
CANADA / JUDGMENT

Grosz v. Guo

2020 BCSC 1073

COURT

Supreme Court of British Columbia

DECIDED

23 July 2020

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2020 BCSC 1073 Grosz v. Guo

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Grosz v. Guo,

2020 BCSC 1073

Date: 20200723

Docket: S178289

Registry: Vancouver

Between:

Robert W.G. Grosz

Plaintiff

And

Hong Guo and Guo Law Corporation

Defendants

Before: The Honourable Madam Justice Forth

Reasons for Judgment

The Plaintiff, appearing in person:

R.W.G. Grosz

Counsel for the Defendants:

S.J. Nelligan

Counsel for the Law Society of British Columbia:

G. Hoekstra

Place and Dates of Hearing:

Vancouver, B.C.

March 4-5, 2020

Place and Date of Judgment:

Vancouver, B.C.

July 23, 2020

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Introduction

- [1] The plaintiff, Robert W.G. Grosz, in a notice of application he filed on February 26, 2019 (the "February 26 Application") seeks to set aside a consent dismissal order filed in this action on March 22, 2018 (the "CDO"). Mr. Grosz seeks to have the court set aside the CDO on the basis that it was obtained by duress. At the commencement of the hearing on March 4, 2020, Mr. Grosz filed a notice of application seeking to withdraw or dismiss the February 26 Application without costs and without prejudice to reapply. The defendant, Hung Guo ("Ms. Guo"), and the corporate defendant, Guo Law Corporation ("GLC") (collectively, the "defendants"), opposed both applications.
- [2] I dismissed Mr. Grosz's application to withdraw or adjourn the February 26 Application, and gave reasons, indexed as 2020 BCSC 998, explaining why.
- [3] These are the reasons on the merits of the February 26 Application.
- [4] I will first deal with the underlying facts leading up to the commencement of this action and the default judgment that was obtained on October 2, 2017 (the "Default Judgment").
- [5] The duress that Mr. Grosz says he was under is alleged to have occurred after the Default Judgment and before filing of the CDO, between October 2, 2017 and March 22, 2018 (the "Key Time Period"). I will deal in more specific details with those facts.

Background Facts

- [6] Mr. Grosz alleges he was offered a job by Ms. Guo on July 18, 2016 to work as a designated paralegal with GLC. He accepted the position and started work on October 3, 2016. He claims, however, he was not paid for his work between October 3 and 17, 2016, and for overtime wages between October 18 through January 23, 2017. This is disputed by the defendants.
- [7] In January 2017, GLC initiated bankruptcy proceedings (the "GLC Bankruptcy").
- [8] In June and July 2017, Mr. Grosz submitted some invoices to Ms. Guo setting out what he claimed were the unpaid services.

- [9] On July 11, 2017, Mr. Grosz sent a letter to Ms. Guo, copied to her lawyers, alleging that Ms. Guo had failed to forward to her tax accountant cash receipt books of GLC regarding payments received from clients (the "July 11 Letter").
- [10] On July 21, 2017, Ms. Guo emailed Mr. Grosz asking that he not do anything for her, that he was not authorized to speak on her behalf and that he not go to her office.
- [11] According to the Report to Crown counsel that Mr. Grosz attached to one of his affidavits, the following sequence of events took place from July to September 2017, respecting a criminal complaint made by Ms. Guo:
- a. Ms. Guo terminated Mr. Grosz's employment in July 2017, and had informed him that he was not welcome to be at the offices of GLC at any time;
 - b. Mr. Grosz disobeyed Ms. Guo's demand and attended at the GLC offices, uninvited, on two different occasions;
 - c. On July 23, 2017, Mr. Grosz attended at Ms. Guo's private residence unannounced and unsolicited by Ms. Guo. He came demanding money and ultimately her sister paid Mr. Grosz \$1,000. Ms. Guo reported what had happened to the RCMP. The RCMP phoned Mr. Grosz and informed him he was not to contact Ms. Guo any further, or he risked being charged with criminal harassment;
 - d. On September 1, 2017, Ms. Guo reported to the RCMP that Mr. Grosz had disobeyed the RCMP direction since he had contacted her by both telephone and email. Mr. Grosz sent Ms. Guo a letter in which he demanded to be paid for the work that he felt he had completed, and also made reference to a vibrating dildo that he had purchased for Ms. Guo, attaching photographs of the item and sending them to Ms. Guo by email as attachments;
 - e. Ms. Guo reported that Mr. Grosz had also telephoned her several times in the past week on her work telephone line, demanding payment of \$25,000 and repeatedly making reference to the fact that he was in possession of a high-powered handgun that he had been given by a friend;
 - f. On September 1, 2017, a constable of the RCMP sent a request to the Surrey RCMP to deploy police officers to Mr. Grosz's residence and attempt to arrest him without a warrant. Mr. Grosz refused to exit. A decision was made to obtain a rush warrant;
 - g. On September 5, 2017, the Surrey RCMP arrested Mr. Grosz for criminal harassment, sexual assault and uttering threats. A decision was made not to charge him with sexual assault on the totality of the evidence; and
 - h. Mr. Grosz was released on a promise to appear on September 13, 2017 at the Richmond Provincial Court. He was charged with harassment and uttering threats (the "Criminal Charges"). He was on an undertaking that he have no contact with Ms. Guo, directly or indirectly, and that he not attend her residence or work place.

- [12] Mr. Grosz denies many of the allegations made in the Report to Crown counsel.
- [13] As of August 21, 2017, Mr. Grosz was formally terminated by Ms. Guo. It appears that both parties agree that Mr. Grosz stopped doing any work for Ms. Guo in July 2017. Mr. Grosz says he performed "admin" services on July 22, 2017, which is the last work that Mr. Grosz claims he performed for Ms. Guo or GLC.
- [14] On August 25, 2017, Mr. Grosz sent an email to Craig E. Jones, Q.C., then counsel for Ms. Guo, advising that he would be sending to Ms. Guo and other intended recipients a series of files, including three photos of a vibrating dildo and a letter to Ms. Guo dated August 25, 2017 that contained a settlement offer.
- [15] In the August 25, 2017 letter, Mr. Grosz offered to settle for \$25,000 (the "First Offer") and offered to provide a complete release of all possible claims. The offer was open for acceptance until August 31, 2017, after which he advised that he would file a claim for over \$600,000 against Ms. Guo and GLC.
- [16] On August 29, 2017, Mr. Grosz filed with the Trustee in Bankruptcy a Proof of Claim in the GLC Bankruptcy for the amount of \$15,713.65 in unpaid wages and disbursements and a claim for \$2,000 under s. 136(1)(d) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3.
- [17] On August 30, 2017, Mr. Jones advised Mr. Grosz that Ms. Guo's response to the letter of August 25, 2017 and attachments was:
- Your letter is defamatory, the attachments are vulgar and bizarre. The threat to send the letter and its attachments to third parties if Ms. Guo does not pay you \$25,000 (the "next step, absent a settlement, would be to email the letter to her and the other named recipients") is criminal extortion.
- [18] On August 30, 2017, Mr. Grosz reoffered the \$25,000 to settle and advised that if it was not accepted by August 31, 2017, he would sue (the "Second Offer").
- [19] On September 1, 2017, Mr. Grosz filed an Amended Proof of Claim in the GLC bankruptcy, amending the amount to \$15,673.65.
- [20] On September 5, 2017, Mr. Grosz filed the notice of civil claim in this action. In the claim, he sought payment for unpaid wages and disbursements, damages for sexual harassment and wrongful dismissal, punitive damages, an order requiring the establishment of a sexual harassment policy and special costs.
- [21] On September 5, 2017, Mr. Grosz filed an Amended Supplemental Proof of Claim in the GLC Bankruptcy seeking \$500,000 as an unsecured claim, broken down as unliquidated damages of \$100,000 for sexual harassment, \$100,000 for wrongful dismissal and \$300,000 for punitive damages as set forth in the notice of civil claim.
- [22] On September 11, 2017, Mr. Grosz made an offer to settle the claim for the sum of \$30,000 (the "Third Offer") in exchange for a complete release of all claims.

- [23] On September 13, 2017, the Third Offer was rejected by the defendants. The defendants made a counteroffer that Ms. Guo was prepared to settle all matters of civil controversy if Mr. Grosz discontinued the action with prejudice and a written apology in a form satisfactory to her for the defamatory statements made. It appears that Bryant A. Mackey, lawyer, had taken over communicating with Mr. Grosz on behalf of Ms. Guo and GLC, in place of Mr. Jones.
- [24] On September 28, 2017, Mr. Grosz filed a without notice application for default judgment on the basis that the defendants had not filed any response to civil claim.
- [25] On October 2, 2017, Master Dick heard the without notice application and granted the Default Judgment:
1. the defendant Hong Guo shall pay \$8,249.43 to the plaintiff Robert W.G. Grosz;
 2. the defendant Guo Law Corporation shall pay \$4,525.39 to the plaintiff Robert W.G. Grosz.
- [26] Two other orders that Mr. Grosz sought in his draft order were not granted and struck out by the master.
- [27] The Default Judgment was served on the defendants on October 2, 2017.
- [28] On the same day, October 2, 2017, Mr. Grosz offered to settle all claims against Ms. Guo and GLC for \$28,448.47 (the "Fourth Offer"). Mr. Grosz included the following term in his offer:
- Excluded from this settlement proposal is a release from any claims regarding the complaint of Hong Guo with the RCMP and the resulting damages from the criminal action filed against me (2025-61853).
- [29] Further on October 2, 2017, Mr. Grosz filed a garnishing order against Ms. Guo and GLC for \$8,249.43 and \$4,525.39 respectively.
- [30] On October 11, 2017, Mr. Grosz sought to have the stay of proceeding lifted in the GLC Bankruptcy. The defendants consented to lifting the stay.
- [31] On the same day, October 11, 2017, Mr. Grosz filed a writ of seizure and sale against GLC and Ms. Guo.
- [32] On October 18, 2017, a response to civil claim was filed on behalf of the defendants by Mr. Mackey. That same day, the defendants filed an application seeking to set aside the Default Judgement. The application was scheduled to be heard on November 1, 2017.
- [33] On October 24, 2017, a consent order was filed in the GLC Bankruptcy lifting the stay.
- [34] On October 24, 2017, Mr. Mackey emailed Mr. Grosz advising that if Mr. Grosz was interested in settling the claim, his client would be content with:
- an order by consent to set aside the Default Judgment;

- a consent dismissal order of the entire claim;
- an agreement that the defendants will not file a counterclaim or claim against Mr. Grosz; and
- an agreement that the defendants will not seek costs against Mr. Grosz.

[35] On October 25, 2017, Mr. Grosz made an offer to settle the action for the sum of \$17,300.21 (the "Fifth Offer"), excluding damages for the criminal action, but advising that if Ms. Guo withdrew the criminal complaint, he would provide a complete release from damages for the criminal action. There was no response from the defendants to the Fifth Offer.

[36] On October 29, 2017, Mr. Grosz made an offer to settle the action for the sum of \$8,229.43 in garnished funds paid into court (the "Sixth Offer"), except for any claims relating to the criminal matter, but advising that if Ms. Guo withdrew the criminal complaint he would provide a complete release from damages for the criminal action.

[37] Mr. Grosz alleges that during this period, his criminal defence counsel was advising him that the Crown was exerting more pressure to agree to a trial date while resisting disclosure of evidence.

[38] On November 1, 2017, Mr. Mackey and Mr. Grosz were in chambers waiting to check in on an application by the defendants to set aside the Default Judgment, when Mr. Grosz advised that he was prepared to offer to settle all matters for \$5,000 (the "Seventh Offer"). It was agreed that the application to set aside the Default Judgment would be adjourned to discuss the terms of the settlement.

[39] The following email exchanges took place between Mr. Grosz and Mr. Mackey, on the terms of settlement:

a. November 2, 2017 - Mr. Mackey sent an email to Mr. Grosz confirming that Mr. Grosz proposed \$5,000 to settle all matters and suggesting the following conditions:

- a settlement of everything with a full release of all known and unknown claims, including the Proposal;
- setting aside the Default Judgment by consent; and
- a final release and consent dismissal order without costs as if tried on the merits.

b. November 2, 2017 - Mr. Grosz responded, advising that he was in general agreement with the proposal, but he raised three additional issues:

- he needed an unemployment insurance record of employment for \$6,000 that Ms. Guo paid him;
- he needed a letter from Ms. Guo to the RCMP and Crown counsel, advising that she withdrew her criminal complaint against him and did not wish to testify; and
- a full release from Ms. Guo of "all known and unknown claims".

- c. November 3, 2017 - Mr. Mackey responded that his client could not agree to the requests and in particular stated:

As I had mentioned at court it is simply not possible, and nor is it ethical, to tie the settlement of your civil lawsuit to my client's ability or willingness to testify in a criminal proceeding in which you have been charged.

Mr. Mackey then suggested that the application to set aside the Default Judgment be rescheduled for November 10, 2017.

- d. November 3, 2017 - Mr. Grosz responded:

I am willing to agree to all of your proposed terms, except that I would only be content to provide Ms. Guo with a release that is limited to the action. I trust that is acceptable and look forward to your reply. Thank you for your efforts.

- e. November 6, 2017 - Mr. Mackey asked if Mr. Grosz was available the coming Friday, November 10, to reset the application.
- f. November 6, 2017 - Mr. Grosz replied that he thought that an agreement had essentially been reached on a settlement of the action for \$5,000 with each side to bear its costs, subject to a standard release. He referred to the three conditions he had asked for and stated that he wished to settle "so that both sides can put an end to this unfortunate state of affairs and get on with their respective lives". He reiterated his offer to settle for \$5,000 with each side to bear their own costs, plus a standard release that is limited to the action.
- g. November 7, 2017 - Mr. Mackey replied that the proposed release would not preclude Mr. Grosz from pursuing a claim for malicious prosecution against Ms. Guo because:

that cause of action, even if it were true what you say (which we deny, of course), would not arise until the criminal proceedings against you are concluded in your favour (that is a necessary element of the tort). The release we propose is for claims, known or unknown, that exist as of the time of settlement and is a standard release in these kinds of cases. My clients won't agree to a settlement unless it is a comprehensive guarantee that they will not face further claims arising from the past relationship of the parties.

- h. November 7, 2017 - Mr. Grosz confirmed he was prepared to sign a mutual release provided that it would not exclude "an action for malicious prosecution that commenced with Ms. Hong Guo's initial complaint to the RCMP on July 23rd".
- i. November 14, 2017 - Mr. Grosz sent a follow-up email, stating:

Just to be clear, with hypothetical ethical issues aside, my preference would be to settle the litigation as proposed for \$5,000 and grant Ms. Hong Guo a complete release of 'all known and unknown' claims to include her complaints to the RCMP on and after July 23rd if she states an intention to withdraw her complaints and not testify. My desire is to see all matters between us wrapped up so that we can each get on with our respective life. I hope this helps.

j. November 16, 2017 - Mr. Mackey replied that his clients were prepared to move forward with the proposed settlement, that he hoped that a settlement could be reached and provided details necessary to effect a fair settlement to all parties over the next several days.

[40] The parties went back and forth on the terms of the mutual release. On November 22, 2017, Mr. Grosz signed a mutual release that provides, at para. 1, a general release but clarifies "not including a potential civil claim by Grosz against Guo for malicious prosecution". Paragraph 3 of the mutual release also provides:

3. Grosz, Guo, and GLC hereby agree to set aside the judgment obtained in the Action, dismiss the action without costs to any party, with such dismissal as though judgment was pronounced on the merits, and that Grosz will receive \$5,000 of the funds paid into Court to the credit of the Action with the remainder to go to either or both of Guo and GLC.

[41] On November 28, 2017, Mr. Mackey sent an email to Mr. Grosz attaching a signed release by Ms. Guo dated November 28, 2017, advising that:

HOWEVER, IM SURE YOU WILL BE MORE INTERESTED IN THE RELEASE. I HAVE ONLY LOOKED AT THE DOCUMENT ON MY PHONE BUT [IT] APPEARS HONG HAS AMENDED PORTIONS OF IT AND RETURNED HER PREFERRED SIGNED VERSION. AS A RESULT I NEED YOU TO REVIEW IT AND LET ME KNOW IF HER VERSION IS ACCEPABLE. IF NOT, THEN LET ME KNOW.

[42] The mutual release dated November 28, 2017 signed by Ms. Guo removed from para. 1 the following: "but not including a potential civil claim by Grosz against Guo for malicious prosecution". It also changed para. 3 to read:

3. Grosz, Guo, and GLC hereby agree to set aside the default judgment obtained in the Action, dismiss the action based on no merit, without costs to any party, and that Grosz will receive \$5,000 of the funds paid into Court to the credit of the Action with the remainder to go to either or both of Guo and GLC.

[43] On December 14, 2017, Mr. Mackey emailed Mr. Grosz asking if he would be amenable to modifying the proposed release. Mr. Mackey advised that Ms. Guo would like a sentence in the release that indicates that:

the claim for sexual misconduct, etc., is untrue or words to that effect. I believe she sees this as a reasonable compromise by her for accepting the sentence in the release that expressly acknowledges your ability to bring a future claim for malicious prosecution. The other option may be agree to remove the malicious prosecution sentence altogether. Certainly seek legal advice on the subject, but my view is that the release would not bar future causes of action that have yet to crystallize (in the same way that a future automobile collision between you two wouldn't be captured by this release).

[44] On January 16, 2018, Sandy Ross, Mr. Grosz's defence counsel, emailed Kimberly Turnbull, Crown counsel, and Mr. Grosz stating:

I confirm our discussion that you have determined that, in light of the civil resolution of the issues between Mr Grosz and Ms Guo, about to be completed, there is no further public interest in pursuing these charges. As I advised Mr Grosz is prepared to forego any potential suit against Ms Guo for malicious prosecution. At the same time Ms Guo is agreeable to charges being terminated by way of a Stay of Proceedings. Please confirm when you have directed a SOP. I expect that Mr Grosz will then sign civil releases, which are already prepared, so as to receive his settlement funds after which he will have no need or interest to have any interaction with Ms Guo in any way.

[45] On or about January 16, 2018, Crown counsel entered a stay of proceedings on the Criminal Charges. Mr. Grosz was advised that a stay of proceedings meant that the Crown had 12 months to reconsider and re-institute proceedings if it so chose.

[46] On January 18, 2018, the mutual release was sent to Mr. Grosz by Mr. Mackey. Mr. Grosz says he signed it on the same day.

[47] On March 17, 2018, Mr. Mackey forwarded the mutual release signed by Ms. Guo and GLC. The mutual release reads, in part, as follows:

WHEREAS

A. Robert W.G. Grosz ("Grosz") has commenced B.C. Supreme Court action no. VLC-S-S-178289, Vancouver Registry (the "Action") against Hong Guo ("Guo") and Guo Law Corporation ("GLC"), in which he claims damages and debts owing from both Guo and GLC;

B. Grosz has filed a proof of claim, since amended and supplemented (the "Proof of Claim") in the Proposal to creditors made by GLC in estate no. H2204770 (the "Proposal");

C. Guo and GLC also have potential claims against Grosz; and

D. Grosz, GLC, and Guo have agreed to settle the claims raised in the Action and the potential claims against Grosz,

NOW, THEREFORE, in consideration of the mutual obligations of Grosz, Guo, and GLC (each, a "Releasor", together the "Releasors") contained herein, the receipt and sufficiency of which is hereby agreed and acknowledged, Grosz, Guo, and GLC hereby agree as follows:

1. Grosz hereby remises, releases, and forever discharges each and both of GLC and Guo and all of their respective employees, agents, heirs, successors, administrators or assigns of and from any and all actions, causes of action, claims, suits, debts, dues, accounts, bonds, covenants, contracts, demands, damages, interest, expenses, disbursements or compensation of whatsoever kind and howsoever arising, including claims raised in the Action and the Proof of Claim and any other claim or cause arising from Grosz' employment with either or both of GLC and Guo that exist in law or equity at the time of the execution of this agreement.

2. Guo and GLC hereby remise, release, and forever discharge Grosz and his heirs, successors, administrators or assigns of and from any and all actions, causes of action, claims, suits, debts, dues, accounts, bonds, covenants, contracts, demands, damages, interest, expenses, disbursements or compensation of whatsoever kind and howsoever arising, whether known or unknown, suspected or unsuspected, arising in law or in equity that either or both of Guo and GLC ever had, now has, or their respective assigns or any of them, hereafter can, may have against Grosz at the time of the execution of this agreement.
 3. Grosz, Guo, and GLC hereby agree to set aside the judgment obtained in the Action, dismiss the action without costs to any party, with an order of the Court that such dismissal will be as though judgment was pronounced on the merits, and that Grosz will receive \$5,000 of the funds paid into Court to the credit of the Action with the remainder to be released to the holder or holders of the accounts from which the payments into Court were made.
 7. Each Releasor has read this document, has obtained or had the opportunity to obtain independent legal advice, and fully understands the terms of this Mutual Release.
- [48] On March 22, 2018, Mr. Mackey and Mr. Grosz appeared in chambers before Master Keighley and a CDO was granted which reads as follows:
1. By consent, the action shall be dismissed as if on the merits, without costs to any party;
 2. By consent, \$5,000 shall be paid out of court to the plaintiff Robert W.G. Grosz from the garnished funds paid into court from the \$12,774.82 paid into court on October 24, 2017 by Bank of Montreal (receipt 1721110); and
 3. By consent, \$25,083.04 shall be paid out of court to Bryant Mackey, lawyer for the defendants Hong Guo and Guo Law Corporation, from the garnished funds paid into court from the remainder of the funds from the \$12,774.82 paid into court on October 24, 2017 by Bank of Montreal (receipt 1721110), the \$4,525.39 paid into court on October 20, 2017 by Toronto Dominion Bank (receipt 1720897), the \$12,774.82 paid into court on November 1, 2017 by Bank of Montreal (receipt 1721793), and the \$8.01 paid into court on November 7, 2017 by Royal Bank of Canada (receipt 1722122).
- [49] Mr. Grosz received the \$5,000 in settlement funds.
- [50] On May 2, 2018, Mr. Munro, managing director of FTI Consulting, the trustee in bankruptcy, received from Mr. Mackey a copy of the CDO and the trustee marked Mr. Grosz's proof of claim as settled.
- [51] On February 14, 2019, Mr. Grosz claimed he was advised by Mr. Munro that Ms. Guo was in the process of securing a loan from her sister of roughly \$300,000 which would be provided to Mr. Munro so he, on behalf of FTI Consulting as the proposal trustee for GLC, could pay off that month all the proven unsecured creditors against GLC and file a record with the bankruptcy court in order to wind up the insolvency. Mr. Grosz advised that he wanted to secure an undertaking that no payment would be made on unsecured but proven claims

until he could restore his action in Supreme Court and then have his claims assessed, thereby putting them on the list of claims to be paid out.

- [52] On February 20, 2019, Mr. Grosz filed a requisition seeking an order to waive fees. On that day, Master Harper granted an order waiving fees for one notice of application and two affidavits with liberty to apply
- [53] On February 21, 2019, Mr. Grosz filed a without notice application to be heard in camera (closed to the public) for an order that the court set aside the CDO based on duress of the plaintiff, and for an order sealing the file. This application was set for hearing on February 25, 2019. Mr. Grosz appeared before Justice Giaschi, who dismissed the application in its entirety and ordered that the applicant had leave to re-apply, but any such re-application for an order setting aside the CDO had to be served on the defendants.
- [54] On February 25, 2019, Master Muir granted an order waiving fees for six months.
- [55] On February 26, 2019, Mr. Grosz filed this application to be heard in camera. It was returnable on March 8, 2019.
- [56] On March 5, 2019, Mr. Grosz threatened to bring an injunction against the trustee on March 8, 2019, seeking to prevent any payments to unsecured creditors. He stated that he anticipated that on that day, he would obtain an order to set aside the CDO "obtained from me under duress".
- [57] On March 5, 2019, counsel for the trustee responded and advised as follows:
1. The Proposal Trustee does not take a position in the civil proceedings you have commenced against Hong Guo and GLC under Vancouver Registry No. S178289 (the "Grosz Proceedings"). The Proposal Trustee understands you have set down an application on March 8, 2019 to set aside the Consent Dismissal Order entered in the Grosz Proceedings and to invalidate a mutual release between you and the Defendants in such proceedings. The Proposal Trustee will of course respect the decision of the Court in your upcoming application and any future applications you might make in the Grosz Proceedings.
 2. The Proposal Trustee is not aware of any plans in the near future for any payments to be made to proven creditors in the Proposal Proceedings and is not in funds to do so in any event.
 3. If there is either an application or otherwise a plan which would give rise to any payments to be made to proven creditors in the Proposal Proceedings, the Proposal Trustee will provide notice of the same to you by mailing such notice to you at the residential address noted above and by sending emails to both of the email addresses set out above.
- [58] On March 8, 2019, Mr. Grosz appeared in chambers before Justice Mayer who made the following orders:

1. The Plaintiff's application filed February 26, 2019 to set aside the Consent Dismissal Order (the "February 26 Application") is adjourned generally;
 2. The Plaintiff shall pay to the Defendants costs thrown away in respect of the attendance on March 8, 2019 in the amount of \$2,000 forthwith in any event of the Cause (the "Costs Payment");
 3. Mr. Justice Mayer will be seized of any application by the Plaintiff to re-consider or vary the Costs Payment. Such application may be set for one hour;
 4. The Plaintiff shall not be at liberty to re-set the February 26 Application until the Costs Payment has been made;
 5. At the hearing of the February 26 Application the Plaintiff may only rely on materials that he has served on counsel for the Defendants; and
 6. Approval as to the form of this Order by the Plaintiff is dispensed with.
- [59] On March 14, 2019, Mr. Grosz sent to the Vancouver registry a request to appear before Mayer J. to have him reconsider the \$2,000 costs order.
- [60] On March 28, 2019, the defendants served a notice of application seeking to have Mr. Grosz declared a vexatious litigant pursuant to s. 18 of the Supreme Court Act, R.S.B.C. 1996, c. 443 (the "Vexatious Litigant Application"). The Vexatious Litigant Application was set for April 10, 2019.
- [61] On April 3, 2019, Mr. Grosz filed an application to be heard in camera seeking to have the \$2,000 costs thrown away order varied or set aside.
- [62] On April 10, 2019, Mayer J. heard Mr. Grosz's reconsideration application and he dismissed it. The comment made at para. 13 of his unreported reasons is of significance:
- [13] The only way to encourage Mr. Grosz, to ensure that he proceeds in an expeditious way, where appropriate materials are filed, defendant responds, and the matter proceeds as scheduled, is to deliver a message to Mr. Grosz, as a plaintiff, that there are repercussions if he does not do so. So, as a result, I decline Mr. Grosz's application to vary my previous order with respect to the payment of costs.
- [63] The Vexatious Litigant Application commenced on April 10, 2019 and continued on May 27, 2019. On June 3, 2019, Mayer J. released oral reasons, indexed as 2019 BCSC 1545, dismissing the Vexatious Litigant Application. Of significance to the application before me is the comment made at para. 34:

- [34] Accordingly, I dismiss the defendants' application for a finding that Mr. Grosz is a vexatious litigant. It goes without saying that if, for example, Mr. Grosz fails to bring on his application to set aside the consent dismissal order as currently planned or afterwards in a timely manner and Mr. Grosz continues with his past conduct, that the defendants are in no way precluded from bringing a further application pursuant to s. 18 of the Supreme Court Act.
- [64] On November 5, 2019, the parties appeared before me for a judicial management conference in the GLC Bankruptcy. At that time, the issue of resetting the February 26 Application was discussed. Mr. Grosz advised that he had a DVD recording of Ms. Guo made sometime after he had filed the February 26 Application. He wanted to make reference to it at the hearing of the application to set aside the CDO. I advised him he could attach the DVD to an affidavit and if the registry did not accept it, he could bring it to the hearing and hand it to me.
- [65] I was also advised that Mr. Grosz had paid the \$2,000 costs order and, as such, there was no longer any prohibition to setting down the hearing of the February 26 Application. Mr. Grosz wanted to prepare an amended notice of application before the hearing.
- [66] On November 5, 2019, I made the following orders (the "November Order"):
1. The Plaintiff has leave to amend his Notice of Application filed February 26, 2019, to be filed and served no later than January 2, 2020 at 4:00 pm.
 2. The Defendants may file any further or additional response materials, to be filed and served no later than January 16, 2020 at 4:00 p.m.
 3. The hearing of the Plaintiff's application to set aside the Consent Dismissal Order pronounced in this proceeding shall be heard on March 5 and 6, 2020 before Madam Justice Forth.
 4. Approval as to the form of this order by Robert W.G. Grosz is dispensed with.
- [67] The March 2020 dates were chosen over the objections of then defence counsel, Mr. Louman-Gardiner, who objected to such a lengthy delay in having this matter heard. His position was that the matter should be set down for hearing at the first available dates, which were in February.
- [68] Mr. Grosz objected to having it heard in February 2020 since he claimed there was a benchers hearing scheduled in February 2020 respecting Ms. Guo and he had to be in attendance. To accommodate Mr. Grosz, I set the matter for hearing on March 5 and 6, 2020.
- [69] Mr. Grosz did not file any further materials in accordance with my November Order.
- [70] The counsel who was acting on behalf of the defendants, Mr. Louman-Gardiner, is no longer counsel in this action. On November 12, 2019, Mr. Grosz sued Mr. Louman-Gardiner along with other past lawyers who acted for the defendants in this action in the Grosz v. Jones action (Vancouver Registry no. S1912718).

[71] Due to a criminal matter I had to hear on March 6, the dates for the hearing of the February 26 Application were changed to March 4 and 5, 2020.

Admissibility of Evidence

[72] During the hearing, two issues came up on the admissibility of evidence, being:

- a) pages 48 to 130 of Affidavit #11 of Mr. Grosz filed February 21, 2019 ("Affidavit #11") due to a breach of s. 87 of the Legal Profession Act, S.B.C. 1998, c. 9 [LPA]; and
- b) a DVD of excerpts of recordings made by Mr. Grosz of Ms. Guo on July 7, 2017 and March 15, 2019.

Admissibility of Affidavit #11 - pages 48 to 130

[73] On November 15, 2019, I heard an ex parte application by the Law Society of British Columbia (the "Law Society") that included a request that pages 48 to 130 of Affidavit #11 be removed or declared inadmissible. The pages contain copies of records in a proceeding concerning Ms. Guo under the LPA. The records are:

- a. a Benchers order dated January 28, 2017, which attaches a Benchers order of August 16, 2016 (the "August Hearing Panel Order");
- b. a letter from the Law Society to Ms. Guo's counsel dated December 1, 2016;
- c. Affidavit of Linda Murray, staff lawyer at the Law Society, affirmed December 6, 2016; and
- d. Affidavit of Robert Grosz, paralegal, affirmed December 7, 2016.

(collectively, the "Records").

Positions of the Law Society and Mr. Grosz

[74] The Law Society's position is that the Records are covered by s. 87 of the LPA and, as such, are inadmissible without the written consent of the Executive Director.

[75] Mr. Grosz admits that he did not receive the written consent of the Executive Director to attach these Records to an affidavit to be filed in this action. He points out that the August Hearing Panel Order was attached to an affidavit in another proceeding. He suggests that this supports that the Law Society has a double standard and is treating different litigants to different standards. In his view, this is a fundamental breach of natural justice. He further submits that one of the affidavits that was filed was his own and, as such, he should be able to rely on it.

[76] The Law Society points out that in the other action in which the August Hearing Panel Order was used, Mr. Morrison, counsel for a party, wrote a letter to the Executive Director of the Law Society advising as follows:

- a. he was acting for a client of Ms. Guo and GLC who was affected by her significant trust shortage;
- b. this client had a judgment against Ms. Guo and GLC;
- c. a Forbearance Agreement was entered into in which his client agreed to forbear from executing on the assets of Ms. Guo and GLC;
- d. Ms. Guo and GLC failed or refused to make the payments required by the Forbearance Agreement;
- e. Ms. Guo and GLC had advised him that the custodian appointed by the Law Society believed that the August Hearing Panel Order prohibited Ms. Guo from making the payments she was required to make; and
- f. Mr. Grosz, on behalf of Ms. Guo, was going to argue that Ms. Guo was prohibited from making payments on the judgment debt by the terms of the August Hearing Panel Order.

[77] Mr. Morrison requested the consent of the Executive Director to permit him to disclose the August Hearing Panel Order to the court for a number of reasons, including that Ms. Guo intended to make submissions to the court that had the significant potential to mislead the court if the court was not provided with a copy of the August Hearing Panel Order.

[78] On December 6, 2016, the following consent was given by Timothy McGee, Q.C., Chief Executive Officer:

The [August Hearing Panel Order] is a report within the meaning of section 87 of the [LPA] and I hereby provide my consent under section 87(4) of the [LPA] that the [August Hearing Panel Order], and this letter, may be produced to the Court and admitted in court proceedings commenced by your client against Ms. Guo and Guo Law Corporation for the purpose of ensuring that the Court has an accurate understanding of the terms of the Order.

[79] At this hearing, the Law Society pointed out that the procedure that was followed in the other action to seek the consent of the Executive Director is the procedure that should have been followed in this action prior to Mr. Grosz attaching the Records to an affidavit and filing it in court. The proper procedure was not followed by Mr. Grosz.

Analysis

[80] I reviewed pages 48 to 130 of the Affidavit #11 and, in my view, they meet the definition of a report or record as defined in ss. 87(1) and 87(4) of the LPA. The LPA is clear that in order to put these records before the court, a party is required to obtain the written consent of the executor director: s. 87(4) of the LPA. That consent was not obtained. The fact that consent was obtained in a different action does not render the Records admissible in this action.

[81] As such, I ruled that the Records were inadmissible in this proceeding. I advised the parties that I would provide further reasons explaining my ruling and these are those reasons.

Admissibility of the DVD

Positions of the Parties

- [82] At the hearing of this application on March 5, 2020, I allowed Mr. Grosz to play excerpts of recordings he made of Ms. Guo on July 17, 2017 and March 15, 2019. He attached transcripts of what was said as exhibits to his affidavit #21, filed on April 10, 2019. I noted that the copy of Affidavit #21 in Mr. Grosz's application record at Tab 12 was not sworn. There is a sworn copy in the court file. In the future, Mr. Grosz should be placing in Application Records the sworn and filed copies of affidavits and not unsworn ones. It is not clear to me why the copy of Affidavit #21 has a registry filed stamp of April 10, 2019 on it when it was not sworn.
- [83] Mr. Grosz had the excerpts transcribed by a court reporter. He then "corrected" the transcripts based on his listening to the tapes. For the most part, the "corrected" transcripts appear to capture the essence of what was said based on the excerpts played in court.
- [84] Mr. Grosz submits that the first excerpt from July 17, 2017 supports that Ms. Guo was sexually interested in him.
- [85] Mr. Grosz submits that the second excerpt from March 15, 2019 supports that:
- Ms. Guo wanted to continue to have a relationship with him;
 - Ms. Guo admits that she had gone to the police with false allegations, which resulted in him getting arrested on three counts;
 - Ms. Guo admits that she lied; and
 - Ms. Guo admits that "we are even", which refers to the perceived damage she felt as a result of the July 11 Letter Mr. Grosz wrote.
- [86] Counsel for the defendants took the position that the excerpt from the July 17, 2017 meeting was of no relevance to the issues in this application, being whether the CDO should be set aside on the basis of duress.
- [87] Counsel for the defendants took the position that the excerpt from the March 15, 2019 meeting was equally of no relevance since there was no admission that supports that Ms. Guo was exerting any pressure on Mr. Grosz during the Key Time Period. Counsel submits that Mr. Grosz has sought to embellish on what he thinks the words mean, and the interpretation he seeks is not borne out by the words spoken.
- [88] Counsel for the defendants further argued that the excerpts that Mr. Grosz relied on in isolation did not put the meeting in context, since the meeting was much longer. She advised that in the past, Mr. Grosz provided a 30-minute excerpt from the March 15, 2019 meeting which supports that Mr. Grosz tried to convince Ms. Guo at the beginning of the meeting to go somewhere private, like a hotel room, which she refused. This supports that Ms. Guo had absolutely no interest in any type of attraction to him.

Analysis

[89] The excerpt of the July 17, 2017 meeting between Mr. Grosz and Ms. Guo is of no relevance to the issues in this application. There is nothing in this excerpt that provides any evidence of the alleged duress Mr. Grosz says he experienced during the Key Time Period.

[90] I have some significant reservations about whether the excerpt of the March 15, 2019 meeting should be admissible at this application. Mr. Grosz initially stated in his submissions that the meeting was a "settlement meeting". He tried to retract from that statement.

[91] In his letter to Ms. Guo, dated March 18, 2019, he states:

This letter is further to our Rule 9-1 settlement offer meeting at Richmond Centre at 4:00 PM for two hours on March 15, 2019

[92] In support that this was a settlement meeting is Ms. Guo's sworn statement that "[i]n an attempt to resolve matters, I met with Mr. Grosz on March 15, 2019".

[93] In Mr. Grosz's sworn statement in his Affidavit #21, he states:

12. The second transcript is of two excerpts from an audio recording that I made of a meeting with Ms. Guo on March 15, 2019 shortly after the March 8, 2019 hearing, and was part of an attempt to reach a settlement.

[94] Mr. Grosz suggested that Ms. Guo knew he was recording the meeting on March 15, 2019. Yet in his letter of April 23, 2019 addressed to Don Avison, Managing Director & CEO of the Law Society, and Sue Forbes, Q.C., Director of Insurance at the Lawyers Insurance Fund, Mr. Grosz states:

It is undisputed that as of March 15, 2019 when I had a private settlement meeting with Ms. Guo, which I secretly recorded,

[95] If the meeting was for a settlement, the communications made in the course of settlement would be privileged and prima facie inadmissible: *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37 at para. 12. However, since neither of the parties made submissions on this issue, I will resolve this application on the submissions they did make, which centered on the relevance of the communications.

[96] I do not see the relevance of these alleged admissions of Ms. Guo to the issue I have to decide, being whether Mr. Grosz has met the legal test he has to meet in order to set aside the CDO on the basis of duress. After listening to the conversations, I am not prepared to make the inferences he asks me to based on what Ms. Guo says. I also have serious concerns about the trustworthiness of this recording, given the fact that it only covers a portion of the two hour meeting and only Mr. Grosz knew that the conversation was being recorded: *Dhillon v. Dhillon*, 2019 BCCA 163 at para. 20. As such, I put no weight on the excerpts that Mr. Grosz provided.

[97] Ms. Guo submitted a further affidavit attaching a 30-minute audio tape of the same meeting that had previously been provided to her counsel by Mr. Grosz. I have listened to that excerpt. It does support that Ms. Guo was not willing to go to a private place to meet with Mr. Grosz. It also does not touch upon the issues I need to decide in this application and, as such, I put no weight on that excerpt.

Should the Consent Dismissal Order be set aside on the basis of duress?

Legal Principles

[98] A consent order is a formal expression of an agreement between the parties and will operate as a final judgment: *Shackleton v. Shackleton*, 1999 BCCA 704 at para. 12. They will not generally be set aside or varied unless there are grounds that would justify setting aside the underlying contract, such as duress, undue influence, fraud, misrepresentation, mistake or unconscionability: *Verma v. Verma*, 2007 BCCA 566 at para. 28. The Supreme Court of Canada endorsed the following explanation for this approach in *Rick v. Brandsema*, 2009 SCC 10 at para. 64:

This rule reflects the reality that a consent judgment is not a judicial determination on the merits of a case but only an agreement elevated to an order on consent. The basis for the order is the parties' agreement, not a judge's determination of what is fair and reasonable in the circumstances.

[99] In this case, Mr. Grosz seeks to set aside the CDO on the basis of duress. Duress occurs when a party enters into a contract because an illegitimate pressure or demand left them with no real alternative but to do so. The Court of Appeal in *Bell v. Levy*, 2011 BCCA 417, set out the three elements that a party asserting duress must prove (para. 72):

- a. the party seeking to set aside the agreement was under a threat;
- b. the threats were wrongful (i.e., unfair, excessive or coercive); and
- c. the wrongful threats overrode the party's will and vitiated his consent such that the contract was not entered into voluntarily.

[100] This Court in *Song Woon Enterprises Ltd. v. 762138 B.C. Ltd.*, 2014 BCSC 967 [Song Woon] set out the additional factors to consider in determining whether a contract was entered into voluntarily, at para. 110:

1. Did the party protest?
2. Was an alternative course open to the party when it chose to enter the contract - e.g. an adequate legal remedy?
3. Did the party seek independent advice?
4. After entering the contract, did the other party take legal steps to avoid it?

Positions of the Parties

- [101] The defendants say that the Bell test has not been met here in that there were no threats of any kind made by the defendants and no evidence that any threats vitiated Mr. Grosz's consent.
- [102] The defendants submit that the Song Woon factors also demonstrate a complete absence of justifiable duress in that Mr. Grosz did not protest the agreement until February 2019. Rather, he affirmed it. Mr. Grosz chose to settle the action when he had the option of continuing, particularly in light of the consent to lifting the bankruptcy stay of proceedings. Although there is no evidence that Mr. Grosz obtained legal advice, he has legal training and experience. Finally, he has not sought to avoid the benefit of the contract and did not take any steps for nearly one year.
- [103] Mr. Grosz takes the position that he was under duress in that he had no choice but to settle since a term of settlement was that Ms. Guo agreed to withdraw the criminal charges against him and not testify against him. He had to agree to this deal since the advice from his criminal lawyer was that he would likely be found guilty and he was in a precarious situation. His understanding was that if he signed the CDO, it could later be set aside on duress. He decided to proceed in that fashion and then "keep my head down, kiss her ass, if that situation was necessary, literally or figuratively". He submits that Ms. Guo leveraged the criminal charges to secure his consent to the CDO.
- [104] The notice of application filed by Mr. Grosz asserts that the CDO should be set aside for the following reasons:
- a. it was "the product of a criminal extortion attempt" by Ms. Guo to cause Mr. Grosz "to suffer criminal charges which she then caused to [be] dropped in exchange for a payment of \$5,000" to Mr. Grosz;
 - b. the consideration of \$5,000 paid was not adequate consideration because he valued all of his other damages at \$1 million;
 - c. his will was vitiated because ultimately the mutual release that was signed prevents Mr. Grosz from bringing a claim of malicious prosecution against Ms. Guo; and
 - d. the \$5,000 payment was an "illegal pay off" since it was in exchange for Mr. Grosz dropping his request that Ms. Guo be criminally charged.
- [105] Mr. Grosz affirmed and filed his affidavit #18 on March 8, 2019, which makes some further arguments in support of his application to set aside the CDO. The arguments are as follows:
- a. He is not relying on "economic duress", but on "classic duress", which includes threats of physical violence and for which the test is "whether there was a coercion of will such as that there was no true consent" (citing Bell at para. 52);

- b. In considering duress, the court should consider whether the pressure amounted to compulsion of the will of the victim and the illegitimacy of the pressure exerted (citing *Stott v. Merit Investment Corp.*(1988), 63 O.R. (2d) 545 (C.A.); and
- c. Ms. Guo extorted his signature on the mutual release by entrapping him on July 22, 2017 when her sister paid him \$1,000 as a small part payment on his invoices, and then Ms. Guo's sister told him that Ms. Guo was going to falsely report him to the RCMP for extortion.

Analysis

Any threats made

[106] There is no evidence to support that the defendants made any threats to compel Mr. Grosz to enter into the settlement of the action. Ms. Guo did go to the RCMP and report her concerns that Mr. Grosz had uttered threats to her and that he had harassed and sexually assaulted her. Those complaints were made prior to the notice of civil claim in this action being filed on September 5, 2017. Ms. Guo's reporting to the RCMP prior to the action being commenced is not evidence of threats made to compel Mr. Grosz to settle this action.

[107] The evidence is clear that Mr. Grosz wanted to have Ms. Guo agree to withdraw the criminal charges in exchange for the settlement of the action. Ms. Guo's lawyer also made it clear to Mr. Grosz that his client could not agree to this. As noted in para. 39 of these reasons, Mr. Mackey states in his email of November 3, 2017:

As I had mentioned at court it is simply not possible, and nor is it ethical, to tie the settlement of your civil lawsuit to my client's ability or willingness to testify in a criminal proceeding in which you have been charged.

[108] There is no evidence that supports that the defendants did tie the settlement to an agreement to Ms. Guo refusing to testify in the criminal trial.

[109] Ultimately, the evidence appears to support that Ms. Guo did indicate to Crown counsel she did not want to testify. In addition, Mr. Grosz's criminal defence lawyer was able to use the resolution of the civil matter to convince Crown counsel not to proceed with the criminal charges. This was precisely what Mr. Grosz's plan was, as he states in his affidavit #18 at para. 34:

34. Therefore, the only thing I could do at that point was try to soldier on, gain a tactical advantage in the action, get my public defender [to] press the Crown to drop the charges or provide discovery, and meanwhile try to negotiate a reasonable settlement with her as quickly as possible, as the longer this action continued the more it would cost her and, and the angrier she would get.

- [110] These steps do not support that Ms. Guo took advantage of Mr. Grosz in any way in respect to the settlement that was achieved. I cannot find on the evidence before me that any threats were made to induce Mr. Grosz to settle.
- [111] To the extent that Mr. Grosz may have felt pressure from the fact that he had been charged with harassment and uttering threats, the fact that Crown counsel exercised its discretion to charge him cannot be said to be "wrongful" as required under the test for duress. Crown counsel are required to undertake their duty to decide whether to approve charges in the public interest. As previously indicated, Ms. Guo complained to the RCMP before Mr. Grosz had filed the notice of civil claim and there is no evidence that she did so for the purpose of threatening him to agree to settle his claim, particularly when it was Mr. Grosz who ultimately made the settlement offers.

Vitiating Mr. Grosz's consent

- [112] Since I have found there were no threats made, there is no basis for finding that Mr. Grosz's will was overcome. Mr. Grosz made the tactical decision to try to settle the civil claim. The evidence is consistent that he was the one actively pursuing the settlement, not Ms. Guo. He used the settlement of the civil action to lever a resolution of the Criminal Charges. He was successful in doing so. The Criminal Charges were dropped. The decision to stay the Criminal Charges rested with the Crown and not with Ms. Guo. There is no basis for any assertion that Mr. Grosz's consent was vitiated from any action by Ms. Guo or from any threat by any other party.
- [113] Mr. Grosz was the one who wanted a cash settlement of the action. He made a number of offers--a total of seven--gradually reducing the amount of cash he would accept. He was the party who suggested the final settlement amount of \$5,000. At the time, he was facing an application to set aside the Default Judgment. He made the choice to negotiate a settlement instead of running the risk of the Default Judgment being set aside and the action continuing.

Any protest

- [114] Mr. Grosz relied on the terms of the settlement to achieve his goal, the payment of a cash settlement and to use the settlement of the civil action to support having Crown counsel stay the Criminal Charges. He was successful on both counts.
- [115] He only decided to protest the settlement and seek to set aside the CDO when, in February 2019, he found out that there may be some payment to unsecured creditors in the GLC bankruptcy. As he states at para. 47 of his affidavit #18:

But promptly after the year expired I called the Proposal Trustee for GLC to enquire as to what had happened over the past year and a half since I talked with him, at which time he spilled the beans that GUO was going to ostensibly borrow from MIN about \$300,000 in order to pay off the unsecured and proven creditors, have the unproven creditors remove their claims upon her provision of some form of collateral, and then remove GLC from insolvency.

[116] It was then Mr. Grosz appreciated that he had to set aside the CDO so that he could claim he was a "creditor" of GLC and attempt to extract further funds. With this knowledge, he then began to pursue the setting aside of the CDO. None of this evidence supports that Mr. Grosz was under duress when he signed the settlement agreement.

Alternative remedies

[117] Mr. Grosz was not forced to settle this action. He had a choice. He could have attended in chambers in the hopes of maintaining his Default Judgment. If successful, he could have taken steps to execute on his Default Judgment, similar to the steps he took of garnishing both defendants. Alternatively, if the Default Judgment was set aside, he could have proceeded with the action since the stay in the GLC Bankruptcy had been lifted.

Independent legal advice

[118] It is not clear whether Mr. Grosz did obtain any independent legal advice with respect to the settlement agreement, however, clause 7 of the mutual release expressly states that each party had obtained or had the opportunity to obtain independent legal advice and fully understood the terms of the mutual release. Mr. Mackey advised Mr. Grosz to seek independent advice on the terms of the mutual release, particularly with respect to whether the mutual release would bar his proposed malicious prosecution claim against Ms. Guo.

[119] Mr. Grosz has a law degree and worked as a designated paralegal.

[120] Mr. Grosz claims that he could not afford to hire counsel and that his criminal defence counsel was not in a position to provide him any legal advice. This appears to be contradicted by his sworn evidence in his affidavit #18, which references some legal advice he claims he got from his public defender at para. 47:

Therefore my public defender urged me to sign the Mutual Release, keep my head down, stay away from GUO, JONES and MACKEY, not complain about them to the LSBC, and just wait. I took his advice.

[121] There is no evidence of what Mr. Grosz's financial situation was at that time, except that he was no longer employed by GLC. He had been paid \$6,000 in June and July 2017 by Ms. Guo. According to Mr. Grosz's resume, he commenced employment with another law firm and worked there as a litigation paralegal from October 23, 2017 to February 18, 2018.

[122] I find that Mr. Grosz was not under any illusion with respect to the meaning of the settlement documents.

Sought to avoid the benefit

[123] Mr. Grosz relied on the settlement to not only receive the \$5,000 cash but he also used the settlement to assist him in persuading Crown counsel to issue a stay of the Criminal Charges. He is only now seeking to avoid the benefit of the settlement since he sees the potential, in his mind, to get more money through the GLC Bankruptcy.

Lack of consideration

[124] Mr. Grosz submits that the consideration paid was not adequate. He asserts that he has a claim worth \$1 million. If that was his belief, then he should not have made a \$5,000 settlement offer. The \$1 million assessment appears to be based on his belief that he could obtain a judgment for sexual harassment for \$100,000, damages for wrongful dismissal of \$100,000 and punitive damages of \$300,000 against both Ms. Guo and GLC, as set out in para. 19 of his notice of application. It appears the other \$500,000 is claimed for lost wages.

[125] There is no merit in his claim that the consideration was not adequate. He was the party who made the offer. He did so by his own free will. It is not open for him to now argue this was not adequate consideration. No doubt Mr. Grosz wanted Ms. Guo to withdraw the charges, but this was not her decision--it was Crown counsel's decision. The only thing Ms. Guo could do was to advise that she did not wish to testify. That is apparently what she did do.

[126] Mr. Grosz also argues that the mutual release bars him from bringing a claim for malicious prosecution against Ms. Guo. Given my findings that there were no wrongful threats to overcome Mr. Grosz's will, and seeing as neither party made full arguments about the proper interpretation of the mutual release, it would not be appropriate for me to decide this issue. In any event, the defendants have argued that the parties agreed in their negotiations that the mutual release does not bar the malicious prosecution claim and, as I understand their position, they would not seek to rely on the mutual release to prevent Mr. Grosz from bringing such a claim. Mr. Grosz did not make any claim for malicious prosecution in this action.

[127] Ultimately, the question before me is whether Mr. Grosz's consent to having this action dismissed was obtained under duress such that the CDO should be set aside. I cannot make such a finding on the evidence before me.

Conclusion

[128] Mr. Grosz has not satisfied the onus on him to prove that the CDO should be set aside due to duress. I am convinced that Mr. Grosz was operating under his own free will when he voluntarily entered in the settlement of this action with the defendants. The February 26 Application is dismissed.

Costs

[129] The defendants seek an award of special costs assessed on a lump sum basis.

[130] The defendants submit that Mr. Grosz specifically sought to disrupt the proposal process in the GLC Bankruptcy proceeding in order to leverage a resolution of this already-resolved matter and is setting out to make it impossible for professionals to represent their clients. Mr. Grosz threatens to report the lawyers to their professional regulatory bodies should they continue to act for the defendants.

[131] They submit that Mr. Grosz's action in bringing this frivolous and vexatious application and making unfounded allegations of fraud, along with the threats made to counsel to discourage them from acting, are reprehensible conduct and should be punished by an award of special costs. They ask me to assess these costs at a fixed sum of \$3,000.

Legal Principles

[132] Rule 14-1 of the Supreme Court Civil Rules, B.C. Reg. 168/2009 [Rules] recognizes two categories of costs: party and party costs and special costs. Party and party costs are the default option: Rule 14-1(9) dictates that they must be awarded to a successful party unless the court orders otherwise. Special costs will be awarded in response to some kind of reprehensible conduct during the litigation, and are accordingly punitive, not compensatory, in nature.

[133] The test for special costs was set out in *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 (C.A.), where Justice Lambert, writing for the Court, determined that the threshold for awarding special costs is "reprehensible" conduct, which includes "scandalous or outrageous conduct as well as milder forms of misconduct deserving of reproof or rebuke" (para. 17). He further explained this standard at para. 23:

[23] the fact that an action or an appeal "has little merit" is not in itself a reason for awarding special costs. Something more is required, such as improper allegations of fraud, or an improper motive for bringing the proceedings, or improper conduct of the proceedings themselves, before the conduct becomes sufficiently reprehensible to require an award of special costs.

[134] In *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914, Justice Walker set out the following list of circumstances where special costs may be ordered:

[11]

- (a) where a party pursues a meritless claim and is reckless with regard to the truth;
- (b) where a party makes improper allegations of fraud, conspiracy, fraudulent misrepresentation, or breach of fiduciary duty;
- (c) where a party has displayed "reckless indifference" by not recognizing early on that its claim was manifestly deficient;
- (d) where a party made the resolution of an issue far more difficult than it should have been;
- (e) where a party who is in a financially superior position to the other brings proceedings, not with the reasonable expectation of a favourable outcome, but in the absence of merit in order to impose a financial burden on the opposing party;
- (f) where a party presents a case so weak that it is bound to fail, and continues to pursue its meritless claim after it is drawn to its attention that the claim is without merit;
- (g) where a party brings a proceeding for an improper motive;
- (h) where a party maintains unfounded allegations of fraud or dishonesty; and
- (i) where a party pursues claims frivolously or without foundation.

[Citations omitted.]

[135] Following an extensive review of authorities, Justice Gropper distilled the following principles for awarding special costs in *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352:

[73]

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

- [136] The defendants rely on *Gichuru v. Smith*, 2014 BCCA 414 and *Jacques v. Muir*, 2017 BCSC 2400 in support of their position that this Court has jurisdiction to award lump sum special costs.
- [137] Costs are generally fixed by the registrar, who is best placed to conduct the assessment. While the court has the ability to fix costs under R. 14-1(15) of the Rules, that discretion is to be exercised sparingly and should be limited to circumstances where the judge is intimately familiar with the litigation or where the time and costs of a registrar's hearing is not justified. The fact that a judge heard the trial does not, in itself, suggest that the judge is better placed to assess costs: *Gichuru* at paras. 106-08.
- [138] Regardless of who assesses costs, the assessment must be conducted in accordance with the Rules. If a judge intends to assess special costs, rather than having them assessed in the typical way by the registrar, she must consider the same factors as the registrar and make an award consistent with one that would be made by the registrar in similar circumstances--namely, one that allows only objectively reasonable costs.
- [139] The Court in *Gichuru* noted that judges who assess costs in the place of the registrar have a tendency to do so in a summary manner. The Rules do not require a judge to assess costs summarily and, in many cases, the rules of natural justice suggest that a summary proceeding is not appropriate (*Gichuru*, para. 103). Natural justice requires a level of procedural fairness. It is thus generally necessary for the party paying costs to know the particulars of what the payee's lawyer did to incur the costs claimed. This requires disclosure of the other side's file and examination of their lawyer (*Gichuru*, paras. 104, 114). Concern that the party ordered to pay special costs will unduly prolong the assessment must be balanced against their right to challenge the reasonableness of the opposing party's proposed costs (*Gichuru*, para. 109). At para. 110, the Court indicates that the amount involved may be an important consideration in determining whether a summary procedure is appropriate.
- [140] The need for the party against whom a special cost award is made to have a meaningful opportunity to challenge the reasonableness of the fees is further reflected in the Rules. The Rules clearly indicate a need for an account. Rule 14-1(31) requires a sufficient description of the nature of the legal services provided such that a lawyer can advise on the reasonableness of expenses, while subsection (32) allows a party to tender as evidence the opinion of a lawyer on the reasonableness of charges. Absent a bill, there is nothing to advise on and nothing to opine on.
- [141] Writing together, Justices Harris and Goepel conclude that assessing special costs on a summary basis without sufficient evidence of the objective reasonableness of a fee is an error in principle contrary to natural justice and the Rules (*Gichuru*, para. 111).

[142] In Jacques, an exception to Gichuru was made and Justice Blok ordered a fixed amount of special costs in a case that had the "potential to spawn further litigation or unnecessary proceedings over the costs issue itself" (para. 18). The amount sought was relatively modest and was close to what Scale B costs would have been. For those reasons, a registrar's hearing could not be justified. The defendants argue that similar considerations apply to this case.

Analysis

Should I award special costs?

[143] Mr. Grosz's filed materials include threats and allegations of fraud and deceitful conduct against Ms. Guo and her lawyers, as well as other improper behaviour. They include:

- a. allegations of fraud and perjury, not only against Messrs. Jones and Mackey but also against Ms. Guo;
- b. referring to one of Ms. Guo's former lawyers as a "weasel" in correspondence, suggesting that this lawyer was sneaky, untrustworthy, insincere, cunning, deceitful and treacherous. Mr. Grosz copied the Law Society on this correspondence and also attached it to affidavits;
- c. threatening to circulate, and then circulating, the images of a vibrating dildo to various individuals;
- d. referring to Ms. Guo's lawyer as "crooked counsel" in filed pleadings;
- e. on February 28, 2019, making a threat that if any of Ms. Guo's past counsel--Mr. Cuttler, Q.C.; Mr. Jones, Q.C.; Mr. Mackey; or Mr. McLean, Q.C.--should appear in the action, he would object on the basis that he will seek to join each of them as a defendant;
- f. making the same threat to Mr. Louman-Gardiner on March 5, 2019 (that he will object to him representing Ms. Guo or GLC on the possibility that he will include him and/or Farris in this action). On March 6, 2019, Mr. Grosz swore an affidavit saying he would seek to join Mr. Louman-Gardiner as a defendant in this action if leave was granted. Mr. Grosz went on to sue Messrs. Louman-Gardiner, Jones, and McLean in an action he commenced on November 12, 2019;
- g. attempting to interfere in the GLC Bankruptcy by trying to have FTI Consulting dissolved by complaining to Carol Priest, Executive Director of Registries and Online Services, Ministry of Citizens Services;
- h. asserting that FTI Consulting has the appearance of being a "NSA/CIA front company";

- i. raising suspicions against judicial officials. For example, in his affidavit #12, he raises a concern that Master Dick somehow knew Mr. McLean's name and he swears: "This leads me to conclude she either knew him personally, or there was something untoward going on." In his notice of application for leave to appeal filed April 15, 2019, he accuses Mayer J. of being a "blind justice", biased, and lacking judicial independence;
- j. wild speculations and assertions made by Mr. Grosz, including in his notice of application for leave to appeal, where he states that:
 - i. "it is possible that the laws of this land are being ignored by Justice Mayer under ex parte pressure from External Affairs"; and
 - ii. The Richmond RCMP are under pressure from the [Law Society] to refrain from taking action against Ms. Guo pending her paying off the unsecured creditors and thus relieving the LSBC of potential liability for unpaid liquidated damages, or else there are other reasons.
- k. threatening Mr. Mackey by telling him that if he cooperated with Mr. Grosz in pursuing Ms. Guo, Mr. Mackey's former client, he would consider waiving or releasing him from any future civil claim and may not report him to the Law Society;
- l. alleging in sworn affidavits that Mr. Munro, FTI Consulting, and their counsel were attempting to "subvert justice";
- m. making serious allegations against lawyers to police officers of perjury, obstruction of justice, extortion, fraud and conspiracy; and
- n. as of May 7, 2019, Mr. Grosz had filed complaints against 12 different lawyers with the Law Society.

[144] In open court, he referred to Ms. Guo as a "psychopath".

[145] In my view, an award of special costs is warranted in light of Mr. Grosz's conduct during the course of this litigation. Mr. Grosz's name calling and serious allegations against opposing litigants, lawyers, judicial officials and other professionals cannot continue without actual evidence that is not speculative to substantiate them.

Should I assess special costs?

[146] I agree that there are similarities here to the circumstances that were before Blok J. in Jacques. In particular, I am concerned about the possibility that a special costs assessment has the potential to spawn further litigation and proceedings.

[147] However, I am concerned about the lack of any evidence produced by the defendants to support the reasonableness of the amount they seek. I am not convinced that, absent a draft bill of costs or any sort of evidence to support the costs that the defendants seek, it would be fair to Mr. Grosz to make this award. This is so even though the amount--\$3,000--appears to be relatively modest.

[148] I have concluded that lump sum costs should not be awarded.

[149] The February 26 Application is dismissed with special costs awarded to the defendants. Mr. Grosz's signature on the form of the order is waived.

"Forth J."

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