016 BCSC 949 at para. 18, the court noted:

- [18] Special costs may be awarded where a party made the resolution of an issue far more difficult than it should have been, or where a party who is in a financially superior position to the other brings proceedings, not with the reasonable expectation of a favourable outcome, but in the absence of merit in order to impose a financial burden on the opposing party. See *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914, at para. 11.
- [18] In *Mayer* the court described situations in which special costs may be ordered at para. 11:
- (a) where a party pursues a meritless claim and is reckless with regard to the truth;
 - (b) where a party makes improper allegations of fraud, conspiracy, fraudulent misrepresentation, or breach of fiduciary duty;
 - (c) where a party has displayed "reckless indifference" by not recognizing early on that its claim was manifestly deficient;
 - (d) where a party made the resolution of an issue far more difficult than it should have been;
 - (e) where a party who is in a financially superior position to the other brings proceedings, not with the reasonable expectation of a favourable outcome, but in the absence of merit in order to impose a financial burden on the opposing party;
 - (f) where a party presents a case so weak that it is bound to fail, and continues to pursue its meritless claim after it is drawn to its attention that the claim is without merit;
 - (g) where a party brings a proceeding for an improper motive;
 - (h) where a party maintains unfounded allegations of fraud or dishonesty; and,
 - (i) where a party pursues claims frivolously or without foundation.

Discussion

Special Costs

- [19] The plaintiff submits that the defendants' conduct of the litigation was reprehensible because:
3. In response to the plaintiff's claim, the corporate defendant filed a counterclaim, initially claiming \$10,000 in damages. One year after this counterclaim was filed, the corporate defendant began its attempts to amend the counterclaim to sue for \$700,000 in damages from the plaintiff. This threat had a profound effect on the plaintiff. The defendants never produced any evidence to support their claim that the plaintiff ought to be liable for \$700,000.00.
 4. Throughout the litigation, in a myriad of hearings and filed court documents, the defendants repeated the allegation that the plaintiff attempted to block the defendants amended pleadings by filing the trial notice, which was false, and found to be false in every hearing before the court in which it was raised.

5. The defendants significantly delayed the adjudication of this matter by refusing to set discoveries, refusing to sign or enter court orders, adjourning trial dates, and unilaterally filing requisitions to adjourn previously scheduled hearings. The actions of the defendants caused the legal expenses to increase exponentially.
 6. The defendants sought to discredit the plaintiff throughout the litigation, with their materials explicitly and repeatedly [stating] that the plaintiff should have no credibility with the court because, among other allegations, she purposely misused her status as an ex-Mayor getting the RCMP to carry out her wishes. Mr. Karger's affidavits contained many statements attacking the credibility and the character of the plaintiff.
 7. Likewise, Mr. Summers provided affidavits in this proceeding containing content [that] were designed to attack the plaintiff personally, with no relevance to the matters in issue.
 8. Other witnesses for the defendants provided further affidavits containing personal attacks on the plaintiff which were completely irrelevant to the proceedings, and filed only to embarrass the plaintiff or silence her in her quest for justice. The irrelevant evidence was referred to by the defendants in their written submissions at the summary trial in this matter, in support of the defendants' proposition that the plaintiff had "her credibility already questioned in a very public way."
 9. Many of the affidavits filed by the defendants were not filed in support of any court hearing and most could not be challenged because the only witness called to support the defendants' case at trial was Mr. Summers.
 10. During Mr. Summers' cross-examination, he struggled with a number of his own sworn statements, including the fact that he was present during the tree-cutting, [the] fact that he saw the subject tree was endangering the Karger residence, and the fact that the plaintiff stood in close proximity to the tree fallers. While the court did not explicitly comment on Mr. Summers' testimony, it is clear that his prior sworn statements were at odds with his viva voce testimony and with the video footage which became evidence at the trial.
 11. When the court invited the parties to provide written submissions on 'mistake' and 'colour of right', the defendants continued to attack the credibility of the plaintiff.
 12. In addition to attempting to discredit the plaintiff, the defendants went further and stated in open court, affidavits and in written submissions that counsel for the [plaintiff] was also engaged in 'sharp practice', had 'breached her duty of an officer of the court' and mislead, engineered and blocked the efforts of the defendants. [Footnotes omitted, emphasis in original.]
- [20] The plaintiff argues that such conduct was reprehensible, that her health has deteriorated because of the counterclaim and the delay, and that the defendants' actions have saddled her with inordinately high legal expenses.

- [21] The defendants do not deny that at various times they and their previous counsel impugned the credibility of the plaintiff. A theme of personal attack on the plaintiff including claims of her "irrationality" was present throughout the litigation. Even in something as simple as the index to an application record the defendants made highly inappropriate assertions. The issue is, along with the other conduct mentioned, whether a special costs award should be awarded to rebuke such attacks on the plaintiff's credibility.
- [22] In addition, as noted by the plaintiff in her submissions above, previous counsel for the defendants misinterpreted events and made serious allegations against plaintiff's counsel both in the struck amended pleadings and in submissions that were unsupported, improper and contrary to the evidence. For example, on June 15, 2016 then counsel for the defendants sent a letter to Ms. Pagé with the heading "PROFESSIONAL COURTESY and DUTIES OF AN OFFICER OF THE COURT". In that letter, after commenting on how the applications of the plaintiff to strike the defendants' amended response and counterclaim were set down before Madam Justice Loo, counsel said this:

At the hearing you will recall that Madam Justice Loo wrongly was allowed by you to believe that the Defendants Amended Response and Amended Counterclaim filed August 4, 2015 were the only pleadings being put before her for her further consideration.

In my opinion you failed in your duty as an Officer of the Court to immediately correct this misapprehension by Madam Justice Loo.

You knew, but failed to draw to Madam Justice Loo's attention to the fact that the Defendants had already filed, on February 19, 2016 and served, significantly amended pleadings entitled Second Amended Pleadings. These are the same Second Amended Pleadings to which you referred in your Application.

Indeed, Affidavit #5 of Leah Miller, your paralegal, Leah Miller, confirms at p. 4, paragraph c, that Madam Justice Loo was completely focused on the wrong pleadings; namely, the Defendants pleadings filed August 5, 2015.

I attempted on several occasions to address Madam Justice Loo, who did not allow me to speak, as my documents and Application were not before the Court.

Your failure to correct this misapprehension by Madam Justice Loo, in my view, is a breach of the Code of Professional Conduct for BC which states:

2.1-2 To courts and tribunals

- (a) A lawyer's conduct should at all times be characterized by candour and fairness. The lawyer should maintain toward a court or tribunal a courteous and respectful attitude and insist on similar conduct on the part of clients, at the same time discharging professional duties to clients resolutely and with self-respecting independence.

- (c) A lawyer should not attempt to deceive a court or tribunal by offering false evidence or by misstating facts or law and should not, either [in] argument to the judge or in address to the jury, assert a personal belief in an accused's guilt or [innocence], in the justice or merits of the client's cause or in the evidence tendered before the court.

I retain the right to show this letter to the Court on June 22nd and explain how you took advantage of

- (a) preventing the Defendants' Application from being heard concurrently, and
- (b) allowing Madam Justice Loo to focus her attention on the August 5, 2015 Defendants' Amended pleadings which had been superseded by the Defendants' properly filed and served Second Amended pleading of February 19, 2016, which had substantially addressed your earlier objections to the August 5, 2014 pleadings.
- [23] Having reviewed the transcripts before Madam Justice Loo the allegations of former counsel respecting what occurred are incorrect. They so inaccurately relate the events before Loo J. it is difficult to accept they arose from misunderstanding but rather are a deliberate, unsubstantiated, and improper attack on opposing counsel. No competent counsel could come away from the hearing before Loo J. with the understanding reflected in this letter. Counsel for the plaintiff clearly addressed the court on her application respecting the first set of amended pleadings of the defendants and as well her second application respecting the second amended set of pleadings of the defendants. The factual recitation of counsel for the defendants in this letter is false. The court addressed both matters and both counsel were given the opportunity to address the court.
- [24] The defendants characterize the case as hard fought. Superficially that may have been the case, however hard fought does not mean fighting inappropriately. Mr. Justice Macintosh in *Basha Sales Co. v. Adera Equities Inc.*, 2017 BCSC 1715, said this:
- [11] The thorny question on this application is when does hard fighting in high stakes commercial litigation cross a line so as to incur the penalty of special costs? When does a party's prosecution or defence of a case go offside from a costs viewpoint? The cases tell us that such conduct can arise in any number of ways. The judge on the costs assessment must look at everything that happened, when it happened, and, if it is possible to know, why it happened. Generally speaking, so long as the losing party was only trying to legitimately advance a bona fide claim or defence, a vigorous prosecution or defence will not be penalized, and the losing side will pay costs at the ordinary scale. That must remain the case in costs awards as a matter of the long-standing policy in this country, whereby court access is encouraged by relatively low costs tariffs. Special costs must not be awarded too easily. If they were, bona fide claims or defences would be unduly discouraged. However, when the unsuccessful party pleads the case irresponsibly, or even recklessly, or takes steps highly prejudicial to the other side, when those steps appear to lack legal foundation, the consideration of special costs must arise.

- [25] As stated by Madam Justice Kirkpatrick, as she then was, in *Startup v. Blake*, 2001 BCSC 8 at para. 112, "[a] lawyer relies on his reputation for integrity" and therefore "[w]hen that reputation is falsely assailed, the court's reproof should be felt". In my view the conduct of the defendants and prior counsel was a highly improper attack on Ms. Pagé and the "court's reproof should be felt."
- [26] The defendants' attempted filing of a counterclaim of \$700,000 did not succeed nor was the evidentiary basis for it ever disclosed. Commendably, shortly after new counsel assumed conduct of the action the counterclaim was withdrawn.
- [27] While the defendants may have believed that they had a defence and a basis for the counterclaim, the manner in which they pursued their position was reckless and their wide-ranging attack on the plaintiff completely inappropriate. It is true that as a result of their amended pleadings being struck the defendants were denied the opportunity to pursue their counterclaim, however in my view despite such being a form of "punishment" (see *S A S Johal Enterprises Inc. v. 0899979 B.C. Ltd.*, 2016 BCSC 775 at para. 54), I am not satisfied that is a significant factor in this instance given the nature of the counterclaim and its apparent lack of merit.
- [28] This was not a complex matter. The defendants raised irrelevant material and allegations. The conduct of the defence by the defendants and their prior counsel turned a relatively simple lawsuit into a time consuming and complex matter. The defendants' applications were frequently misconceived, unsupported in law and should not have been brought. Cumulatively the behaviour of the defendants and their former counsel established a pattern of non-compliance with orders, a lack of cooperation with counsel on such matters as entry of orders and arranging discoveries and generally was conduct that increased the time and expense to the plaintiff in pursuit of her claim.
- [29] In stark contrast once present counsel was retained the matter proceeded to completion professionally, competently and in compliance with the Supreme Court Civil Rules, B.C. Reg. 168/2009.
- [30] As a result I am satisfied that the plaintiff is entitled to special costs of the action until new counsel was retained on January 24, 2017.
- [31] As indicated the defendants also submit that each party should bear their own costs after their offer to settle of August 29, 2017.

Offer to Settle

- [32] The defendants made three offers. The first was for \$25,000 and costs and was dated April 21, 2017, the second was dated June 22, 2017 and was for \$28,000 and costs. The third and final offer from the defendants was made on August 29, 2017, for \$35,000 plus costs. The only formal offer made by the plaintiff was for \$50,000 and was dated May 23, 2017.

- [33] None of the defendants' offers exceeded the judgment amount of \$35,150, however the offer made on August 29, 2017 was only \$150 less than the judgment amount. The defendants submit that since that offer was made before the parties incurred the expenses associated with trial preparation and trial it ought to have been accepted. They note the plaintiff did not respond to it. The defendants, while not providing an analysis of their position and authorities upon which they relied for their last offer, had done so regarding their offers on April 21 and June 22, 2017.
- [34] Rule 9-1(5)(a) states that the court may "deprive a party of any or all of the costs, including any or all of the disbursements, to which the party would otherwise be entitled in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle". Rule 9-1(6) then provides:
- (6) In making an order under subrule (5), the court may consider the following:
 - (a) whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or served or on any later date;
 - (b) the relationship between the terms of settlement offered and the final judgment of the court;
 - (c) the relative financial circumstances of the parties;
 - (d) any other factor the court considers appropriate.
- [35] In *Warren v. Morgan*, 2015 BCSC 1168, Madam Justice Russell addressed the application of Rule 9-1:
- [24] The dominant and overarching objective of Rule 9-1 is to promote reasonable settlements and to attach some consequences to the failure of a party to accept a reasonable settlement: *Brewster v. Li*, 2014 BCSC 463 at para. 15. Our Court of Appeal explained this further in *Catalyst Paper Corporation v. Companhia de Navegação Norsul*, 2009 BCCA 16 at para. 16, leave to appeal ref'd [2008] S.C.C.A. No. 454:
- [16] It seems to me that the trend of recent authorities is to the effect that the costs rules should be utilized to have a winnowing function in the litigation process. The costs rules require litigants to make careful assessments of the strength or lack thereof of their cases at commencement and throughout the course of litigation. The rules should discourage the continuance of doubtful cases or defences. This of course imposes burdens on counsel to carefully consider the strengths and weaknesses of particular fact situations. Such considerations should, among other things, encourage reasonable settlements.
- [25] There is broad discretion in costs in relation to formal offers to settle. The court may award a party costs even though that party earlier rejected a settlement offer that would have resulted in greater recovery than the award made at trial. On the other hand, the court may penalize a party who has rejected a reasonable settlement offer by an award of single or double costs against that party: *Minhas v. Sartor*, 2014 BCSC 47 at para. 23. The court's

discretion is exercised in accordance with the purposes of the Supreme Court Civil Rules and on consideration of the Rule 9-1(6) factors. I will now consider each factor.

Should the plaintiff have reasonably accepted the offers?

- [26] The assessment of whether an offer ought reasonably to have been accepted must be based on what was known while the offer was available, not with the benefit of hindsight after the judgment of the court: *Bailey v. Jang*, 2008 BCSC 1372 at para. 24; *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 27.
- [27] The reasonableness of an offer is to be assessed by considering such factors as "the timing of the offer, whether it had some relationship to the claim (as opposed to simply being a 'nuisance offer'), whether it could be easily evaluated, and whether some rationale for the offer was provided": *Hartshorne* at para. 27.
- [36] I turn to the application of Rule 9-1(6).

Should the plaintiff have reasonably accepted the offer?

- [37] The offer was made on August 29, 2017 and was open for three business days prior to the trial set for September 18, 2017 some three weeks later. The defendants provided one extra business day after learning the plaintiff could not be reached prior to the long weekend. As a result the plaintiff had limited time to consider the offer.
- [38] The rationale for the offer was provided with the defendants' earlier offers. A review of the authorities should have revealed that the offer was supportable.
- [39] However, the short time frame provided for acceptance was not reasonable. Given the history of the matter the plaintiff should have had additional time to consider the offer. The time limited nature of the offer failed to recognize the effects of the manner of the conduct of the litigation on the plaintiff and its lengthy history both of which favoured a reasonable time for her to consider the offer. This factor weighs in favour of the plaintiff: see *Dodge v. Shaw Cablesystems [SBC] Ltd.*, 2009 BCSC 1765 at para. 14.

What is the relationship between the terms of settlement offered and the final judgment of the court?

- [40] The offer to settle was \$150 less than the amount awarded.

What are the relative financial circumstances of the parties?

- [41] There is little known about the parties' respective financial circumstances. The plaintiff is a widow. She is retired. The defendant Mr. Karger is also retired and in poor health. While he was a developer there is no evidence regarding how successful he was, although there is evidence that in his retirement he travelled extensively including a safari in Africa. The lack of reliable evidence makes this a neutral factor.

Is there any other factor the court deems relevant?

- [42] The conduct of the defendants and previous counsel encompassed the greater part of the history of this action. That conduct has been addressed in the award of special costs. However, the prolonged and somewhat tortured history of the litigation as perpetuated by the defendants is still something that I keep in mind in addressing the defendants' offer to settle.
- [43] In my opinion the short time period provided to the plaintiff to consider the defendants' offer and the successful outcome of the litigation, given its history, favour the plaintiff recovering her costs from January 25, 2017 to completion of the trial at Scale B notwithstanding the closeness of the offer to the final award. The plaintiff will also have disbursements incurred throughout the course of this matter.
- [44] The plaintiff shall have her costs as well of this application.

Assessment of Costs

- [45] As noted the plaintiff concedes that a summary assessment of costs is not appropriate. As a result the costs, if not agreed upon, shall be assessed before the Registrar.

"R.D. Punnett, J."

The Honourable Mr. Justice Punnett

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