
CANADA / JUDGMENT

Gichuru v. Smith

2014 BCCA 414

COURT

British Columbia Court of Appeal

DECIDED

29 October 2014

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2014 BCCA 414 Gichuru v. Smith

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Gichuru v. Smith,

2014 BCCA 414

Date: 20141029

Docket: CA040987

Between:

Mokua Gichuru

Appellant

(Plaintiff)

And

Howard Smith and Howard Smith Personal Law Corporation

both doing business as "Howard Smith & Company"

Respondents

(Defendants)

Before:

The Honourable Mr. Justice Harris

The Honourable Madam Justice Stromberg-Stein

The Honourable Mr. Justice Goepel

On appeal from: Orders of the Supreme Court of British Columbia,
dated May 22, 2013 (Gichuru v. Smith, 2013 BCSC 895,
New Westminster Registry S123626) and dated September 10, 2013
(Gichuru v. Smith, 2013 BCSC 1818, New Westminster Registry S123626).

The Appellant appeared in person

Counsel for the Respondents:

R.S. Anderson, Q.C. & J.K. Yamashita

Place and Date of Hearing:

Vancouver, British Columbia

September 16, 2014

Written submissions from Appellant:

September 29 and October 20, 2014

Written submissions from Respondents:

October 2, 2014

Place and Date of Judgment:

Vancouver, British Columbia

October 29, 2014

Written Reasons by:

The Honourable Mr. Justice Harris and

The Honourable Mr. Justice Goepel

Concurred in by:

The Honourable Madam Justice Stromberg-Stein

Summary:

Mr. Gichuru commenced an action against his former employer for unjust dismissal and breach of fiduciary duty. Mr. Gichuru worked as an articulated student for Mr. Smith's law firm. The trial judge found just cause. She dismissed the breach of fiduciary duty claim. She summarily ordered lump-sum special costs against Mr. Gichuru.

Held: Appeal dismissed with respect to the employment issues. The judge's findings were supported by the evidence and her analysis of credibility. The findings were made in respect of factual issues that were properly before her and there was no unfairness in the trial or arising from the respondents' argument on appeal.

The special costs order is set aside on the ground that there was no evidence before the court permitting a summary assessment. The Court comments on, and rejects, the practice of assessment of special costs in the absence of evidence of legal fees incurred and rejects the so-called "rough and ready" method of assessing special costs.

Reasons for Judgment of the Honourable Mr. Justice Harris and the Honourable Mr. Justice Goepel:

Introduction

- [1] This appeal arises out of the dismissal of Mr. Gichuru's claim for unjust dismissal as an articulated student employed by Howard Smith Personal Law Corporation. The trial judge concluded that the employer had established just cause to terminate Mr. Gichuru's employment. She also rejected Mr. Gichuru's allegation that Mr. Smith, his effective principal, owed him fiduciary obligations.
- [2] The trial judge went on to summarily order lump sum special costs against Mr. Gichuru to rebuke him for recklessly pursuing allegations impugning Mr. Smith's conduct and to avoid an unnecessary but likely protracted hearing before the registrar.
- [3] For the reasons that follow, we would not accede to the appeal as it relates to the employment issues and the award of special costs. We would, however, set aside the assessment of special costs and, unless the parties can otherwise agree as to the amount, refer the assessment of costs to the registrar.

Background

- [4] The reasons for judgment are lengthy and contain a detailed analysis of the evidence as well as comprehensive findings of fact. We propose to set out only sufficient background to set the issues on appeal in an appropriate context.
- [5] One of the issues at trial was whether the employment contract was entered into by Mr. Smith personally or by his professional corporation. The judge concluded the contract was between Mr. Gichuru and the corporation, and not Mr. Smith personally. Although, Mr. Gichuru alleges on appeal that this conclusion is in error, as a practical matter, nothing turns on who the employer was. The respondents have given assurances both at trial and in this Court that if there is liability, the judgment will be paid regardless of who is liable. Accordingly, we have concluded that it is not necessary to address this issue. Throughout these reasons we will, for convenience, refer interchangeably to Mr. Smith or Howard Smith & Company without intending to detract from the judge's conclusion about the parties to the

contract.

- [6] In early 2002, Mr. Gichuru, who had graduated from law school the previous year, was looking for articles. He sent a letter to Howard Smith & Company inquiring about articles in late January 2002. He was offered and accepted an articling position with the firm. He began working at Howard Smith & Company in early February 2002 as a legal assistant because the Law Society had not yet approved his articles.
- [7] In early March 2002, when his articles were approved, he began to work at the law firm as an articulated student. Effectively, although not officially, Mr. Smith acted as his principal. Mr. Gichuru worked under Mr. Smith's direction and supervision.
- [8] The trial judge characterized the employment relationship at para. 164. She said:
- [164] Mr. Gichuru was hired to work at HS&C as an articulated student. He was not hired in some other capacity, although Mr. Smith agreed that Mr. Gichuru could begin work in February 2002, even though Mr. Gichuru's application for admission to the articling program had not yet been approved. Both sides refer to the Articles Agreement and the employment agreement as separate agreements, and they are. However, Mr. Gichuru's obligations as an articulated student overlap his obligations as an employee. Whatever work he was doing as an articulated student, he was also doing as an employee of the firm. For example, as an articulated student, Mr. Gichuru was obligated "to observe strictly all confidences of the principal or of others in the principal's firm." He owed the same obligation in his capacity as an employee in HS&C. This is a necessary aspect of accepting a position in a law firm. As an articulated student, Mr. Gichuru was obligated to accept assignments, direction and supervision from Mr. Smith. When Mr. Smith decided that he wanted Mr. Gichuru to do work for other lawyers in the office, Mr. Gichuru was obliged to accept and do those assignments, in addition to whatever he was doing specifically for Mr. Smith. Mr. Gichuru's obligations as an employee were the same.
- [9] The trial judge made certain critical findings of fact that underlay her conclusion that Mr. Gichuru was in breach of his employment contract:
- [166] I find that Mr. Gichuru was insubordinate. He did not accept that Mr. Smith had the right to determine how HS&C and the business of the firm were to be conducted. When Mr. Smith told Mr. Gichuru what he expected in terms of Mr. Gichuru's availability to do the work Mr. Gichuru was hired to do, Mr. Gichuru rejected it as unreasonable and unfeasible and expected Mr. Smith to justify what he was asking Mr. Gichuru to do before Mr. Gichuru would do as instructed. But it was not for Mr. Smith to justify work terms to Mr. Gichuru.
- [167] I find that Mr. Gichuru was in fact given work assignments by Mr. Murphy, that the assignments were appropriate assignments for an articulated student at HS&C but that, instead of completing the assignments, he argued with Mr. Murphy and expected Mr. Murphy to justify the work before Mr. Gichuru would take it on. I reject Mr. Gichuru's evidence that he did not receive work from Mr. Murphy and that it is "absolutely false" that he refused to do

work for Mr. Murphy. I also find that Mr. Gichuru was given work by Ms. Barkwell-Blake and that he did not do what he had been asked by her to do.

- [168] I find that these issues were brought to Mr. Gichuru's attention at Mr. Gichuru's meeting with Mr. Smith on April 18, 2002. At that meeting, Mr. Smith again raised his own difficulties concerning Mr. Gichuru's availability and told Mr. Gichuru what Mr. Smith expected. When Mr. Smith stated his concerns and expectations for Mr. Gichuru, Mr. Gichuru's response (by, on his own evidence, indicating that he was only five minutes away and could not see what the problem was) was to deny there was a problem and require his boss to justify why things had to be the way Mr. Smith wanted, as opposed to the way that Mr. Gichuru wanted.
- [169] I conclude that Mr. Gichuru is probably mistaken about the further discussions about "lunch" he relates he had with Mr. Smith at the end of the week of April 22, 2002. He did not put this evidence to Mr. Smith during Mr. Smith's cross-examination, and I think it more likely that these were among the matters canvassed during the meeting on April 18, 2002. There was nothing in Mr. Smith's evidence to suggest that, after the Abbotsford courthouse incident he had a change of heart concerning Mr. Gichuru.
- [170] I find that, by the end of the meeting on April 18: Mr. Gichuru had been informed by Mr. Smith about what Mr. Smith expected; he had been warned by Mr. Smith that his conduct was unacceptable; and he recognized that his continued employment at HS&C was in jeopardy unless he changed. Based on Mr. Gichuru's own evidence, the April 18 meeting was a "big deal," and concerned him to the extent that he took the step of documenting what had happened. I also accept Ms. Enair's evidence that Mr. Gichuru contacted the Law Society around this time and spoke to her. However, as his "no-names" discussion with Ms. Enair confirms, Mr. Gichuru was not prepared to change. His view remained that what Mr. Smith required was unreasonable and unacceptable to him.
- [171] Although I conclude that Mr. Gichuru is most probably mistaken about the date, and that this discussion probably also occurred at the April 18 meeting, based on Mr. Gichuru's evidence regarding a further discussion about "lunch" with Mr. Smith while they were in Abbotsford, Mr. Gichuru in essence communicated to Mr. Smith that Mr. Smith's way of running his firm was unacceptable to Mr. Gichuru and he was not staying. Mr. Gichuru said he felt relieved.
- [172] I have also concluded that an incident probably occurred at the Abbotsford courthouse where Mr. Gichuru spoke disrespectfully in a loud voice to Mr. Smith. The event itself is not something a person in Mr. Smith's position is likely to forget, even though some details have faded from memory after ten years. Ms. Barkwell-Blake's evidence on cross-examination supports Mr. Smith's evidence that an incident occurred. I conclude that Mr. Gichuru is mistaken in his recollection of events at the Abbotsford courthouse on April 22 and 23, 2002.

- [173] Despite having been warned at the April 18 meeting that his conduct was unacceptable, apart from April 19 (when he stayed at the office, "feeling miserable"), I find that Mr. Gichuru did not alter his behaviour. Mr. Gichuru does not dispute this. When Mr. Smith again attempted to reach Mr. Gichuru over lunchtime, he could not. Although it was a very serious step, I find that, at that point, Mr. Smith was justified in terminating Mr. Gichuru's employment. In my view, Mr. Gichuru had demonstrated quite clearly by his conduct that he found the working conditions Mr. Smith set for him to be unacceptable and that he would not accept them. I conclude that Mr. Gichuru's behaviour was such that the employment relationship could no longer viably subsist.
- [10] In light of her conclusion on just cause, the trial judge did not proceed to analyze issues connected to notice, damages or consequential damages.
- [11] The trial judge did, however, reject Mr. Gichuru's allegation that Mr. Smith owed him a fiduciary duty arising out of Mr. Smith's status as his effective principal. The nub of her reasoning follows:
- [180] Ad hoc fiduciary relationships must be established on a case-by-case basis. Vulnerability alone is insufficient to support a claim that a fiduciary duty is owed. The party asserting the duty must be able to point to a forsaking by the alleged fiduciary of the interests of all others in favour of those of the beneficiary, in relation to the specific legal interest at stake. For an ad hoc fiduciary duty to arise, the claimant must show, in addition to the vulnerability arising from the relationship (as described by Wilson J. (dissenting) in *Frame v. Smith*, [1987] 2 S.C.R. 99): (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control. See *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261, at paras. 28, 31, 33 and 36.
- [181] The relationship between an articulated student and his or her principal is not a per se fiduciary relationship. Mr. Gichuru acknowledges that, to succeed on this aspect of his claim, he must make out the elements of an ad hoc fiduciary relationship.
- [182] Neither side has been able to locate any cases where a principal has been found to be in a fiduciary relationship with the principal's articulated student in relation to the student's articles. I do not find that at all surprising. This is because a lawyer's primary duty is to the lawyer's clients, to whom, and without any doubt, the lawyer owes fiduciary obligations. The idea that, by taking on an articulated student, a lawyer gives an undertaking (either express or implied) to act in the articulated student's best interests, is incompatible with the lawyer's existing fiduciary obligations to the lawyer's clients. To paraphrase McLachlin C.J. at para. 44 in *Alberta v. Elder Advocates*, imposing such a burden on a lawyer is inherently at odds with the lawyer's duty to act in the best interests of the lawyer's clients. [Emphasis in original.]

- [183] I find that Mr. Smith did not in fact give Mr. Gichuru any undertaking to act in Mr. Gichuru's best interests, nor could he. The clients' interests came first. This is sufficient to dispose of Mr. Gichuru's breach of fiduciary duty claim, because, on the facts, Mr. Gichuru is unable to establish an essential element of the relationship; it does not exist. Moreover, Mr. Smith did not in fact control whether or not Mr. Gichuru completed articles and was called to the bar. Mr. Gichuru himself had the ability to terminate the relationship and reassign his articles to any other lawyer qualified to act as a principal. Mr. Gichuru was never "vulnerable," in the sense required to establish an ad hoc fiduciary relationship, to Mr. Smith's control.
- [184] Of course, a lawyer acting as principal to an articulated student has important responsibilities to the student, and also has important responsibilities to the Law Society. But the principal's responsibilities and obligations to the student are not fiduciary obligations, nor is the lawyer in a fiduciary relationship with the student.

On Appeal

- [12] Mr. Gichuru accepts that the trial judge relied on the correct legal test to determine when an employer has just cause to dismiss an employee. Reduced to its essentials, just cause exists where the employee's conduct, in breach of the employment contract, is such that the employment relationship can no longer viably exist: see *McKinley v. BC Tel*, 2001 SCC 38 at para. 29. The employer bears the burden of proving just cause. Moreover, Mr. Gichuru concedes that the facts found by the trial judge support the finding of just cause. His contention on appeal is that the trial judge erred in her findings of fact. In substance, he argues that the trial judge made palpable and overriding errors in reaching her findings of fact.
- [13] As we understand it, Mr. Gichuru's argument about palpable and overriding error focuses on two principal contentions. First, he argues that the trial judge's conclusion that just cause existed depended critically on her finding that he was not available at lunchtime on April 26 and 29, 2002, when Mr. Smith said he had tried to contact him. He argues that there was no evidence that he was not available at those times and, accordingly, the judge's findings were made in the absence of any evidence. Second, he attacks the trial judge's finding that he was in breach of his employment contract before April 18, 2002, when he had lunch with Mr. Smith to discuss issues and concerns about his employment at the firm. These findings and the findings about the events at the Abbotsford courthouse on April 22, 2002, set out above, he contends, were based on palpable and overriding errors in the trial judge's assessment of credibility.
- [14] We are, with respect, unable to discern any merit in these submissions. The trial judge recognized the importance of credibility to the facts she was required to find in deciding the case. She noted at para. 132 that "the degree and frequency of the conflicts between Mr. Gichuru's evidence, on the one hand, and the evidence of other witnesses who worked at HS&C, on the other, is striking". She gave examples of conflicts in the evidence relating to a number of important issues in the trial. She explained how she intended to assess

credibility, relying on seminal authority in this province: see paras. 129 and 130. The trial judge considered the arguments the parties advanced to justify their views of what credibility conclusions the judge should reach. She analyzed credibility issues both from a general perspective and, importantly, in relation to specific factual questions, such as: whether Mr. Gichuru was asked to do work that he did not do, or do adequately; what occurred at the lunch meeting on April 18, 2002; and whether he was subsequently available by telephone to Mr. Smith in late April 2002.

- [15] The trial judge did not find Mr. Gichuru's evidence on a catalogue of important matters to be reliable unless it was independently supported. She preferred the evidence of other witnesses to Mr. Gichuru's where the evidence conflicted. She gave detailed reasons explaining her credibility findings and how they related to her findings of fact. In undertaking that analysis, it is evident that the trial judge properly applied the burden of proof. We see no merit in Mr. Gichuru's criticism of the trial judge's assessment of credibility. The analysis was undertaken carefully with painstaking attention to detail and to a consideration of the submissions on credibility advanced by both parties, but particularly by Mr. Gichuru. Mr. Gichuru has not demonstrated any error in principle in the way in which the trial judge assessed credibility. To the contrary, his argument on appeal does not rise above an attempt to reargue his case and suggest that the trial judge, in reaching her conclusions on credibility, should have weighed matters differently.
- [16] In our view, a review of the evidence at trial demonstrates that there was ample evidence supporting each of the findings of fact made by the trial judge. By way of example, Mr. Gichuru contested the trial judge's finding that Mr. Murphy had asked him to do work that he did not do. But that was exactly what Mr. Murphy said had occurred. In short, Mr. Murphy had attempted unsuccessfully to enlist Mr. Gichuru's assistance on a number of personal injury files, but found the experience so frustrating that he gave up and did the work himself. The trial judge was entitled to find the facts as she did, having seen the witnesses and assessed their evidence against the probabilities and the relevant circumstances.
- [17] Similarly, we are satisfied that the trial judge's finding that Mr. Gichuru was unavailable to Mr. Smith when he attempted to call him on April 26 and 29, contrary to instructions he had received, is supported by the evidence. Mr. Gichuru testified that he was always available to be contacted at lunchtime by telephone and that if he did not answer his cell phone, it would have been because he was in court or driving to court. He testified that he never missed a call. Specifically, he disputed that he might have missed calls when he went home for lunch and was listening to music. He said he was no more likely to miss a call in his apartment than in the office.
- [18] On cross-examination, it was suggested to Mr. Gichuru that he had missed a call from Mr. Smith on April 30 at lunchtime (this suggestion was consistent with some evidence Mr. Smith had previously given at a Human Rights Tribunal hearing). Mr. Gichuru explained that he had attended court in Maple Ridge at 1:30 p.m. that day and that he would have left for Maple Ridge at about 12:30 p.m. He would have turned his phone off while he was driving.

He was also asked whether he had missed calls from Mr. Smith in the morning and evening of April 29. This evidence needs to be set in context. Mr. Gichuru was being cross-examined on cell phone records. It is apparent from a review of the transcript that the initial premise of the cross-examination was that the cell phone records disclosed calls made to Mr. Gichuru's phone. As the evidence developed, it became clearer that the calls reflected Mr. Gichuru phoning to retrieve voicemail messages that had been left earlier. Accepting that, the cell phone records disclosed Mr. Gichuru phoning his voicemail first thing on the morning of April 29, which was a Monday, and then phoning his voicemail again in the evening of April 29 to pick up a message left earlier in the day. Mr. Gichuru testified that, on those occasions, a caller who had gone to voicemail had not left a message.

- [19] Mr. Smith was clear that he had attempted unsuccessfully to reach Mr. Gichuru at lunchtime on April 26 and April 29, 2002. He explained how he had been able to identify those particular days and why he had been mistaken in his evidence before the Human Rights Tribunal in identifying April 30 as the date when he attempted to contact Mr. Gichuru. Mr. Smith explained the sequence of events that had triggered him dictating his termination letter on April 26, but then holding it over the weekend. He had refreshed his memory from notes of a call that he had made to the Law Society on April 26 advising that he would be terminating Mr. Gichuru. He also referred to some records that he had located during trial that showed Mr. Gichuru's expenses for attending court in late April. Those records did not disclose any claim for expenses on April 26 or April 29, although they did do so for April 30 when Mr. Gichuru attended court in Maple Ridge.
- [20] Mr. Smith testified that at lunchtime on April 26 he had called Mr. Gichuru's cell phone and not received an answer. The call went to voicemail, but he did not leave a message. He then checked with his office to determine if Mr. Gichuru's whereabouts were known and was advised that he had left the office. That was the last straw and Mr. Smith dictated a termination letter over the phone, but decided to leave it over the weekend. At lunchtime on April 29, he called again, principally to check whether Mr. Gichuru would answer the phone. He did not. Once again the call went to voicemail but Mr. Smith did not leave a message. Mr. Smith's evidence that the call went to voicemail but he did not leave messages on April 26 (a Friday) and April 29 is consistent with Mr. Gichuru's cell phone records disclosing Mr. Gichuru's call to pick up messages on the morning and evening of April 29.
- [21] Mr. Gichuru cross-examined Mr. Smith on his evidence that he had called at lunchtime on both April 26 and April 29. Mr. Smith confirmed his evidence.
- [22] Mr. Gichuru gave rebuttal evidence arising from the records of his expenses that had been disclosed after he had given evidence in his case. He did not give any evidence in rebuttal explaining whether he was available to receive calls at lunchtime on April 26 and 29, 2002.
- [23] In our view, it is clear that there was evidence before the trial judge from which she could draw the conclusion not only that Mr. Smith had attempted to reach Mr. Gichuru by cell phone at lunchtime on those days but also that Mr. Gichuru had not been available to take

the calls as he should have been. It is, respectfully, a complete misapprehension of the state of the evidence to suggest, as Mr. Gichuru does, that there was no evidence before the court to support a finding of fact that he was not available, or failed, to take calls from Mr. Smith at the time he was required to receive them. Mr. Gichuru has not demonstrated any palpable or overriding error in the findings of fact made by the trial judge.

- [24] It is, of course, trite law that this Court owes deference to findings of fact made by a trial judge if they are supported by the evidence. Assessing credibility and finding facts based on that assessment are peculiarly the province of the trial judge. In this case, Mr. Gichuru's argument fails to demonstrate any legal error made by the trial judge in the assessment of the evidence and credibility. On this aspect of the appeal, Mr. Gichuru simply attempts to reargue his case at trial. He invites us to reweigh the evidence - something we should not do. We would not accede to Mr. Gichuru's contention that the trial judge committed palpable and overriding errors in reaching her findings of fact.
- [25] Mr. Gichuru goes further than suggesting that the trial judge made findings of fact in the absence of evidence that established just cause. He submits that it was improper for the judge to make those findings because he did not have proper notice by way of the pleadings or other notice that he was alleged not to have been available on those particular days.
- [26] Mr. Gichuru contends that he understood that the allegation he faced was that he had not been available to receive a call at lunchtime on April 30, 2002. He based that understanding on evidence that Mr. Smith had given earlier at a Human Rights Tribunal hearing explaining what had precipitated his decision to terminate Mr. Gichuru's employment. Further, there was no specific pleading that he had not been available on April 26 and 29, 2002, and at the beginning of his evidence, he had requested that any alleged facts relied on to justify termination be put to him in his evidence so that he would have an opportunity to respond to them. He argues that it was not suggested to him in his cross-examination that he had been unavailable on those dates. Accordingly, the judge erred in making findings of fact about those dates, since the issue was not properly joined between the parties.
- [27] We do not find Mr. Gichuru's argument persuasive.
- [28] In his Notice of Civil Claim, Mr. Gichuru alleged that he had been wrongfully dismissed on April 30, 2002. In the Response to Civil Claim, amongst other alleged breaches of the contract of employment, the defendants alleged that Mr. Gichuru had breached express terms of the contract of employment, including his obligation to "obey the reasonable and lawful directions" of Mr. Smith. They pleaded:

Often, the only time in a work day available for the Defendant Smith and the Plaintiff to communicate was over the lunch hour because of the Defendant Smith's busy court schedule, and for this reason, the Plaintiff was specifically requested to be capable of telephone contact over that time. Notwithstanding repeated requests and admonitions that the Plaintiff make himself available over the lunch hour, the Plaintiff refused to be available over this time period and accordingly compromised his use to the Defendant Smith because of strategic

communication breakdown caused by his absence

[29] The defendants go on to plead that Mr. Gichuru was warned of this breach of his employment contract and that if the breach was not remedied, he would be dismissed. They then pleaded:

On a third occasion, the Plaintiff again neglected to answer his mobile phone, at a time that he was required on a pressing matter. On account of failed efforts by the Defendant Smith and support staff to contact the Plaintiff on this day, and due to the Plaintiff[s] failure to accede to the Defendant Smith's repeated warnings, a notice of dismissal was forwarded to the Plaintiff on account of his breach of the employment contract.

[30] There is no issue that the "third occasion" referred to in the pleading is an alleged event occurring after the lunch meeting on April 18, 2002. It is, accordingly, clear that the defendants were relying as justification of just cause on Mr. Gichuru's failure to be available by telephone on a day between April 18 and April 30, 2002, when the termination letter was provided to the appellant.

[31] The pleadings, therefore, raise the factual issue of whether Mr. Gichuru had been unavailable by phone immediately prior to his dismissal and it was, as a pleadings matter, entirely proper for the trial judge to make findings of fact in relation to it. It may have been open to Mr. Gichuru to request particulars of the specific date or dates on which it was alleged that he had not been available by telephone. It does not appear that was done. Regardless, the pleading as it stands is sufficient to raise properly the issue for the purposes of trial.

[32] In our view, Mr. Gichuru places inappropriate weight on the fact that Mr. Smith had testified earlier at a Human Rights Tribunal hearing that what had precipitated his decision to terminate Mr. Gichuru's employment was his inability to reach Mr. Gichuru by phone on April 30, 2002. That evidence was given in a hearing dealing with different issues and it is difficult to see that the date on which Mr. Smith had attempted to contact Mr. Gichuru was relevant to the issues in that hearing. In any event, Mr. Gichuru was not entitled to rely on that evidence of the specific date as if it were a pleading, or particulars of pleadings, that formally defined the issues between the parties for the purposes of trial. The specific date was not, in that sense, a formal allegation of material fact. The gravamen of the formal allegation is that after being warned that he had to be available to Mr. Smith at certain times, within very short order, he disobeyed the instructions he had received. The specific time he was unavailable is less significant, although, of course, as a matter of trial fairness, Mr. Gichuru was entitled to know when it was said he was unavailable and to have the opportunity to address that issue in his evidence. In our view, he did receive that opportunity.

- [33] At trial, as has already been alluded to, Mr. Smith explained not only that he was mistaken in saying that he had tried to call Mr. Gichuru on April 30, but he also explained how he had reconstructed the timeline using documents that he had not consulted before giving evidence at the Human Rights Tribunal. Unfortunately, some of those documents had been located during the course of the trial, after Mr. Gichuru had testified.
- [34] We have already canvassed the scope of Mr. Gichuru's evidence, both in direct and on cross-examination. There was clearly some confusion as the evidence unfolded about what the cell phone records disclosed about calls made to his phone. As discussed, it appears the evidence eventually established that Mr. Gichuru had called for messages in the morning and evening of April 29, and it was suggested in cross-examination that Mr. Gichuru had been unavailable on April 29, although it was not put to him that he had failed to answer a call from Mr. Smith at lunchtime.
- [35] Mr. Gichuru, it will be recalled, gave evidence that he did not miss calls and that if he had been phoned, he would have answered the call, unless he was in court or driving. He was cross-examined generally about his availability to take calls and whether he might have missed some, but he was not confronted with the specific allegation that he had been unavailable to receive cell phone calls on April 26 or lunchtime April 29, 2002.
- [36] As already noted, when Mr. Smith gave his evidence, he pinpointed those dates as the dates he had attempted to contact Mr. Gichuru and explained how it was that he was now able to identify those as the specific dates. Mr. Gichuru was, by then, well aware of when it was said he had not been available to Mr. Smith. Mr. Gichuru cross-examined Mr. Smith on this evidence but did not receive answers that assisted his case.
- [37] Mr. Gichuru then had the opportunity to give rebuttal evidence. Indeed, he did give rebuttal evidence related to the document that showed the expenses he claimed for driving to court at the end of April. This was one document that Mr. Smith had relied on to refresh his memory of the dates on which he attempted to call Mr. Gichuru but it was not the only one. Mr. Smith also refreshed his memory by referring to a Law Society document that recorded his April 26 call to the Law Society in which he explained that he would likely be terminating Mr. Gichuru's employment and the reasons why. This document is clear evidence that corroborates Mr. Smith's evidence that he failed to reach Mr. Gichuru on April 26. More importantly, for current purposes, the document was available before trial and should have alerted Mr. Gichuru to the fact that there was evidence that he had been called on that date. Nonetheless, Mr. Gichuru did not give, or attempt to give, any evidence in rebuttal to explain why he would not have been able to receive telephone calls at lunchtime on April 26 or 29, if Mr. Smith had tried to reach him.
- [38] In all of these circumstances, we do not think there was anything improper or unfair in the trial judge accepting that Mr. Smith had tried unsuccessfully to contact Mr. Gichuru on those dates and that Mr. Gichuru had been unavailable to receive those calls, without a reasonable excuse. By the time Mr. Smith had given his evidence about these calls and been cross-

examined on them by Mr. Gichuru, Mr. Gichuru must have recognized what amounts to a very minor shift in the case. That shift amounted to little more than that Mr. Smith had tried to contact Mr. Gichuru on two days after the April 18, 2002, lunch meeting and that one of those days was April 29 rather than April 30, 2002.

- [39] What happened here is the kind of situation that arises regularly in trials. A witness corrects mistaken evidence during trial. The opposing party has the opportunity to address the issue but, as in this case, does not do so. In our opinion, it is not open to him now to say that the trial was unfair or that the trial judge had no proper basis on which to make findings of fact about April 26 and April 29, 2002.
- [40] We turn now to two further arguments advanced by Mr. Gichuru concerning the finding of just cause. First, Mr. Gichuru, in his factum at least, misinterprets the relationship between the trial judge's findings of fact and her conclusion that his employer had just cause to terminate his employment. Mr. Gichuru argues that the finding of just cause was based on his unavailability on April 26 and 29, 2002.
- [41] The trial judge's statement that Mr. Smith had just cause to terminate Mr. Gichuru's employment at that point has to be read in a wider context. The trial judge had found that Mr. Gichuru was in breach of his employment contract before the lunch meeting on April 18, 2002. At that lunch meeting, Mr. Gichuru was warned that unless his conduct changed, his employment was in jeopardy. The trial judge concluded that the events after that April 18 meeting were, in effect, culminating events demonstrating that Mr. Gichuru would not alter his behaviour and that, as a result, just cause existed to terminate his employment.
- [42] Second, Mr. Gichuru alleges one specific legal error in the trial judge's contractual analysis. He contends that the law does not permit an employer to rely on reasons for termination that were not provided to an employee at the time of termination, unless the employer learned of the relevant facts subsequent to the termination.
- [43] In our view, it is unnecessary to comment on whether this view of the law has any merit. This is so because the alleged legal principle does not arise on the facts of this case. Mr. Gichuru relies on the wording of the letter that he received on April 30, 2002, terminating his employment. In relation to the reasons for termination, that letter simply said:

I should also add, to be fair to you, that your attitude is not pleasing and the idea of what would constitute your work hours is also not pleasing.

I will report to the Law Society. I do not intend to report that there is anything unsatisfactory [about] your work ability.

I am sorry that this happened, but cannot be convinced that your continued Articles in my law firm will be a benefit to us.

- [44] The reality is, as the trial judge found, that Mr. Gichuru was well-informed, before he was terminated, of the concerns his employer had about his performance and attitude. He could have been in no doubt about why his articles were terminated and the defendants did not rely on reasons to justify cause not known to Mr. Gichuru. More specifically, Mr. Smith had spoken to Mr. Gichuru about his availability as early as March 2002. The lunch meeting on April 18, 2002, canvassed the critical problems. Mr. Gichuru called the Law Society on April 18 and discussed the reasons why his employment was at risk. The trial judge found that a serious incident had occurred on April 22 at the Abbotsford courthouse and that Mr. Gichuru knew that Mr. Smith took a very serious view of what had occurred then.
- [45] We turn finally to the suggestion that the trial judge erred in finding that Mr. Smith, as effective principal, did not owe fiduciary duties to his articulated student, Mr. Gichuru. The trial judge assessed the case against the well-known test for finding that an ad hoc fiduciary duty exists, which requires:
- (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.
- [46] The trial judge found that Mr. Smith did not give an undertaking to act in Mr. Gichuru's best interests, nor could he have, because to have done so would be incompatible and in conflict with Mr. Smith's fundamental fiduciary duties that he owed to his clients. Moreover, she also concluded that Mr. Gichuru was not in the requisite sense "vulnerable" to Mr. Smith's control. Mr. Gichuru contends these conclusions are in error. First, he says, the alleged duty is not incompatible or in necessary conflict with the acknowledged fiduciary duties owed to clients. The two duties can jointly co-exist without contradiction. Secondly, he argues that he was "vulnerable" and that vulnerability was not dissipated because he could seek articles elsewhere. By way of example, he drew our attention to the fact that a lawyer's client can terminate a retainer and seek other representation without that undermining the existence of a fiduciary duty. In the result, Mr. Gichuru asks for an order remitting the matter of the existence of a fiduciary duty and any alleged breaches back to trial.
- [47] We note that the trial judge found as a fact that Mr. Smith had not given an undertaking to act in Mr. Gichuru's best interests. Certainly, Mr. Smith took on obligations to Mr. Gichuru both in his capacity as an employer (through his law corporation) and as Mr. Gichuru's effective articling principal. But taking on those obligations does not imply that in doing so he was undertaking to act in Mr. Gichuru's best interests in the sense necessary to create a fiduciary duty. The trial judge's analysis that Mr. Smith could not give such an undertaking without creating a necessary conflict with his primary fiduciary duties owed to clients may very well be entirely correct, but it is not necessary to decide the question for the purposes of deciding this appeal. The trial judge's finding as a fact that Mr. Smith gave no such undertaking in the circumstances of this case is sufficient to dispose of the claim. No basis

has been demonstrated to undermine her finding of fact. Accordingly, we would not accede to this ground of appeal.

- [48] We turn finally to two matters that have arisen since the hearing of the appeal. On September 29, 2014, Mr. Gichuru wrote to the Court Registry. In his letter, he raised a number of matters. First, he requested that the Division recuse itself on the ground that a reasonable apprehension of bias arose from the conduct of the hearing. Second, he asserted that the respondents had raised new arguments on the appeal relating to the April 26 and 29, 2002, calls. He said that those arguments caught him by surprise and that he did not have sufficient time in reply (which he timed at four minutes) to respond to them. He requested that the Division not consider those arguments or, alternatively, that he be given an opportunity at a further oral hearing to respond to them or, failing that, that he be permitted to provide written submissions. Finally, Mr. Gichuru argued that the suggestion advanced by the respondents that this Court award party and party costs on a summary basis, if we were not inclined to uphold the order awarding special costs, was also a new argument to which he ought to be permitted to respond in a brief written submission.
- [49] Through the Registry, we informed Mr. Gichuru that the Division would not recuse itself and that we would not receive any further submissions except a brief written submission dealing with the costs issue.
- [50] Turning to the issue of a reasonable apprehension of bias. The issue arose because each member of the Court strongly encouraged Mr. Gichuru to move off his argument that the trial judge erred in finding that his employment contract was with the law corporation and not Mr. Smith personally. Mr. Gichuru says he was prevented from making his argument and that a reasonable and informed observer, viewing the matter realistically and practically, would conclude that he did not receive a fair hearing by an impartial court.
- [51] There is no merit in this submission. Mr. Gichuru was encouraged or directed to move on to other aspects of his appeal because the issue he was addressing was of no practical significance to the outcome of the appeal. The respondents had committed on the record to pay a judgment, if there was liability, regardless of which defendant was liable. Spending time on who was the party to the contract wasted the time available to Mr. Gichuru to advance his argument that the trial judge had erred in her finding that his employment had been terminated for cause. A reasonable and informed observer would conclude that the Division was assisting Mr. Gichuru by directing him to focus on issues that might materially affect the practical outcome of the appeal to his benefit and not detriment.
- [52] Turning to the new argument issue. Mr. Gichuru argued in his factum that the trial judge made findings of fact about the phone calls on April 26 and 29, 2002, in breach of principles of natural justice because the respondents had not put those alleged facts to him in cross-examination. The substantive issues on this matter have been canvassed above. He submits, however, that the respondents did not respond to this argument in their factum and that their response to it in oral submissions was a new argument of which he did not have notice.

- [53] Mr. Gichuru is correct in saying that the respondents did not directly respond to the specific paragraphs in his factum raising this ground of appeal, but they did take the position in their factum that the issue of just cause was properly pleaded and was before the court. They also submitted that the finding of just cause rested on multiple and cumulative reasons and that the findings of fact made by the trial judge were supported by the evidence. The evidence in support of that argument, including the evidence bearing on the April 26 and 29 phone calls, was referenced in the respondents' factum. They also devoted pages of their factum to correcting factual statements made by Mr. Gichuru in his factum. Specifically, the factum references the cross-examination of Mr. Gichuru on Mr. Smith's attempts to call him after April 18, 2002, and Mr. Smith's attempt to call him on April 26 and 29. In substance, the factum does contest the factual basis of Mr. Gichuru's argument.
- [54] In our view, in their oral submissions, the respondents elaborated properly on their factum and responded appropriately to Mr. Gichuru's oral submissions. In their oral submissions, the respondents did not raise new points of law, rely on any authorities not already before the Court, or take the Court in any material way to evidence not already referred to in the factum. It must be remembered that Mr. Gichuru carried the burden of establishing that the record demonstrated facts capable of supporting his argument. The respondents' oral submissions highlighted for the Court how the evidence unfolded at trial. In substance, their submission consisted of explaining the record. In doing so, they relied almost exclusively on references to the record included in their factum. In our view, this was entirely proper. In considering the merits of Mr. Gichuru's argument, the Court was entitled to know, for example, that Mr. Gichuru had cross-examined Mr. Smith on those particular phone calls and had not availed himself of an opportunity to give evidence about them in reply. For the purposes of the appeal, Mr. Gichuru ought to have anticipated the relevance of these matters and been prepared to deal with them. An appellant does not acquire a right to submit further submissions in reply by not thinking about obvious objections to the argument he or she is advancing or by being unprepared to deal with matters in the record relevant to the ground of appeal being advanced.
- [55] Mr. Gichuru complains also that he had, he contends, only four minutes in reply and that he was deprived of a fair opportunity to respond. The court record suggests that Mr. Gichuru spent nearly 10 minutes in reply. Mr. Gichuru received the entire morning to make his argument. He also had time for reply. Mr. Gichuru was given significantly more than half of the time available to the court for oral submissions. Mr. Anderson reluctantly acquiesced in that allocation of time, although he stated a preference for a more equal allocation, given that he anticipated, quite accurately, that he would need to spend time referring in detail to the evidence. Mr. Gichuru chose to use the time he was allocated in the way that he saw fit. In our view, Mr. Gichuru had ample time to deal with these issues either in his principal submissions or in reply to explain his position.

- [56] In our view, there was nothing unfair in the hearing of the appeal. We see no basis on which we should have agreed to refuse to consider whether the trial judge breached a principle of natural justice in making certain findings or to receive additional oral or written submissions on the matter.

Costs

- [57] Following delivery of the trial reasons, the parties made submissions on costs. The trial judge's reasons on costs are indexed at 2013 BCSC 1818.
- [58] At the costs hearing Mr. Gichuru argued that each side should bear their own costs, or alternatively, that Mr. Smith recover only 25% of his assessed costs. He submitted Mr. Smith should be deprived of his costs because of misconduct on his part and his counsel's part.
- [59] Mr. Smith sought special costs. Alternatively, and on the basis of an offer to settle, he sought an order that he recover costs assessed on a party and party basis on Scale B up to September 13, 2012 and double costs thereafter.
- [60] The trial judge dealt first with Mr. Gichuru's application. She noted that pursuant to R. 14-1(9) of the Supreme Court Civil Rules (the "Rules") costs of a proceeding must be awarded to the successful party unless the court otherwise orders. The trial judge reviewed in detail Mr. Gichuru's various complaints about the conduct of Mr. Smith and his counsel, but ultimately concluded that Mr. Gichuru had not met the burden on him to displace the usual rule that costs follow the event. She dismissed Mr. Gichuru's application in regard to costs.
- [61] She then turned to Mr. Smith's application. She dealt first with the offer to settle. She found that it had been made too close to trial. In the circumstances, she was not prepared to find that the offer was one that Mr. Gichuru ought reasonably to have accepted. On that basis, she was not prepared to exercise her discretion and make an order for double costs.
- [62] In regard to special costs, she noted that such an award is intended to chastise a party for reprehensible, scandalous or outrageous conduct and that unproven allegations of fraud or dishonesty may attract an award of special costs since such allegations are serious and potentially very damaging to those accused of deception. She noted that Mr. Gichuru had made serious allegations of dishonesty against Mr. Smith. She found that he had not proven the allegations of dishonesty at trial nor had he proven any breach of fiduciary duty. She noted that Mr. Smith had put Mr. Gichuru on notice in advance of the trial that the allegations of misconduct had no evidentiary foundation and that he would seek special costs.
- [63] After a detailed review of the allegations, pleadings and evidence, the trial judge concluded that an award of special costs was justified. She summarized her views as follows:

- [76] Mr. Gichuru's attacks on Mr. Smith's professional integrity and honesty were persistent and maintained over a period of years. They were maintained after Mr. Smith warned Mr. Gichuru of the consequences, something Mr. Gichuru should have appreciated even without any warning. A lawyer relies on his reputation for integrity. When that reputation is falsely assailed, the court's reproof should be felt.
- [77] As I noted above, alleging (and failing to prove) fraud or dishonesty will not necessarily result in an award of special costs. Here, however, there is something more, namely: Mr. Gichuru's recklessness in making such allegations and in stubbornly refusing to abandon them, maintaining them over a period of years, and through to closing submissions at the trial. In my view, based on Mr. Gichuru's reckless allegations of fraud and dishonesty against Mr. Smith, an award of special costs is justified.
- [64] The trial judge then turned to the issue of how costs were to be assessed. Mr. Smith sought to have costs, including disbursements, assessed summarily pursuant to R. 14-1(15). Mr. Gichuru opposed such an assessment. He said that regardless of whether special costs or party and party costs were ordered he was entitled to have costs and disbursements assessed by the registrar and to have the ability to challenge the amounts claimed.
- [65] The trial judge held that it was appropriate to assess costs summarily. In reaching this decision she took into account that Mr. Gichuru had no current ability to pay a judgment in respect of costs, whatever the amount, and as such had nothing at stake in forcing Mr. Smith to incur the time and expense of a formal assessment. She saw no good reason why Mr. Smith should be subject to an assessment. She noted that judicial resources are scarce and need to be used efficiently and effectively. In her view making an order that required an assessment before the registrar was not compatible with the economical use of judicial resources.
- [66] The trial judge then went on to assess costs. In regard to the approaches to the quantification of special costs she said:
- [86] There are three common approaches to the quantification of special costs: one is to award costs equal to the actual legal costs incurred by the party to whom costs are being awarded; a second is to fix costs at a percentage of actual legal costs, often on 80 or 90 percent of the actual legal costs; and a third is what is sometimes referred to as a "rough and ready" approach, based on \$5,000 per half day plus taxes and disbursements. See *Clare's Cove Marina Ltd. v. Salmon Arm (City)*, 2013 BCSC 912, at para. 32.
- [67] She then noted that in this case Mr. Smith had asked to have costs determined on the basis of the rough and ready approach which on his calculations using a multiplier of \$6,000 per half day would lead to a costs award of \$108,000.

- [68] Mr. Smith did not put before the trial judge any evidence of his actual legal fees. He did submit a draft party and party bill of costs which showed various tariff items that with taxes totalled \$29,629.60. In addition the bill of costs showed disbursements of \$16,490.63 leading to a total party and party bill of \$46,120.23.
- [69] The trial judge indicated that the draft bill provided some guidance in determining costs on a rough and ready approach. She considered the factors set out in R. 14-1(3)(b) and noted that given the importance of the litigation to Mr. Smith, the scandalous allegations that had been made against him and the successful outcome, he was entitled to a substantial costs award. She assessed costs inclusive of disbursements and taxes at \$90,000. Her reasoning in that regard was:
- [90] I would not increase the per-half-day amount to \$6,000, as requested by the defendants, although I appreciate that it has been done in other cases cited to me in argument. In Bradshaw, the court's assessment was based on \$5,000 per half day, and the total amount of the award after a 51-day trial included disbursements and taxes. That basic approach commends itself to me.
- [91] Therefore, on the "rough and ready" approach, and under Rule 14-1(15), I fix the defendants' costs of this action, including disbursements and taxes, at \$90,000. This is roughly double the amount presented in the draft bill of costs, which included disbursements and taxes. Although, since it includes disbursements and taxes, it represents somewhat less than \$5,000 per half day, I have concluded that it represents appropriate compensation by way of special costs in this action.

Issues On Appeal

- [70] Mr. Gichuru now challenges both the award of special costs and the summary assessment of those costs. While acknowledging that a judge's decision on costs will generally be insulated from appellate review, Mr. Gichuru notes that an appellate court may and should intervene where it finds the trial judge has misdirected himself or herself as to the applicable law or made a palpable error in the assessment of the facts: *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71 at para. 43.
- [71] Mr. Gichuru suggests that the trial judge erred by finding that he had made reckless allegations of fraud and dishonesty. He submits the trial judge ordered him to pay special costs of the entire proceeding even though there was already an order in place in relation to a payment of party and party costs for certain interlocutory applications that had been made in the course of the action.

- [72] Mr. Gichuru further submits that this was not an appropriate case for special costs to be assessed summarily. He submits that parties who are impecunious should not be treated differently than more affluent parties. He notes that one of the trial judge's stated reasons for a summary assessment was the stubbornness he had shown in litigating the action including his appeal of Madam Justice Bruce's interlocutory orders. Mr. Gichuru points out that he in fact succeeded on several issues on that appeal: *Gichuru v. Smith*, 2010 BCCA 352.
- [73] Mr. Gichuru challenges the validity of an assessment made in the absence of evidence of the actual legal fees incurred by Mr. Smith. Mr. Gichuru also challenges the use of a fixed fee "rough and ready" calculation to assist in determining special costs. He notes that this Court in *Bradshaw v. Stenner*, 2013 BCCA 61 at para. 16 [Bradshaw Review] had suggested that the suitability of a fix fee rough and ready calculation may require resolution in this Court.
- [74] Mr. Smith asks this Court to uphold the special costs assessment. He submits that in the circumstances the award of special costs was justified and there are no grounds to interfere with the trial judge's exercise of her discretion.
- [75] Mr. Smith cites several cases in the trial division that have made rough and ready summary assessments. He says the authority for such assessments is *Interclaim Holdings Limited v. Down*, 2002 BCCA 632.
- [76] Mr. Smith submits that a bill of special costs is not a prerequisite to a summary assessment. In support he cites the trial decision in *Bradshaw v. Stenner*, 2012 BCSC 237 [Bradshaw]. Mr. Smith suggests that he should not be put through the time and costs of a registrar's hearing. At the hearing of this appeal his counsel advised that if the summary assessment was reversed, he would prefer this Court summarily assess costs on a party and party basis, as per the draft bill of costs, rather than go through the costs and expenses of a registrar's hearing.

Discussion

A. Award of Special Costs

- [77] The award of costs, including the appropriate scale of costs, involves the discretion of the trial judge. This Court should not interfere with that discretion unless the trial judge made an error in principle or the costs award is plainly wrong: *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9 at para. 27.
- [78] The test for special costs was set out in *Garcia v. Crestbrook Forest Industries Ltd. No. 2* (1994), 9 B.C.L.R. (3d) 242 (C.A.) at para. 17, where Lambert J.A., speaking for the Court, after an extensive review of the authorities, concluded:

... 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.

[79] A party who alleges serious misconduct against another in a civil lawsuit must be prepared to prove such allegations or reap the consequences in the form of an order for special costs: *Kurtakis v. Canadian Northern Shield Insurance Co.* (1995), 17 B.C.L.R. (3d) 197 (C.A.). In this case, Mr. Gichuru's pleadings made serious allegations against Mr. Smith, including the following:

20. Smith provided false and misleading information to the Law Society with respect to the circumstances surrounding the termination of the plaintiff's articles.
21. Smith falsely informed the Law Society the plaintiff insisted on taking a 60 minute lunch away from the office and that the plaintiff never worked after 5:30 p.m.
22. Smith failed to inform the Law Society that he had promised to hire another person as an articulated student to replace the plaintiff.
23. Smith falsely informed the Law Society that Beuhler had consented to the correspondence providing the alleged reasons for the termination of the plaintiff's employment.
24. In or about May 2003, as a result of the correspondence received from Smith, the Law Society refused to allow the plaintiff admission in the Law Society Admission Program.
25. In or about May to June 2003, as a further result of the correspondence received from Smith, the Law Society required the plaintiff to provide personal medical information and undergo an independent psychiatric evaluation.

[80] The trial judge found that Mr. Gichuru did not prove any of his allegations. A lawyer relies on his reputation for integrity. While not every accusation against a lawyer will lead to special costs, when a lawyer's reputation is falsely assailed, the court's reproof should be felt: *Patriquin v. Laurentian Trust of Canada Inc.*, 2002 BCCA 6 at paras. 27 and 29; *Bronson v. Hewitt*, 2011 BCSC 102 at para. 118; *Startup v. Blake*, 2001 BCSC 8 at para. 112.

[81] In the circumstances of this case it was open to the trial judge to make an award of special costs. Mr. Gichuru has not established that she misdirected herself as to the applicable law or made any error in her assessment of the facts. We would not accede to this ground of appeal.

B. Assessment of Special Costs

i. Overview

[82] This aspect of the appeal raises several issues of general importance which need be considered before turning to the assessment made in this case. The issues include: the power of a judge to assess costs and the source of that power, when a judge should assess costs, and, if a judge does decide to assess costs, how that assessment is to be carried out.

The third issue raises several additional issues. These include: whether a judge's method of assessment can differ from that of a registrar, whether a judge can assess special costs absent evidence of the actual legal fees incurred, and whether a judge can use the rough and ready method to assess special costs.

[83] To address these issues it is first necessary to consider the purpose of special costs, the civil rules governing special costs and how these rules have evolved over time. We will next discuss the powers of a judge to assess costs and various factors that should be considered in determining whether such an assessment should be carried out summarily. We will then consider the ways that costs can be assessed and consider the validity of the rough and ready method of assessment. That discussion will also involve the question as to whether an account is a pre-condition to a special costs assessment. Finally we will turn to the assessment made in this case and whether it has to be reconsidered.

ii. The Rules - Present and Past

[84] Rule 14-1 of the Supreme Court Civil Rules sets out the present rules governing costs. The Rules recognize two categories of costs: party and party costs and special costs. A trial judge cannot impose cost sanctions that are not authorized by the Rules: *Kurtakis; A.E. v. D.W.J.*, 2009 BCSC 505 at paras. 48-50, *aff'd* 2011 BCCA 279 at paras. 12, 39.

[85] Party and party costs are assessed in accordance with Appendix B of the Rules. On an assessment of special costs a party is entitled to those fees that were proper or reasonably necessary to conduct the proceeding.

[86] For the purpose of this appeal the following provisions of the present Rules are of particular import:

Rule 14-1 - Costs

How costs assessed generally

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

(a) the parties consent to the amount of costs and file a certificate of costs setting out that amount;

(b) the court orders that

(i) the costs of the proceeding be assessed as special costs, or

(ii) the costs of an application, a step or any other matter in the proceeding be assessed as special costs in which event, subject to subrule (10), costs in relation to all other applications, steps and matters in the proceeding must be determined and assessed under this rule in accordance with this subrule;

- (c) the court awards lump sum costs for the proceeding and fixes those costs under subrule (15) in an amount the court considers appropriate;
- (d) the court awards lump sum costs in relation to an application, a step or any other matter in the proceeding and fixes those costs under subrule (15), in which event, subject to subrule (10), costs in relation to all other applications, steps and matters in the proceeding must be determined and assessed under this rule in accordance with this subrule;

...

Assessment of party and party costs

- (2) On an assessment of party and party costs under Appendix B, a registrar must
 - (a) allow those fees under Appendix B that were proper or reasonably necessary to conduct the proceeding, and
 - (b) consider Rule 1-3 and any case plan order.

Assessment of special costs

- (3) On an assessment of special costs, a registrar must
 - (a) allow those fees that were proper or reasonably necessary to conduct the proceeding, and
 - (b) consider all of the circumstances, including the following:
 - (i) the complexity of the proceeding and the difficulty or the novelty of the issues involved;
 - (ii) the skill, specialized knowledge and responsibility required of the lawyer;
 - (iii) the amount involved in the proceeding;
 - (iv) the time reasonably spent in conducting the proceeding;
 - (v) the conduct of any party that tended to shorten, or to unnecessarily lengthen, the duration of the proceeding;
 - (vi) the importance of the proceeding to the party whose bill is being assessed, and the result obtained;
 - (vii) the benefit to the party whose bill is being assessed of the services rendered by the lawyer;
 - (viii) Rule 1-3 and any case plan order.

Assessment officer

- (4) The officer before whom costs are assessed is a registrar.

Disbursements

- (5) When assessing costs under subrule (2) or (3) of this rule, a registrar must

- (a) determine which disbursements have been necessarily or properly incurred in the conduct of the proceeding, and
- (b) allow a reasonable amount for those disbursements.

...

Costs arising from improper act or omission

- (14) If anything is done or omitted improperly or unnecessarily, by or on behalf of a party, the court or a registrar may order
 - (a) that any costs arising from or associated with any matter related to the act or omission not be allowed to the party, or
 - (b) that the party pay the costs incurred by any other party by reason of the act or omission.

Costs of whole or part of proceeding

- (15) The court may award costs
 - (a) of a proceeding,
 - (b) that relate to some particular application, step or matter in or related to the proceeding, or
 - (c) except so far as they relate to some particular application, step or matter in or related to the proceeding

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

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Form of bill in certain cases

- (30) A bill for special costs or a bill under the Legal Profession Act may be rendered on a lump sum basis.

Description of services

- (31) A lump sum bill must contain a description of the nature of the services and of the matter involved as would, in the opinion of a registrar, afford any lawyer sufficient information to advise a client on the reasonableness of the charge made.

Evidence of lawyer

- (32) A party to an assessment of costs or a review of a lump sum bill may put in evidence the opinion of a lawyer as to the nature and importance of the services rendered and of the matter involved and the reasonableness of the charges made, but a party must not put in evidence the opinions of more than 2 lawyers, and a lawyer giving an opinion may be required to attend for examination and cross-examination.
- [87] The foundation of the present cost rules can be traced back to the initial Supreme Court Rules, 1880 (the "1880 Rules"). While the language and terminology has evolved over time, the principles governing costs have remained fairly constant.
- [88] The 1880 Rules set out that fees and costs as between party and party or solicitor and client should be allowed only according to the schedule in Appendix H (MR 385). Costs were to be determined by a taxing officer; in regard to costs to be paid by another party, no costs were to be allowed which appeared to the taxing officer "to have been incurred through over-caution, negligence, or mistake, or merely at the desire of a party" (MR 391).
- [89] The distinction between "party and party" and "solicitor-client" costs recognized in the 1880 Rules continues to the present day. The Supreme Court Civil Rules, 1990 (the "1990 Rules") introduced the term special costs in place of solicitor-client costs.
- [90] 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 S.C.R. 3 at 134-138. Special costs may also be ordered in circumstances where there has been no wrongdoing. Such orders may arise from the terms of a statute, (*Laye v. College of Psychologists of British Columbia* (1998), 114 B.C.A.C. 201; *Campbell River Woodworkers v. British Columbia (Minister of Transportation and Highways)*, 2004 BCCA 27) or a contract (*Johal v. Viridi*, 2012 BCSC 450). Parties in estate litigation are often entitled to special costs (*Leung v. Chang*, 2014 BCSC 1243), as are those in committee proceedings (*Vieira (Re)*, 2013 BCCA 420). A successful public interest litigant may be entitled to special costs: *Victoria (City) v. Adams*, 2009 BCCA 563.
- [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.
- [92] The power of a judge to award costs directly first arose in the Supreme Court Rules, 1890, which allowed a judge to fix a lump sum in lieu of taxation in interlocutory applications (MR 765).

[93] A judge's powers to fix costs were expanded in the Supreme Court Rules, 1906. Marginal Rules 998 and 998a read respectively:

23. In interlocutory proceedings the court or judge may fix a lump sum of costs.

23(A) Where the cause or matter is tried at any other place other than: Victoria, Vancouver, New Westminster, Nanaimo, Nelson, Rossland, Greenwood, Grand Forks, Vernon or Kamloops, the court or judge may fix a lump sum for costs of the whole proceedings, and may on any case, wherever tried, fix such sum with the consent of all parties.

[94] A judge's ability to fix a lump sum in interlocutory proceedings was removed in the Supreme Court Rules, 1925. Judges continued to have the power, except in certain registries, to fix sums for the whole proceeding and to have that power in any case where the parties consented. Those Rules were changed in 1961. Pursuant to the 1961 Supreme Court Rules, a judge could fix lump sum costs of a whole proceeding only with consent.

[95] The judge's power to fix costs with consent continued through the 1977 (R. 57-6) and 1990 (R. 57-13) Supreme Court Rules. In January 1992, R. 57-13 was amended to give the court the additional power upon application by a party or by consent to fix a lump sum as the costs of a motion. In May 2002, R. 13.1 was adopted. Pursuant to R. 13.1, the court could award lump sums of an interlocutory application and either fix those costs, inclusive or exclusive of disbursements, or order that costs be in accordance with Schedule 3 of Appendix B and fix the scale of those costs pursuant to the terms of the Appendix.

[96] Rule 14-1(15) of the present Rules has expanded the role of the court. A judge who awards costs of a proceeding may now fix the amount of costs including the amount of disbursements.

[97] Prior to the adoption of the present Rules and other than for a period of years in specific registries, a judge did not have the power under the Rules to fix the amount of costs absent the consent of the parties. Even so, a judge could still fix costs pursuant to inherent jurisdiction: *Harrington (Guardian ad litem of) v. Royal Inland Hospital*, (1995) 69 B.C.A.C. 1; *Graham v. Moore*, 2003 BCCA 497; *Buchan v. Moss Management Inc.*, 2010 BCSC 121 at paras. 15-22 [Buchan], *aff'd* 2010 BCCA 393 at paras. 11-32 [Buchan Appeal]. While these cases recognized the court's jurisdiction to assess costs, they all cautioned that it was a jurisdiction to be exercised sparingly.

[98] The cases concerning the court's inherent jurisdiction to fix costs all pre-date the introduction of the present Rules. In *Lines v. Gordon*, 2009 BCCA 107, this Court summarized the scope of a court's inherent jurisdiction at paras. 23-25. While a court has the inherent power to regulate its own procedure, it cannot adopt a practice or procedure inconsistent with the rules of court as set down by statute or adopted by ancient usage. Inherent jurisdiction is invoked where there is a gap in the statutory regime. This was the case under the previous Rules, as reviewed above. Under the present Rules, there is no longer a gap in regard to a judge's power to assess costs that requires invoking the court's

inherent jurisdiction: see Lines at para. 26. The power to award costs now comes from and must be considered in the context of the Rules.

iii. When and How Should a Judge Assess Costs

[99] While R. 14-1(15) authorizes a judge to assess costs, the Rules are silent as to when and how a judge should exercise that authority. These questions are inter-related and should be dealt with together.

[100] At the outset, it is important to emphasize that in exercising the power to fix costs a judge cannot act arbitrarily or capriciously. He or she must act in a manner consistent with the Rules and the principles that have long governed such awards. In *Stiles v. B.C. (W.C.B)* (1989), 38 B.C.L.R. (2d) 307 (C.A.) at 310, Lambert J.A. articulated the limits on a judge's power to award costs:

Generally, the decisions on costs, including both whether to award costs, and, if awarded, how to calculate them, are decisions governed by a wide measure of discretion. See *Oasis Hotel Ltd. v. Zurich Insurance Co.* (1981), 28 B.C.L.R. 230, [1981] 5 W.W.R. 24, 21 C.P.C. 260, [1982] I.L.R. 1-1459, 124 D.L.R. (3d) 455 (C.A.). The discretion must be exercised judicially, i.e. not arbitrarily or capriciously. And, as I have said, it must be exercised consistently with the Rules of Court. But it would be a sorry result if like cases were not decided in like ways with respect to costs. So, by judicial comity, principles have developed which guide the exercise of the discretion of a judge with respect to costs. Those principles should be consistently applied; if a judge declines to apply them, without a reason for doing so, he may be considered to have acted arbitrarily or capriciously and not judicially.

[101] The principle governing cost assessments under the Rules is simple: parties are only entitled to their objectively reasonable legal costs as determined according to the particular costs scale that they were awarded. This principle applies equally to assessments made by the registrar under Rules 14-1(2) or 14-1(3) and assessments made by a judge under R. 14-1(15). It applies whether costs are awarded pursuant to a final judgement or interlocutory application. This principle follows from the plain and ordinary meaning of the Rules and the basic principles of natural justice, as discussed below. It reflects the requirement in Rules 14-1(2) and 14-1(3) that only those costs proper and reasonably necessary to conduct the proceeding may be allowed. Lastly, it applies with equal force regardless of the method used to assess costs; that is, whether it is done pursuant to a hearing or summarily.

[102] The Rules specifically set out two scales of costs: party and party and special costs. In an award of special costs, R. 14-1(3)(a) requires a registrar to allow only those fees that were proper or reasonably necessary to conduct the proceeding. Rule 14-1(3)(b) sets out a non-exhaustive list of factors for a registrar to consider in determining whether fees were proper and reasonably necessary. While a judge when fixing costs under R. 14-1(15) may not necessarily follow the same procedure as a registrar, the ultimate award of costs must be consistent with the award that a registrar would make in similar circumstances. Thus, in making a determination of special costs a judge must consider the non-exhaustive list of

factors in R. 14-1(3)(b). The quantum of the award should not depend on the identity of the assessor.

- [103] When a judge has assessed costs in place of a registrar it has often been done in a summary manner. The Rules do not mandate that a judge assess costs summarily. In many cases, the rules of natural justice would suggest that a summary proceeding is not appropriate: *Williston Navigation Inc. v. BCR Finav No. 3 et al.*, 2007 BCSC 190 at paras. 49-58 [Williston]. Absent consent, natural justice requires a certain level of procedural fairness. In the typical case, this means providing an opportunity for the party against whom costs are being awarded to test the reasonableness of the fees underlying the award, which reflects the basic costs principle that cost awards are meant to be an indemnity for fees incurred rather than to provide a windfall.
- [104] As we explained above, the principle underlying R. 14-1 is that parties are only entitled to their objective reasonable legal costs as determined by the precise scale of costs they were awarded. In order to determine if a legal fee is reasonably objective, it is often necessary to know the particulars of what the lawyer did to accrue it. As noted by Kirkpatrick J., as she then was, in *Canadian National Railway Co. v. A.B.C. Recycling*, 2005 BCSC 1559 at para. 28 [A.B.C.], it is difficult to conceive that a proper examination of a party's incurred legal costs can take place without disclosure of the other side's file and an examination of the other side's lawyers in respect of the file and the matters arising therefrom.
- [105] The fact that a lawyer has billed a certain sum does not necessarily make the fee reasonable. This is of particular importance when the other party to the litigation is paying the bill. As noted by Seaton J.A. in *Royal Trust Corporation of Canada v. Clarke* (1989), 35 B.C.L.R. (2d) 82 (C.A.) at 88:

The party who made that arrangement, the successful party in the litigation, might have made a very poor bargain. The bill rendered pursuant to the agreement might be justifiable between the solicitor and his client but thoroughly unjustifiable to impose on another. The client might have demanded more work to be done than was appropriate in the circumstances, or more lawyers and more expensive lawyers to be retained than were appropriate in the circumstances. Of course, at the taxation, if the other litigant is paying the bill the client will be particularly pleased to see that the bill is as high as possible.

- [106] Whether a judge should determine the quantum of costs as authorized under R. 14-1(15) is a matter of judicial discretion. It is a discretion that must be exercised in light of Rules 14-1(2) (for party and party costs) and 14-1(3) (for special costs). It is a discretion which should be exercised sparingly: see *Buchan Appeal* at para. 13. There is good reason for that approach. The court officer best placed to determine if the fees billed by a lawyer are objectively reasonable is usually the registrar. The registrar's extensive knowledge and experience assessing legal bills is seldom matched by that of a trial judge.

- [107] An exception to that general proposition can arise in cases when the judge is intimately familiar with the litigation, or the time and costs of a registrar's hearing cannot be justified. In this regard, the words of Southin J.A. in *Interclaim* are often cited:
- [27] As this division is also the division which heard the appeals mentioned in paragraph 13, we are substantially familiar with what happened below. I have in mind also that these litigants have taken unto themselves, from the pool of judicial resources available in this Province, more than can be said to be their fair share. They are not alone in doing such things but litigants must be encouraged to be economical of judicial time.
- ...
- [38] I accept the submission of Mr. Willms that this is a proper case for the exercise of the power to fix a sum to be paid in lieu of taxation. This litigation has already consumed, as I have already indicated, far too much of the public resource of judicial time as it is. To send the claim to taxation will engage a large amount of the time of a taxing officer whose decision might be appealed and matters will go on and on. Among other things, the taxing officer would have to learn about this litigation all that we already know, a duplication of effort which does no one any good. ...
- [108] However, the fact the judge has heard the trial does not necessarily lead to the conclusion that the assessment be done summarily or that the best use of judicial resources is for the judge to embark on the assessment of costs. The time the judge spends on the assessment is time the judge does not have for other matters.
- [109] A related concern is that the party who might have to pay the costs will prolong any assessment by requiring microscopic review of the services undertaken by counsel for the successful party: *Buchan* at para. 25. This concern must be weighed against the right of a party to challenge the reasonableness of the opposing party's proposed costs. This right derives from the rules of natural justice: see *Williston* at para. 53.
- [110] It is true that a more detailed review may be tedious and expensive. That does not mean such a review is unfair to the successful litigant, particularly given that significant amounts may be in issue. While R. 1-3(1) sets out that the object of the Rules is to secure the just, speedy and inexpensive determination of every proceeding on the merits, R. 1-3(2) mandates that the proceedings be conducted in a way that is proportionate to the amounts involved in the proceeding, the importance of the issue in dispute and the complexity of the proceeding. The amount involved may be an important consideration in determining whether a summary procedure is appropriate.

iv. The Need for an Account

- [111] As indicated above, the right of a party to challenge the reasonableness of the opposing party's proposed costs derives from the rules of natural justice. Where a court elects to make a summary assessment of costs, the party facing a costs order must have a meaningful opportunity to challenge the reasonableness of the fees allegedly incurred by the other

party; this opportunity is denied where there is insufficient evidence as to the scope and nature of the actual legal fees: Williston at para. 53. Assessing special costs on a summary basis absent sufficient evidence of the objective reasonableness of those fees is an error of principle, contrary to both natural justice and to the Rules.

- [112] Several cases, including the case before us, have proceeded with a summary assessment absent a bill of special costs. In *Bradshaw*, the Court held that the failure to produce a bill of special costs should not bar a judicial assessment. At the time of the assessment in *Bradshaw* the case was under appeal. The judge was concerned that the production of a bill would lead to a loss of solicitor-client privilege because the defendant would relentlessly insist upon detailed information about subjects discussed with counsel and advice and instructions given.
- [113] This same situation existed in *A.B.C.* There *Kirkpatrick J.* recognized that the assessment of special costs would require a waiver of privilege. One of the main purposes of special costs is to indemnify the successful party for the actual legal costs they have incurred. Absent a bill or other evidence of the legal fees incurred there is no way of knowing the amount of those costs. While the disclosure of the legal account may result in a waiver of privilege, that is the price that a party may have to pay if it seeks to recover special costs.
- [114] It is difficult to conceive how a proper examination of a party's reasonably incurred legal fees can be made without disclosure of the party's file: see *A.B.C.* at para. 28 and *Williston* at para. 53. A simple presentation of the client's bill to the trial judge together with counsel's submission would not usually allow a party to challenge the reasonableness of the legal costs nor would it allow for an objective determination of the reasonableness of those costs. In *A.B.C.*, *Kirkpatrick J.* considered that the prejudicial effect of disclosure could be minimized or eliminated by deferring the assessment until both parties had exhausted or waived their rights of appeal.
- [115] In *Buchan*, an objection was made that there was not a proper "bill of special costs before the court". In that case the successful party had filed the affidavit of a legal assistant exhibiting the law firm's statements of account. *Bauman C.J.S.C.*, as he then was, agreed with the comments in *Fraser, Horn & Griffin, The Conduct of Civil Litigation in British Columbia*, 2d ed. (Markham: LexisNexis, 2007) that a bill for special costs is presented in the same form as a bill between a solicitor and client under the *Legal Profession Act*. Importantly, he did not suggest that an assessment should take place in the absence of any bill.
- [116] The need for a bill of a lawyer to tax his account against a client has been long recognized. In the absence of a bill a registrar does not have jurisdiction to conduct a review of a solicitor's account: *Kelly v. McMillan and Harbottle & Co.*, 2003 BCSC 307.
- [117] The Rules clearly indicate the need for an account. Since 1961 taxing officers have had the power to assess a solicitor-client bill in the form permitted for lump sum charges by the *Legal Profession Act* (MR 983a). Marginal Rule 983b required that every lump sum bill

should contain a description of the nature of the services and of the matter involved as would in the opinion of the taxing officer afford any solicitor sufficient information to advise a client on the reasonableness of the charges made. Marginal Rule 983c allowed any party to a taxation of a lump sum bill to put into evidence the opinion of a solicitor as to the nature and importance of the services and the reasonableness of the charges.

- [118] The provisions in the 1961 Rules have been carried forward and are found today in Rules 14-1(30), 14-1(31) and 14-1(32). Rule 14-1 (30) sets out that a bill for special costs may be rendered on a lump sum basis. Rule 14-1(31) sets out that a party is entitled to a sufficient description of the nature of the services provided so that another lawyer can advise on the reasonableness of the charges. Absent a bill there is nothing to advise on. Rule 14-1 (32) allows a party to an assessment to put into evidence the opinion of a lawyer as to reasonableness of the charges made. Absent a bill there is nothing to opine on.
- [119] A party seeking an assessment of special costs must tender evidence of the legal fees incurred and a sufficient description of the nature of the services and of the matter involved to afford any lawyer sufficient information to advise a client on the reasonableness of the charge made. This will usually be provided in the same form as a bill between a solicitor and client under the Legal Profession Act. Those cases, such as *Bradshaw*, that have held that a court can assess special costs absent evidence of actual legal costs were wrongly decided and should not be followed.
- [120] Where a party is claiming its legal accounts are privileged, it can elect to waive privilege, wait until all appeals are exhausted before having its costs assessed or choose to abandon its claim to special costs.
- v. How Should a Judge Quantify Special Costs
- [121] In this case, the trial judge stated that there were three common approaches to the quantification of special costs. The first was to award costs equalling the actual legal costs incurred by the party to whom costs were being awarded. The second was to fix costs at a percentage of actual legal costs. The third was to use the rough and ready approach based on \$5,000 per half day plus taxes and disbursements. A similar incantation can be found in several recent cases: *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914; *Clare's Cove Marina Ltd. v. Salmon Arm (City)*, 2013 BCSC 912 [*Clare's Cove*]; *Hundal v. Border Carrier Ltd.*, 2012 BCSC 2196; *Nomani v. Tan*, 2014 BCSC 78; *Leung*, *supra*. Other cases that have adopted the rough and ready method calculation include: *Johal*, *supra*; *Morriss v. Prism Properties Inc.*, 2011 BCSC 615; *King v. TD Canada Trust*, 2013 BCSC 2283.
- [122] The close relationship between actual legal fees and special costs is well documented in the jurisprudence. In *Bradshaw Construction Ltd. v. Bank of Nova Scotia* (1991), 54 B.C.L.R. (2d) 309, *aff'd* [1992] B.C.J. No. 1657, *Bouck J.* described the relationship at p. 319:

As I understand the notion of Special Costs under Rule 57(3), they are meant to provide a much higher indemnity than Ordinary Costs where the circumstances warrant. They are assessed under paragraphs (a) to (g) of Rule 57 with a view to the relationship between the successful party and his or her own solicitor. But they are not necessarily the fees that the successful solicitor would recover from his or her client. Those fees arise from a review of a solicitor's bill under the Legal Profession Act, S.B.C. 1987 ch. 25, Part 10, as amended by the Justice Reform Statutes Amendment Act, 1989, s. 26; in force 1 September 1990; B.C. Reg. 267/90. Instead, Special Costs are the fees that a reasonable client would pay a reasonably competent solicitor for performing the work described in the bill. On the other hand, fees payable by the client to the solicitor pursuant to a bill taxed under the Legal Profession Act represent fees for work done by that solicitor for that client. In the usual course of events, a bill taxed as Special Costs will be less than a bill taxed under the Legal Profession Act. This is because Special Costs still fall under the category of party and party costs, whereas fees due under the Legal Profession Act are assessed in a similar way to the old method of solicitor and own client costs.

A taxation of Special Costs is objective in nature while a taxation under the Legal Profession Act is subjective. Put another way, a losing party should not have to pay for the cost of the most experienced and qualified lawyer if that kind of service was not necessary. However, in most instances, a bill for Special Costs will usually be about 80% or 90% of a similar bill assessed under the Legal Profession Act.

Rule 57(3) discussed in *Bradshaw Construction* is the present R. 14-1(3).

[123] In *A.B.C.*, Kirkpatrick J. noted that while special costs are not necessarily the fees that a successful solicitor would recover from his or her client there may well be circumstances in which special costs and a bill taxed under the Legal Profession Act would be equivalent. She noted the similarities between the provisions in the then R. 57(3) and s. 71(4) of the Legal Profession Act which a registrar must consider on a review of a lawyer's bill.

[124] This Court in *Lee* also noted the comparison between the special costs rule and the provisions of the Legal Profession Act. Both incorporate most of the factors in *Yule v. Saskatoon (City)* (1955), 16 W.W.R. 305 (Sask. Q.B.). In *Lee*, K. Smith J.A., writing for the Court, noted that in *National Hockey League v. Pepsi-Cola Canada Ltd.* (1995), 2 B.C.L.R. (3d) 13 (C.A.), this Court had approved the formula suggested by Bouck J. in *Bradshaw Construction* that special costs will "in most instances" be less than a bill assessed under the Legal Profession Act.

[125] The Court went on to note, however, that the rule of thumb approach of a deduction from legal fees is merely an aid to a proper assessment and each case will turn on what is proper or reasonably necessary in the particular circumstances within the meaning of the words in R. 57(3). Smith J.A. concluded his discussion at para. 49:

In my view, the legislative intention is clear that special costs under Rule 57(3) are in their nature to resemble closely the reasonable fees that would be charged by a lawyer to his or her own client. It may be that, in some cases, they will be equal in amount. However, special costs and lawyers' reasonable fees are not identical.

[126] The rough and ready approach pursuant to which special costs are set at a fixed sum has a much shakier legal foundation. It is based on the comments of Southin J.A. in *Interclaim* where she said at para. 40:

Taking it all in all, I consider that justice will be done in this case if this Court adopts the rough and ready old-fashioned method of determining the sum to be awarded under s. 197(2) at a sum per half day, which sum will cover also a reasonable award for preparation, but not including in those days those spent arguing the issue of champerty before Brenner J. Five thousand dollars per half day or less seems right to me.

[127] Madam Justice Southin's comments must be placed in their proper context. *Interclaim* was a complex bankruptcy proceeding which began with the petitioner's ex parte application for an interim receiving order and other ancillary relief. The proceedings were subsequently characterized as involving the most extraordinary use of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 [BIA], ever seen in Canada.

[128] In due course the trial judge had to deal with the costs of the proceeding. His reasons are found at 2001 BCSC 1303. At the outset he had to determine whether the court should fix lump sum costs. He noted that the reason underlying the usual practice of referring such matters to the registrar was that, in customary litigation, much of the pre-trial proceedings are conducted outside of the purview of the trial judge. Pre-trial discoveries and interlocutory steps may go on for several years before the case ultimately comes to the trial judge who renders the final trial judgment, which usually includes a costs disposition. He found this proceeding was different. He had heard the initial ex parte application and then all subsequent proceedings related to the efforts to set aside the ex parte orders. Because of this he had as much detailed knowledge about the nature of the case, including its novelty and complexity, as anyone was ever likely to have, and because of his knowledge of the proceeding it was his view that costs ought not be referred to the registrar and he should fix the costs in a lump sum.

[129] While the proceedings had been brought under the BIA it was recognized that the tariff for costs set out in the BIA was hopelessly out dated. All parties agreed that the trial judge was not bound by the tariff amounts. He assessed costs based on the provisions of the 1990 Supreme Court Rules.

- [130] At that time the Rules included not only party and party and special costs but also increased costs. Increased costs could be awarded where a court determined that for any reason an award of ordinary costs would lead to an unjust result. Increased costs were often given in the circumstances where there was a considerable discrepancy between an award of party and party costs and special costs.
- [131] The main parties who were seeking to recover costs were the Downs Group and the Renoir Group. Fasken Martineau DuMoulin ("Fasken") was lead counsel for the Downs Group. Their legal fees totalled \$1,299,199.10. The Renoir Group's counsel, Shapray Cramer & Associates, had legal accounts totalling \$149,952.50.
- [132] The trial judge awarded the Downs Group 60% of their legal fees and the Renoir Group 80% of their fees. In dollar terms the Downs Group was entitled to recover \$779,519 while the Renoir Group would recover \$119,962.
- [133] When the matter came on for appeal, Southin J.A. found that the applications had been misconceived because the proceedings were under the BIA. She held the costs provisions found in the Rules had no application and that counsel had led the judge below down the wrong road. At the hearing, no one suggested that if the Court concluded that the Rules were irrelevant, that they should send the matter back for reconsideration.
- [134] Southin J.A. was of the view that the award to the Downs Group could not be justified because they had mounted a full frontal attack on many issues when the matter could have been resolved more economically. It was in this context that Southin J.A. made her comments concerning the rough and ready calculation. In a subsequent hearing, the reasons of which are found at 2003 BCCA 201, Southin J.A. fixed the number of half days for the purpose of assessment of costs at 80 which led to an assessment of \$400,000. That sum represented but 30.79% of Faskens' fees (an award closer in amount to a party and party costs award). We would also note Southin J.A. saw no problem with the award that had been made to the Renoir Group and she upheld the trial decision awarding them 80% of their actual legal fees.
- [135] As noted above, there have in recent years been numerous trial decisions which have purported to follow Southin J.A.'s rough and ready method. None of the decisions have discussed the context in which Southin J.A. made her award. None have noted that *Interclaim* was not a case about special costs, or that the award in *Interclaim* was but 30% of the actual legal fees incurred.
- [136] It was not until 2008 that a judge was asked to consider a rough and ready assessment. In *Insurance Corp. of British Columbia v. Eurosport Auto Co.*, 2008 BCSC 935, the rough and ready approach suggested an amount of \$390,000. The actual legal fees incurred however were but \$291,297, a difference of almost \$100,000. The judge considered the various factors set out in the R. 57(3) and awarded as special costs the actual legal fees incurred.

[137] In Buchan, counsel referred Bauman C.J.S.C. to Southin J.A.'s comment in Interclaim. Bauman C.J.S.C. reproduced a table provided by counsel at para. 27:

The Moss defendants also note that in many cases an award for special costs will be made in the range of 75% to 90% of the actual costs charged. Counsel then produces this table:

1. Actual Legal Costs

The actual legal fees were \$286,878.00. Fees plus disbursements and taxes total \$364,663.94.

2. The rough-and-ready (\$5,000 per half day) approach

The \$5,000 per half day approach leads to \$240,000.00 for fees based on a 24 day trial. Alternatively, using all 28 days of court appearances, this approach leads to \$280,000.00. Taxes and disbursements would be added to these amounts.

3. The percentage of actual legal costs approach

Actual legal fees were \$286,878.00. Thus 75% equals \$215,158.50. 90% equals \$258,190.20. Taxes and disbursements would be added to these sums.

[138] He then proceeded at para. 28 to make his award:

In my view a special costs award of \$240,000.00 plus taxes and disbursements in this matter is an award that represents an inherently reliable assessment of the value, on a special costs basis, of the work performed on this file by counsel for the Moss defendants.

[139] It is important to note that in making the award the Chief Justice did not purport to adopt the rough and ready method. The award that he did make was 83.66% of the actual legal fees.

[140] In Morriss, the trial judge applied the rough and ready calculation to assess special costs. She noted that Interclaim had been decided in 2002 and that the value of \$5,000, adjusted to inflation, was now \$5,800. She used that figure to make awards of special costs in the amount of \$104,400 for one defendant and \$69,600 for the other defendant. The judgment does not provide any information concerning the actual legal fees incurred.

[141] In Mayer, the trial judge assessed special costs for five successful parties. In regard to the approaches for assessing lump sum awards for special costs, he said:

[101] In Buchan, Bauman C.J.S.C. described three different approaches to assessing a lump sum award for special costs:

- (a) actual legal costs;
- (b) a percentage of actual legal costs (often 80% to 90% of actual legal fees incurred as assessed);

- (c) \$5,000 per half day, plus disbursements and taxes, also known as the "rough and ready" approach.

[102] The first two approaches have been affirmed by the Court of Appeal in *Lee (Guardian ad litem of) v. Richmond Hospital Society*, 2005 BCCA 107 at paras. 38-40, 46-49 and *National Hockey League v. Pepsi-Cola Canada Ltd.* (1995), 2 B.C.L.R. (3d) 13 at para. 16. The third, or "rough and ready" approach, has been adopted in *Interclaim* and in *Morriss v. Prism Properties Inc.*, 2011 BCSC 615.

[142] On the facts in *Mayer* the use of the rough and ready approach led to significantly different results for the five parties, summarized at para. 140 of the reasons:

Applying the rough and ready approach would result in the following assessments of the legal fees portion of special costs, exclusive of the special costs hearing:

- (a) Richard Mayer group of defendants - \$385,000 (the amount claimed is \$475,133.40);
- (b) Mr. Furnemont - \$265,000 (the amount claimed is \$161,246);
- (c) Mr. Seccombe - \$5,000 (the amount claimed is \$21,899);
- (d) Gina Mayer and Rita Webb - \$395,000 (the amount claimed is \$236,630); and
- (e) Bhora Mayer - \$395,000 (the amount claimed is \$218,259).

[143] For three of the parties an assessment based on the rough and ready approach would have led to awards far in excess of the amount of legal fees paid. In regard to the other main party, the rough and ready approach led to an award approximately \$100,000 less than the legal fees incurred. In the result, the trial judge awarded three of the parties their actual legal costs while the other two parties were given an award based on the rough and ready calculation. That sum worked out to 81.03% and 20.83% of actual legal fees.

[144] In *Bradshaw*, as already discussed, the judge proceeded in the absence of any legal account. The parties were seeking \$465,000 based on the \$5,000 per half day which the judge indicated had been accepted in *Interclaim* and applied in *Buchan*. The judge ultimately awarded special costs of \$465,000 but did so inclusive of \$24,000 in disbursements. The trial judge in this case purported to follow *Bradshaw* and also made the award inclusive of disbursements.

[145] We should note that leave to appeal was sought in *Bradshaw*. Leave was refused in reasons found at 2012 BCCA 481. The chambers judge was aware that the trial judge had not commented on the fact that the award of costs in *Interclaim* had been made pursuant to the BIA and the recovery in *Interclaim* was less than one-third of the actual solicitor-client costs. However, he did not feel in all the circumstances that the application by the trial judge of the rough and ready guide was a compelling enough basis upon which leave to appeal should be granted.

- [146] An application was then brought to reconsider the leave decision. Those reasons are found at 2013 BCCA 61. The division hearing the reconsideration matter acknowledged that the question of the necessity of a legal account and the uncritical application of the half day fees may be issues for resolution by this Court. However, the particular circumstances of the case were not found to rise to the level that warranted leave being granted. An important factor in the decision to refuse leave was that the appellant, in the trial court, had not pursued the need for evidence of the fees charged and had proceeded on the basis that \$465,000 represented full indemnity.
- [147] In Hundal actual legal fees were \$180,658. Using the \$5,000 per day rough and ready approach from Interclaim would have led to fees of \$225,000. The judge set the fees at \$144,526, representing 80% of the fees incurred.
- [148] In Clare's Cove legal costs totalled \$351,636. The trial judge noted that \$5,000 in 2002 when Interclaim was decided is the equivalent of \$6,250 today. He awarded special costs based on \$6,000 per half day which came to \$168,000 which represented 47.7 % of actual legal fees.
- [149] In King, following a proceeding that lasted three half days, the trial judge awarded special costs of \$18,000 based on the rate of \$6,000 used in Clare's Cove. There is nothing in the reported decision to indicate that the trial judge had information concerning the actual legal fees incurred.
- [150] The purpose of this analysis has been to consider the legal underpinning for using the rough and ready approach in summary assessments of special costs. Mayer is the only case in which a judge has attempted to justify using the rough and ready approach:
- [137] In my opinion, given the circumstances of this case, and having regard to the interests of the applicants and Mhinder Mayer, assessing costs using the rough and ready approach of \$5,000 per half day, as a purposeful guide, is the most fair and appropriate manner in which to assess special costs. I say that because this approach:
- (a) obviates concerns expressed by Mhinder Mayer regarding variations in hourly rates, potential duplication of effort, potential failure to always delegate work to the lawyer with the most appropriate hourly rate, and inadequacies in some of the materials submitted in support of the legal fees claimed;
 - (b) obviates Mhinder Mayer's concerns about unnecessary or unnecessarily prolonged legal research, because the rough and ready figure of \$5,000 per half day incorporates preparation time;
 - (c) addresses the concerns expressed by Levine J. in [Genesee Enterprises Ltd. v. Abou-Rached, 2001 BCSC 1172] about the size of accounts;
 - (d) avoids the difficulty faced in assessing actual fees billed in the absence of the lawyers' entire files; and

- (e) avoids disclosure of privileged file material at this stage of the litigation, where the dispute between Mhinder and Bhora Mayer remains extant (the trial is scheduled to proceed in September 2011) and in the face of Mhinder Mayer's outstanding appeals from my previous reasons for judgment.
- [151] While considerations such as the above may explain why judges have been attracted to the rough and ready approach, they are not factors that are relevant to an assessment of special costs. Under R. 14-1(3) special costs are limited to the fees that are proper and reasonably necessary to conduct the proceeding. If a judge intends to assess special costs he or she must consider all of the circumstances, including but not limited to those set out in R. 14-3(b), and then allow those fees that were properly or reasonably necessary to conduct that particular proceeding. The rough and ready method is the antithesis of that process. It sets a fixed fee based on the number of hearing days regardless of the actual circumstances of the litigation or the expense incurred in conducting it.
- [152] The cases show that the relationship between the rough and ready method and actual legal fees is completely capricious. In some cases, the rough and ready amount reaches an amount well in excess of the actual fees incurred; in others considerably less. It sets a fee without any reference as to whether or not the services that were provided were proper or reasonably necessary. The comments of Saunders J.A. in the Bradshaw Review as to the precedential value of Interclaim are apposite:
- [17] ... Obviously Interclaim does not impose a rule or principle dictating the amount to assess as special costs for a half day. It could not do so, nor did it purport to do so. An assessment is required to be case specific and must respond to the language of Rule 14 of the Supreme Court Civil Rules. It seems to me that Interclaim is simply a case in which, in the interests of efficiency, in proceedings that had consumed a vast amount of court resources with legal accounts that exceeded well over a million dollars, this court made an assessment. That assessment was made with appreciation of the nature of the issues and positions taken below, the degree to which the services were provided in relation to the litigation and for the party entitled to costs, and the enthusiastic engagement of all the parties in the full blown extenuated litigation. Not much more can be said about it than that.
- [153] We adopt her comments. Interclaim does not impose a rule or principle dictating the amount to assess as special costs. The rough and ready approach based on a fixed fee per half day should not be used to assess special costs. Those cases that have applied the rough and ready assessment are, in our respectful opinion, wrongfully decided and should not be followed.
- vi. Summary of General Principles
- [154] We would briefly summarize the principles as discussed above. 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.

- [155] When assessing special costs, summarily or otherwise, a judge must only allow those fees that are objectively reasonable in the circumstances. This is because the purpose of a special costs award is to provide an indemnity to the successful party, not a windfall. While a judge need not follow the exact same procedure as a registrar, the ultimate award of special costs must be consistent with what the registrar would award in similar circumstances. Thus, a judge must conduct an inquiry into whether the fees claimed by the successful litigant were proper and reasonably necessary for the conduct of the proceeding as set out in R. 14-1(3)(a), taking into account all of the relevant circumstances of the case and with particular attention to the non-exhaustive list of factors in R. 14-1(3)(b).
- [156] A special costs assessment, whether before a judge or a registrar, cannot proceed in absence of evidence of the amount of legal fees incurred. Usually this will be provided in the same form as a bill between a solicitor and client under the Legal Profession Act. This is necessary to allow a court to inquire as to the objective reasonableness of the fees claimed by a litigant, as the fact that a solicitor has billed a certain sum does not necessarily make the fee reasonable. Where production of a bill of special costs would lead to a loss of solicitor-client privilege, the party seeking special costs must either waive privilege or can elect to preserve privilege by having its costs assessed after all appeals are exhausted.

vii. Assessment in This Case

- [157] Having set out and considered the principles that apply to a special costs assessment, we return to this case. In making her assessment the trial judge made two fundamental errors of principle. First, she assessed the costs in the absence of any evidence as to the legal fees actually incurred. Second, she used the rough and ready method to determine the amount of costs. In fairness to the trial judge, she is one of many to make these mistakes.
- [158] In these circumstances the assessment of costs cannot be sustained. If Mr. Smith wishes to enforce his special costs order he will have to have those costs assessed by the registrar. The assessment will be at large and the registrar will be free to assess a sum which may be more or may be less than that set by the trial judge. We note that Mr. Gichuru in his supplemental written submissions advises that if the special costs award is upheld he would consent to special costs being assessed in the amount of \$38,000.

- [159] In the course of submissions, Mr. Smith requested that if we did not uphold the trial judge's assessment, we should summarily assess his party and party costs based on the draft bill which was put before the trial judge. The stated reason for the request was that Mr. Smith wanted to avoid the costs of a registrar's assessment given the strong possibility that the costs award may prove to be uncollectable.
- [160] Mr. Gichuru opposes a summary assessment of the draft bill of party and party costs. He notes that the draft bill is not supported by affidavit evidence and that Mr. Smith has claimed the maximum or close to the maximum number of units for several items. He also submits that there are serious problems with several of the disbursements that are claimed. He does advise that if he is unsuccessful on every ground of appeal other than the awarding of special costs he would consent to party and party costs being fixed by this Court in the amount of \$34,000.
- [161] We agree with Mr. Gichuru that we should not summarily assess Mr. Smith's party and party bill. The difficulty with that suggestion is that many of the tariff items in the draft party and party bill contain a range of units. Pursuant to s. 3(3) of Appendix B when there is a maximum and minimum number of units provided for an item the registrar has a discretion in determining the appropriate number and in exercising his discretion the registrar must have regard for the following principles:
- (a) one unit is for matters in which little time should ordinarily have been spent;
 - (b) the maximum number of units is for a matter in which a great deal of time should ordinarily have been spent.
- [162] These are matters that we cannot decide summarily in an evidentiary vacuum. Similarly there is no evidence before us concerning the disbursements claimed in the draft bill. We cannot accept on faith the amounts claimed. If Mr. Smith elects to limit his costs award to party and party costs those costs will still have to be assessed by the registrar. We do note that the taxation of a party and party bill is a much simpler process than the taxation of a bill of special costs.

Conclusion

- [163] In the result, we would dismiss Mr. Gichuru's appeal save and except the assessment of special costs is set aside. Mr. Smith can elect to have his special costs fixed at \$38,000. Alternatively he can elect to present for assessment before the registrar a bill of special costs or a bill of party and party costs.
- [164] Mr. Gichuru's appeal has been largely unsuccessful. The only issue upon which he has had some success is in regard to the manner in which costs are to be assessed. For that reason, we would award Mr. Smith 80% of his costs of the appeal.

"The Honourable Mr. Justice Harris"

"The Honourable Mr. Justice Goepel"

I AGREE:

"The Honourable Madam Justice Stromberg-Stein"

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