
CANADA / JUDGMENT

J.M.C. v. Y.S.

2018 BCSC 915

COURT

Supreme Court of British Columbia

DECIDED

5 June 2018

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2018 BCSC 915 J.M.C. v. Y.S.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

J.M.C. v. Y.S.,

2018 BCSC 915

Date: 20180605

Docket: E042844

Registry: New Westminster

Between:

J.M.C.

Claimant

And

Y.S.

Respondent

Corrected Decision: The claimant's initials in the style of cause
of the decision have been corrected on October 31, 2018

Before: District Registrar Nielsen

Reasons for Decision

Counsel for Claimant:

J. Ling

Respondent on her own behalf:

Y. S.

Place and Date of Costs Hearing:

New Westminster, B.C.

October 6, 2017

April 3 and 4, 2018

May 9 and 30, 2018

Place and Date of Judgment:

New Westminster, B.C.

June 5, 2018

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Introduction

- [1] This is an assessment of special costs pursuant to the order of Mr. Justice Bernard dated January 16, 2017, wherein he states "the claimant shall have his costs of the litigation, with these costs to be assessed by the registrar as special costs". The decision regarding special costs is cited J.M.C. v. Y.S., 2017 BCSC 59.
- [2] The order arose from a contentious family law proceeding involving primarily parenting rights and the division of property and is cited J.M.C. v. Y.S., 2015 BCSC 1770.
- [3] The respondent's conduct was found by the court to be scandalous and outrageous.
- [4] The claimant seeks reimbursement of the total costs of the family law case and the legal costs associated with this assessment of special costs, both assessed as special costs.
- [5] The claimant seeks reimbursement of \$104,172.48 in legal costs related to the family law case. The \$104,172.48 comprises of \$86,291.50 in legal fees, \$7,282.52 in disbursements, and \$10,598.46 in taxes.
- [6] The claimant also seeks reimbursement of \$44,729.07 in legal costs associated with the assessment of special costs. The \$44,729.07 comprises of \$36,400.00 in fees, \$1,037.82 in disbursements, and \$4,411.25 in taxes, and \$2,880 representing the claimant's time and disbursements incurred in putting together the hearing record.

Background

- [7] The background facts giving rise to the award of special costs are summarized by Mr. Justice Bernard in the cost decision cited J.M.S. v. Y.S., 2017 BCSC 59. At paragraphs 1 through 10 the court provides the basis for the costs award and also directly addresses the various factors to be considered by the registrar in assessing those costs. Paragraphs 1 through 10 state:

1 L.W. BERNARD J.:-- In Reasons for Judgment indexed as 2015 BCSC 1770, all claims in these family law proceedings, other than costs, were resolved. The contentious trial issues related to parenting and asset division, with the former dominating the litigation. At trial, the claimant (the "husband") enjoyed substantial success, overall, and for the reasons that follow, I have concluded that he is entitled to his costs, assessed as special costs, against the respondent (the "wife").

2 The parties' short marriage ended in July 2012, upon the wife's announcement of separation after she had moved, without the husband, into a jointly and recently purchased family home, with the parties' one-and-a-half year old son. The husband was at work, at the time. When it became evident to the perplexed husband that the marriage was over, he commenced divorce proceedings. In the pre-trial period, the wife unjustifiably inhibited the husband's parenting time with his young son. She also expertly "doctored" financial documents produced as pre-trial disclosure, and took unreasonable positions that thwarted any reasonable prospect of pre-trial settlement.

3 The trial consumed 18 days, in total. It commenced on September 29, 2014, and concluded on May 26, 2015. The trial was needlessly protracted and delayed due to the mendacity and manipulations of the wife. The trial - indeed, the entirety of the litigation process - was seriously tainted by the wife's ongoing deceit and orchestration of events to further her personal objectives. To add insult to injury, the wife accused the husband of paranoia in relation to his suspicions that she was "setting him up" and altering financial documents; these were, eventually, demonstrated to have been well-founded suspicions. Notably, but for the perseverance of the husband's counsel, the wife's sophisticated deceptions might never have been discovered.

4 In the overview of the Reasons for Judgment, the following observations, germane to costs, were made:

[6] Mr. C. seeks special costs against Ms. S. Ms. S's credibility became a time-consuming issue at trial. In pre-trial disclosure, she produced bank records that did not accord with other documents or with the same bank records obtained directly, by court order, from the financial institutions. The records obtained directly from the bank revealed troubling inconsistencies with those produced by Ms. S., and led to a well-founded allegation that Ms. S. had "doctored" her banking records before disclosing them to Mr. C.

5 The foregoing paragraph only touches, however, upon the misconduct of the wife, which also included the following:

- (a) repeatedly lying under oath during her testimony;
- (b) colluding with her parents, who testified on her behalf, to deceive the court in relation to material matters relating to both financial and parenting issues;
- (c) extensively, and expertly, altering her bank records before disclosing them to the husband;
- (d) actively resisting a mid-trial application for production of records directly from the bank, by arguing that the request was without foundation and fueled by the husband's paranoia;

- (e) engaging in a concerted plan to remove the husband from her life and unjustifiably minimizing the husband's role in his son's life;
- (f) unreasonably denying and restricting the husband's parenting time in the prolonged post-separation pre-trial period, and thereby causing undue distress for both the husband and the parties' young son;
- (g) resisting the preparation of a report pursuant to s. 211 of the Family Law Act, S.B.C. 2011, c. 25 despite repeated requests by the husband for one, because she knew that an objective assessment was most unlikely to favour her and her litigation objectives;
- (h) taking unreasonable positions that effectively precluded a resolution short of trial; and,
- (i) needlessly prolonging the entire litigation process at great expense to the husband, both financially and emotionally.

6 The applicable provisions of the Supreme Court Family Rules, B.C. Reg. 169/2009 ["SCFR"] are:

16-1(1) If costs are payable under these Supreme Court Family Rules or by order, those costs must be assessed in accordance with Appendix B unless any of the following circumstances exist:

...

- (b) the court orders that
- (i) the costs of the family law case be assessed as special costs . . .

...

16-1(2) On an assessment of specials costs, a registrar must

- (a) allow those fees that were proper or reasonably necessary to conduct the family law case, and
- (b) consider all of the circumstances, including the following: . . .

...

16-1(7) Subject to subrule (9) ["Costs of applications"], costs of a family law case must be awarded to the successful party unless the court otherwise orders.

7 It is well-settled that: (a) special costs may be awarded against a litigant who has engaged in reprehensible conduct in the course of the litigation; and, (b) reprehensible conduct encompasses that which is scandalous or outrageous, as well as lesser forms of misconduct that are, nonetheless, deserving of reproof or rebuke: see *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 (C.A.), 119 D.L.R. (4th) 740 at paras. 11-17; *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352 at paras. 21-75.

8 In the case at bar, I am satisfied: (a) that the husband was the successful party; (b) that there is no reasonable basis for not awarding costs to him; and, (c) that the husband's costs should be assessed as special costs. More specifically, the husband was the party who enjoyed substantial success at trial, in relation to both parenting and financial issues, and I am satisfied there is no compelling reason to depart from the rule that awards costs to the successful party.

9 As for the costs being assessed as special costs, there can be no question that the wife's conduct throughout the litigation was scandalous, outrageous, and deserving of rebuke. Most significantly, her concerted and enduring deceit included sophisticated document tampering, deliberate and repeated lies under oath, and the tendering of knowingly false witnesses and evidence in a blatant attempt to mislead the court.

10 There has been no evidence of compelling extenuating circumstances that might properly serve to mitigate the seriousness of the wife's conduct, nor is there any evidence to suggest that an award of special costs would cause undue hardship in the circumstances. In short, the wife's conduct cannot be countenanced by the court; it must be firmly, clearly, and unequivocally denounced: see for example *Rozen v. Rozen*, 2002 BCCA 537; *Isacson v. Isacson*, 2014 BCSC 2351; and *G.W.M. v. W.C.M.*, 2015 BCSC 1642.

Legal Principles

[8] Supreme Court Family Rules, 16-1(2) and (4) instructs the considerations of the registrar on an assessment of special costs. Supreme Court Family Rules, 16(1)(2) provides:

Assessment of special costs

- (2) On an assessment of special costs, a registrar must
 - (a) allow those fees that were proper or reasonably necessary to conduct the family law case, and
 - (b) consider all of the circumstances, including the following:
 - (i) the complexity of the family law case 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 family law case;
 - (iv) the time reasonably spent in conducting the family law case;
 - (v) the conduct of any party that tended to shorten, or to unnecessarily lengthen, the duration of the family law case;
 - (vi) the importance of the family law case 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.

[9] Supreme Court Family Rules, 16-1(4) provides:

Disbursements

(4) When assessing costs under subrule(1) or (2) of this rule, a registrar must

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

[10] The seminal case concerning the assessment of special costs is *Gichuru v. Smith*, 2014 BCCA 414. *Gichuru v. Smith*, supra pertains to special costs arising pursuant to Supreme Court Civil Rules, B.C. Reg. 3/2016 ["SCCR"], Rule 14-1, however, it applies equally to costs assessed under SCFR, 16-1.

[11] In *Gichuru v. Smith*, supra, the Court emphasized that the successful party is only entitled to their objectively reasonable legal costs. The mere fact that a lawyer has billed a certain amount does not make the fee objectively reasonable. This point is made by the BCCA at paras. 104-105 and 155 as follows:

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.

...

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).

- [12] In the present case we have all the bills of the lawyer for the claimant who had conduct of the trial, Ms. Milau, and her affidavit of justification. Ms. Milau was cross-examined on her affidavit by the respondent. We also have the evidence of the respondent where she attests in her affidavit, sworn September 27, 2017 and filed September 28, 2017, at para. 3, "overall I agree that Ms. Milau's fees and disbursements were reasonable within the claimant's cost submission to the family law case except for Ms. Milau's fees and disbursements on post-trial matters and matters irrelevant to special costs".
- [13] The trial took 18 days to complete. Six court applications were required with respect to disclosure, four pretrial, and two mid trial. The case itself spanned a period of four years, longer than the party's marriage. The length of the trial and the need for the multiple court applications in relation to financial disclosure have been clearly laid at the feet of the respondent by the court. If not for the scandalous and outrageous conduct of the respondent, the legal fees incurred would have been substantially less.
- [14] Despite the respondent's affidavit evidence that the claimant's trial costs were reasonable, she argues the billed fees are excessive overall "given the marriage was short, and the case was ordinary considering that the primary issues were parenting and a division of assets". The respondent alleges the inordinate length of time taken to conclude the proceeding was due to the claimant's "reckless effort to excessively and unreasonably prolong the litigation process". This argument is in stark contrast to the findings of the court to the contrary. It also demonstrates a continuing lack of insight on the part of the respondent into her own behaviour.
- [15] The findings of the court which form the basis of the special costs award are binding upon the registrar for the purposes of this assessment. Regrettably, rather than addressing the bills of the lawyers, much of the respondent's cross examination and evidence was directed in an attempt to show that the court was wrong in its assessment of her conduct during the proceeding, and that the claimant is to blame for the prolonged litigation, both pre and post trial. For the reasons that follow, I disagree.

Application of the Principles

- [16] In assessing special costs, the registrar is to consider all the circumstances of the proceedings, including those itemized in SCFR, 16-1(2)(b). However, the registrar is bound by the findings of the court giving rise to the court's order for special costs, and specifically, the characterization of the respondent's behaviour during the proceeding as scandalous and outrageous. A special costs assessment is not the time or place to argue otherwise. If a litigant takes issue with the court's decision, the remedy is an appeal, not a collateral attack on the findings of the court during a special costs assessment.

Supreme Court Family Rules, 16-1(2)(b)(i) - Complexity

- [17] The level of complexity of the proceeding can be gleaned from the reasons for judgment on the merits cited *J.M.C. v. Y.S.*, 2015 BCSC 1770.

- [18] The respondent had engaged in a sophisticated level of deception and fabrication with respect to documents with the purpose of minimizing the claimant's share of the property division, and also to subvert the claimant's application for more parenting time. At paras. 75-76 and 82 the court states:

75 The credibility of Ms. S. and her parents, as witnesses, was seriously undermined as a result of a strenuously opposed mid-trial order that authorized Ms. S.'s bank to provide her records directly to Mr. C.'s counsel. These new records and the accompanying testimony of Ms. Miroschnichenko, established that the records Ms. S provided to Mr. C. in the pre-trial period, were altered after she received them from TD-Canada Trust.

76 Despite Ms. S.'s denials and professed ignorance, I am satisfied that the evidence shows that either Ms. S., or someone acting at her behest, altered these records, and that the alterations were intended to: (a) mislead Mr. C. and the Court as to the true state of Ms. S.'s finances; and, (b) to support some of Ms. S.'s claims, such as the existence of a \$100,000 loan to the parties from her parents. The fact and nature of the discrepancies between the two sets of records leads to no other reasonable conclusion.

...

82 As to whether Ms. S. was capable of altering the records she received from the bank, and doing so in a convincing fashion (i.e., making the documents appear original and unaltered, including accounting for any deletions or additions so as to achieve balanced accounts), I am satisfied that she had the necessary skills and abilities if she were so inclined. Ms. S. has a master's degree in accountancy and works as a senior accountant for a private equity firm; moreover, it cannot be overlooked that no one other than Ms. S. (or someone acting at her behest) would have reason to make these deletions and additions.

- [19] The claimant's lawyer addresses the complexity of the proceeding in her affidavit of justification dated July 11, 2017 as follows:

13. The complexity of this case had everything to do with the Claimant having to navigate the outrageous claims and unreasonable actions of the Respondent. She made baseless allegations - many times unsupported by independent evidence - and in order to properly prepare for the case, the Claimant was put to the task of having to "disprove" her allegations. Allegations related to mistreatment of the child and harm to the child, among others.
14. The resistance to disclosure also created difficulty. On the one hand, the Respondent alleged her difficulty in obtaining documents. On the other hand, she would not agree to provide authorization to the Claimant or myself to obtain them directly. At least five applications were prepared (January, March, July, September 2014, and January 2015) that related to disclosure from the Respondent. I note that until the January 2015 application, all disclosure made pursuant to an order or agreement, was arguably contaminated and inauthentic.
15. Furthermore, the level of sophistication in the Respondent's document fabrication was essentially never before seen, by either myself or any colleagues from whom I sought advice. The Respondent managed to fabricate years of banking records, across multiple financial institutions, across thousands of entries of credits and debits, which resulted in the need to forensically investigate many, if not all, of the transactions contained in the records, both before, and after the authentic records were obtained. There were also third party communications disclosed by the Respondent that supported the information in the fabricated documents. Furthermore, because of the degree of sophistication and the apparent authenticity and internal consistency of the Respondent's documents as produced, it was necessary to elicit the evidence of banking expert to attest to the authenticity of certain records, obtained directly from third party financial institutions.
16. The fabrication of documents by the Respondent, on the level involved, affected and undermined the review of nearly all of the documentary evidence, including emails, texts, letters, put into evidence by the Respondent.

I find this was an unusually complex case requiring a high degree of patience, perseverance, and skill on the part of the lawyer to sort out this complexity.

Supreme Court Family Rules, 16-1(2)(b)(ii) - Skill, specialized knowledge and responsibility of the lawyer

- [20] The level of fabrication by the respondent of the documentary evidence was sophisticated and required a painstaking, detailed examination of the documentary evidence and multiple court applications. To expose the respondent's deception, two mid trial applications were necessary in order to obtain the original documents from their source, rather than from the respondent herself.

Supreme Court Family Rules, 16-1(2)(b)(iii) - Amount involved

- [21] At issue in the litigation was property division involving a duplex, and an apartment, both located in Burnaby BC, and parenting arrangements.

- [22] Together, the Burnaby properties would be currently valued at roughly \$2 million dollars.
- [23] The parenting issues were extremely important to the claimant, although impossible to value in terms of money. The difficulties arising with respect to the parenting issues are summarized in the lawyer's affidavit of justification at paras. 49 through 55 wherein she states:
49. When the parties attended a JCC, the only agreement they could come to was that the Claimant could see [A] weekly under supervision - at that time, the Respondent only agreed to two people. Unfortunately, the parenting time set out in the order, conflicted with the work schedules of these two people.
50. The Respondent appeared to be content with this state of affairs. People she would not agree to, among others: the Claimant's father and two brothers. The people she would agree to, did not wish to be involved, or could not. In an extreme example, the Respondent suggested a person that did not exist.
51. As a result, [A] did not see his father at all in the period from May 2013, until December. This created a clear disadvantage for the Claimant with respect to his relationship with his son.
52. Upon the Claimant filing an application on March 5, 2014, the Respondent agreed to increase the parenting time. However, she would not agree to overnight parenting time immediately. She agreed to allow a slight increase beginning on March 9, 2014, and that it had to be supervised.
53. The Claimant sought again, four months later, to increase his parenting time. Again, the Respondent opposed his application, countering with an excruciatingly gradual increase over a period of two months. Among her objections, was that the Claimant is not responsible in changing diapers.
54. Just prior to the trial, the Claimant asked for a two hour increase in parenting time and the Respondent said no. She alleged that [A] is undergoing "stress" and a change/increase would not be good. There was no independent reliable evidence of any stress, the Claimant did not see any stress, nor was there any expert evidence on what the cause of any stress may be. In the same vein, however, the Respondent strenuously opposed a s.211 report, which would have perhaps resolved such concerns.
55. The evidence in this regard was compelling, as the Respondent strongly put forth, in no uncertain terms, her conviction that the Claimant was a poor parent, that he has little to no parenting skills, and that she could not be sure if he even loved [A]. At her Examination for Discovery, she went so far as to suggest that the appropriate parenting arrangement for [A], should she pass, is that he would go live in China with her parents: Her position throughout, including in her closing submission, is that the best interest of [A] that there is a parenting schedule that severely restricted the Claimant's time with [A].

- [24] In addition to the difficulties surrounding the claimant's parenting time, the claimant needed to confront the respondent's deception and fabrication of the documents relevant to the issue of property division, and the false oral evidence of the respondent and her parents in this regard which directly bore upon the amount involved. See *J.M.C. v. Y.S.*, 2015 BCSC 1770 para. 75. The stakes were high, both financially and emotionally.

Supreme Court Family Rules, 16-1(2)(b)(iv) - Time reasonably spent in conducting a family law case

- [25] The evidence and affidavit material has canvassed the time spent with respect to the family proceeding. The proceeding took considerable time because of the behaviour and deception of the respondent and her parents.
- [26] Of note, in order to keep costs down on the claimant's part, the claimant himself assisted directly in the proceeding in many ways including copying, preparing binders, tabbing documents, drafting and proofreading some of his affidavits. The claimant did what he could in order to keep the costs to a minimum.

Supreme Court Family Rules, 16-1(2)(b)(v) - Conduct that shortened or unnecessarily lengthened the duration of the family law case

- [27] It is clear from the court's findings that the conduct of the respondent drove up the costs of the proceeding. The trial was originally set for six days however, it took eighteen. In addition, two mid trial applications were necessary on January 14 and 30, 2015, to compel the production of bank records from their source. These two mid trial applications were in addition to the four pretrial applications with respect to disclosure.
- [28] The respondent not only failed to provide full, complete, and truthful disclosure, she was part of an active deception which involved a sophisticated alteration of the original bank documents.
- [29] The respondent also made allegations affecting the client's parenting time which were found by the court to be unwarranted and unsupported. These unsupported allegations extracted both a financial and emotional toll on the claimant.
- [30] The respondent's misconduct did not end with the conclusion of the trial. Following the conclusion of the trial on May 26, 2015, but before judgement was pronounced on October 1, 2015, she made to an application for a "non-expiring travel authorization".
- [31] The respondent's travel with [A] had been a significant issue at trial. This is made clear by the court's reasons for judgement which were pronounced October 1, 2015, cited *J.M.C. v. Y.S.*, 2015 BCSC 1770, wherein the court states at paras. 104 and 124(6) and (7):

104 Having due regard for the foregoing, I am satisfied that Ms. S. should not hold a passport for A. or be permitted to take him out of Canada without a court order specifically authorizing her to do so. Given Ms. S.'s demonstrated predilection for altering documents to suit her purposes, Mr. C.'s written consent is not sufficient.

...

D. Disposition

124 Pursuant to the foregoing, there shall be:

...

6. An order that Ms. S. shall not remove A. from the Province of British Columbia unless an order of this Court permits otherwise.
7. An order that Ms. S. shall not apply for any travel or identity documents for A., and shall, within 48 hours of the release of this judgment, surrender any such documents she holds, to Mr. C., through his counsel.

[32] Following the court's order, discussions took place with Citizenship and Immigration Canada and Passport Canada which lead the claimant's lawyer to believe the respondent had previously forged the claimant's signature on [A]'s passport dated June 26, 2013. In this regard the lawyer attests:

93. It showed that the Respondent forged the Claimant's signature and then maintained the deceit by re-directing all his contact information to hers:
 - a. The Claimant does not and never has lived in the "SAME" address as hers;
 - b. 604-696-9995 is the main reception line of the Respondent's workplace (Abacus Private Equity) and not the Claimant's;
 - c. 604-435-3089 is the Respondent's house; a number having never been associated to the Claimant;
 - d. The box asking if there are any "... legal proceedings pertaining to custody of, mobility of, or access to child" has been check "No", which clearly was not the case;
 - e. The signature does not resemble the Claimant's.
 - f. The handwriting throughout the form is distinct and that of the Respondent's.

[33] Quite apart from the alleged discrepancies in [A]'s 2013 passport application, by making an application for a non-expiring travel authorization after the conclusion of the trial, when the respondent's travel with [A] had been put in issue, the respondent's behaviour in this regard demonstrates a lack of insight into her own behaviour. It is this sort of behaviour on the part of the respondent that has prolonged and lengthened every aspect of this proceeding.

[34] The evidence also indicates the claimant has been compelled to bring post judgment applications to have the respondent comply with her child support obligations.

Supreme Court Family Rules, 16-1(2)(b)(vi) and (vii) - Importance, result obtained and benefit to the client

[35] The proceedings were of the utmost importance to the claimant. The respondent denied the claimant access to his son for a total of eight months, and generally sought to deny him his parenting rights. The respondent also embarked upon a sophisticated attempt to defraud the claimant of his rightful share to a division of the family assets. The claimant was entirely successful in respect of these very important issues.

[36] In all the circumstances, the result obtained for the claimant was excellent and of the utmost importance.

Supreme Court Family Rules, 16-1(2)(b)(vii) - Supreme Court Civil Rules, 1-3

[37] The register is to have consideration to the principle of proportionality when assessing special costs.

[38] In my view, the lawyer was frugal in every aspect of the proceeding, up to and including the trial. She was a five-year call and her hourly rate was \$225. She did not charge for the time of her legal assistant, and she allowed the claimant to perform office work related to his file in order to assist in keeping the legal costs to a minimum.

[39] The total amounts claimed in the conduct of the family law proceeding is \$104,172.48, comprising of fees in the amount of \$86,291.50, disbursements in the amount of \$7,282.52, and taxes in the amount of \$10,598.46. These amounts claimed are allowed in full. The fees were both proper and reasonably necessary to the conduct of the family law case, and the disbursements were shown to have been necessarily or properly incurred. The amount claimed is objectively reasonable as per *Gichuru v. Smith*, supra, and I would also globally characterize the total amount claimed for the family law proceeding as a fair fee in all the circumstances.

[40] In *Hutchison v. Victoria Golf Course*, 2009 BCSC 644, a review under the Legal Profession Act, S.B.C. 1998, c. 9 ("LPA"), the court sanctioned a global approach to a fair fee. At paras. [81] through [84] the court states:

81 A review of the Solicitor's authorities supports this global approach. For example, in *Nathanson, Schacter & Thompson LLP v. Inmet Mining Corp.* 2007 BCSC 724, 72 B.C.L.R. (4th) 291, at issue was whether the client should be premium billed for result, beyond the amounts previously billed and paid. Registrar Blok refused to allow a fee of \$10,000,000 as claimed by the appellant law firm, restricting the fee to the amount already billed and paid, which included a premium, of \$5,248,835. That was a "fair fee", which was not disturbed on appeal to this court.

82 There are many examples of registrar's applying such a global approach, see for example, *Belding v. Campbell* 2009 BCSC 379, *Jose v. Jeffrey B. Johnston Law Corporation* 2009 BCSC 186, *Davis & Company v. Jiwan et al*, 2006 BCSC 658, affirmed on appeal to this court 2007 BCSC 1775, and on further appeal 2008 BCCA 494, leave to appeal to the S.C.C. refused April 23, 2009, [2009] S.C.C.A. No. 30. Thus in *Davis & Company v. Jiwan et al*, Registrar Sainty in paragraph 287 in setting the fee said "In my opinion, taking into account all of the factors set out above and which are applicable to this matter, I find the reasonable fees payable by the clients to the solicitors is \$700,000". The fees set reduced those of the law firm which were originally \$915,889.88.

83 There is nothing in the reasons that give rise to a reasoned belief that the registrar omitted consideration of relevant factors in coming to a global assessment. The requirement for such a finding in an appellant context is emphasized by the Supreme Court of Canada in *Van de Perre v. Edwards*, 2001 SCC 60, [2001] 2 S.C.R. 1014, at paragraph 10, and by Madam Justice Ryan, speaking for the Court of Appeal in *Girard v. Girard*, 2006 BCCA 482, where she says at para. 32:

[32] As the Supreme Court of Canada noted in *Van de Perre v. Edwards*, [2001] 2 S.C.R. 1014, at para. 15:

As indicated in both *Gordon* and *Hickey*, the approach to appellate review requires an indication of a material error. If there is an indication that the trial judge did not consider relevant factors or evidence, this might indicate that he did not properly weigh all of the factors. In such a case, an appellate court may review the evidence proffered at trial to determine if the trial judge ignored or misdirected himself with respect to relevant evidence. This being said, I repeat that omissions in the reasons will not necessarily mean that the appellate court has jurisdiction to review the evidence heard at trial. As stated in *Van Mol (Guardian ad Litem of) v. Ashmore* (1999), 168 D.L.R. (4th) 637 (B.C.C.A.), leave to appeal refused, [1999] S.C.C.A. No. 117, [2000] 1 S.C.R. vi, an omission is only a material error if it gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion. Without this reasoned belief, the appellate court cannot reconsider the evidence.

[Emphasis added.]

Although the above discussion is made in the context of a family law proceeding, to like effect is the decision of the Court of Appeal in *Steward v. Berezan*, 2007 BCCA 150, 64 B.C.L.R. (4th) 152, in the context of an appeal regarding damages. The Honourable Mr. Justice Donald, states at para. 8:

[8] Second, the first ground is based in part on an absence of reasons. The reasons relating to the past loss are brief. The failure to discuss a relevant factor in depth, or even at all, is not itself a sufficient basis for an appellate court to reconsider the evidence. The omission is only a "material error" if it gives rise to the "reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected [the] conclusion": *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33 para. 39, 72, quoting from *Van de Perre v. Edwards*, [2001] 2 S.C.R. 1014, 2001 SCC 60 para. 15. That test is not satisfied in this appeal.

84 There is nothing in the reasons of the registrar, or in the absence of reasons giving mathematical precision to the result found, that give rise to the inference that there was material error, or that relevant evidence was forgotten, ignored or misconceived. In the circumstances, I find no merit in these arguments.

[41] Although *Hutchison v. Victoria Golf Course*, supra, involved a review pursuant to the LPA, the concept of an overall fair fee is equally applicable to the assessment of special costs. Indeed, the factors enumerated in SCFR, 16-1(2) are almost identical to the factors listed in s. 71(4) of the LPA.

Costs of the assessment

[42] The general rule is that an award of special costs of a proceeding carries with it the entitlement to special costs of the subsequent assessment, subject to a limited discretion that may be exercised by the registrar to depart from this general rule. At the prehearing conference, prior to the assessment of special costs, I advised the respondent, who is unrepresented, of this general rule.

[43] The registrar's discretion to depart from the general rule must be exercised sparingly and only in very compelling circumstances, and there are none here. See *Le Soleil Hospitality Inc. v. Louie*, 2017 BCSC 162, at paras. [8] through [13] for a full discussion of the general rule, and exceptions. Accordingly, the costs of the assessment of special costs will be assessed as special costs.

[44] Subsequent to the completion of the family law proceeding and the award of special costs, the client retained a different lawyer and law firm to act on his behalf. The new lawyer and law firm has had conduct of the assessment of special costs. The total costs claimed for the assessment of special costs is \$44,729.07, comprising of \$36,400.00 in fees, \$1,037.82 in disbursements, and \$4,411.25 in taxes. In addition, there is a claim for the claimant's time and disbursements incurred in putting together the hearing record. This amount totals \$2,880.

[45] For the reasons that follow, in my view, the amount claimed for the assessment of special costs must be reduced. The amount claimed is disproportionate to the costs of the family law proceeding itself, is not objectively reasonable as per *Gichuru v. Smith*, supra, and when viewed globally, does not result in a fair fee as per *Hutchison v. Victoria Golf Course*, supra.

[46] Pursuant to SCFR, 16-1(2)(a), on an assessment of special costs, the registrar is to allow those fees that were proper, or reasonably necessary, and is to consider all the circumstance including those factors enumerated in SCRF, 16-1(b).

APPLICATION OF THE FACTORS TO THE SPECIAL COSTS ASSESSMENT

Complexity, difficulty and novelty of the issues

- [47] This was a typical assessment of special costs. The issues arising in the assessment were not complex, difficult, or novel.

Skill, specialized knowledge and responsibility involved

- [48] Again, this was a typical assessment of special costs. The assessment did not require skill, specialized knowledge, or responsibility which was outside or beyond the normal requirements of a typical assessment of special costs.

The amount involved

- [49] At issue on the assessment of special costs is the bill of the lawyers in relation to the family law case, and the bills of the new lawyer related to the costs assessment. Together they total roughly \$150,000. The amount is significant when viewed through the lens of the claimant.

The time reasonably spent

- [50] The assessment of special costs required approximately three and a half days to complete. In addition, there was a pre hearing conference and a settlement conference. The entire process from the award of special costs to the completion of the assessment spanned a year and four months. The award of special costs was made January 16, 2017, and the assessment completed in May 2018. The costs sought in relation to the assessment of special costs total \$44,729.07.
- [51] By comparison, the family law proceeding giving rise to the award of special costs spanned four years, involved an 18 day trial, involved six court applications for disclosure, the preparation of three applications for contempt none of which proceeded, and a court application for special costs. The total costs for the family case sought in this regard are \$104,352.85.
- [52] I have had the opportunity to review, in detail, the bills of both lawyers and law firms. There are several specific matters of note which require adjustment. First, the amount of time billed for "preparing and researching" for the costs assessment is substantial. Between April 26, 2017 and April 2, 2018, the lawyer billed 37.31 hours and \$7,462 in fees, before applicable taxes.
- [53] The new lawyer and firm needed to become familiar with the family law case, however, the costs in this regard are not properly visited on the party responsible for the payment of special costs. The claimant has the right to the lawyer of his choice, however, that does not impose a corresponding duty on the respondent to pay the costs associated with the change of lawyers.

- [54] The new lawyer was called to the bar in September 2016 and billed her time at \$200.00 per hour. The rate per hour is reasonable. However, the amount of preparation and research time is unreasonable, and excessive in the circumstances. There were no thorny legal issues arising on the assessment. The examinations of the witnesses during the assessment, including cross examination, proceeded relatively smoothly without any technical glitches. There was no obvious need for the kind of preparation and research as billed.
- [55] The second matter which requires adjustment is the amount billed at lawyer's rates for what was properly secretarial work. On July 11, 2017, the lawyer billed 4.4 hours of time, at her lawyer's rate, for "photocopying, hole punching, preparing tabs, index, binder covers and prepare binders for filing". Again, on September 28, 2017, the lawyer billed for 1.4 hours to "gather pleadings and put together the hearing record". This is secretarial work, or perhaps legal assistant work if there were more technical issues arising, and none are apparent. However necessary, this work cannot be billed at lawyer's rates as it does not have an objective corresponding value to the client. Even if the client had authorized the lawyer to perform secretarial work at lawyer's rates, this would be an example of what the court of appeal in *Gichuru v. Smith*, *supra*, identified as charges which are not objectively reasonable. It is not a cost which can reasonably be visited upon the respondent. Further, secretarial work is typically viewed as overhead.
- [56] Finally, there are charges for travel time at full rates. In *Hutchison v. Victoria Golf Course*, *supra*, at para. [57], the court approved the approach of Registrar Blok, as he then was, to travel time by lawyers. Registrar Blok stated:
- ...
- [96] Travel time is often the subject of dispute between solicitors and clients. The solicitors argue that they are being taken away from their practices where they would otherwise be recording billable time at their full rates. Clients argue that the solicitors are simply sitting on an airplane or ferry and are lending no expertise or adding any value to the file. Unless there is evidence that the lawyer was actually working on the file during the travel time (and there is no evidence of that here), it has been my practice to allow travel time at half to reflect a balance between the competing views, an approach that I also adopt here. The appropriate reduction is \$4,100.
- [57] The bills indicate the new lawyer charged full hourly rates for her travel time on at least one occasion. There is no evidence to suggest that that travel time involved work on the file. Indeed, during argument it was conceded that this charge was billed in error. Accordingly, those related charges would need to be halved.
- [58] There was the suggestion, in closing submissions, that Ms. Milau may have billed her full hourly rate for travel time in the family law proceeding, and therefore, her bill ought to be reduced accordingly. Although it is the lawyer's responsibility to account for all their billed time during an assessment of special costs, the allegation ought to have been put to her in cross examination. This would have allowed for a potential denial, explanation, or

justification. In all the circumstances, I am not prepared to reduce Ms. Milau's bill on this basis. For the reasons discussed above, the total amount claimed for fees in the family law proceeding were objectively reasonable as per *Gichuru v. Smith*, supra, and represented a fair fee when viewed globally as per *Hutchison v. Victoria Golf Course*, supra. Indeed, the reasonableness of Ms. Milau's fees charged in the family law proceeding was conceded by the respondent in her own affidavit filed in these proceedings.

Conduct which may have lengthened or shortened the proceeding

- [59] The respondent attempted to re-litigate some of the court's findings in the family law proceeding concerning her conduct giving rise to the special costs award. This unnecessarily protracted the costs assessment. She did however acknowledge that the charges of the lawyer and law firm, in the family law proceeding, were reasonable. The respondent's issues with costs predominantly related to those which were post-trial.
- [60] Regretfully, the respondent also engaged in inappropriate attacks on counsel's integrity and competence which were totally unwarranted and baseless. Again, this unnecessarily lengthened the assessment hearing.

Importance of the proceeding to the claimant, result obtained, and benefit

- [61] The claimant is an individual of average means. Recovering the costs of the litigation is extremely important to him. As the entirety of the costs relating to the family law case have been recovered, and the bulk of the special costs of the assessment of special costs have also been recovered, the result obtained is excellent overall.

Rule 1-3

- [62] The SCCR, 1-3 provides:

Object

- (1) The object of these Supreme Court Civil Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits.

Proportionality

- (2) Securing the just, speedy and inexpensive determination of a proceeding on its merits includes, so far as is practicable, conducting the proceeding in ways that are proportionate to
- (a) the amount involved in the proceeding,
 - (b) the importance of the issues in dispute, and
 - (c) the complexity of the proceeding.

- [63] Although counsel for the claimant has done a commendable job on the assessment of special costs, considering the provision of SCCR, 1-3, I find the costs claimed to assess the special costs arising from the family law case to be unreasonable and disproportionate. I do not doubt that the lawyer put in the time billed, however, when all the factors are considered, those fees were not proper or reasonably necessary to the conduct of the special costs assessment. A comparison of the time billed for the assessment of the special costs, to the time billed in conducting the family law case itself, stands in stark contrast.
- [64] Considering the provision of the SCFR, 16-1(2) only those fees proper and reasonably necessary to the matter are to be allowed. In all the circumstances, I find the amount claimed for the assessment of special costs is disproportionate to the costs of the family law proceeding itself, is not objectively reasonable as per *Gichuru v. Smith*, supra, and when viewed globally, does not result in a fair fee as per *Hutchison v. Victoria Golf Course*, supra.
- [65] For the assessment of special costs the claimant is awarded \$29,500, consisting of \$25,000 in fees, \$3,000 in taxes, and \$1,500 for disbursements, inclusive of taxes.

DISPOSITION

- [66] The total award of special costs is therefore \$133,672.48 consisting of \$104,172.48 in special costs in relation to the family law case and \$29,500 in special costs relating to the special costs assessment.
- [67] The respondent has paid an advance of \$30,000. In addition, the respondent is owed \$1,000 in costs payable by the claimant pursuant to an order of Master Muir pronounced March 16, 2017. The \$1,000 in costs has not been paid, nor has Master Muir's order been appealed, varied, or set aside in this regard. There is evidence that the claimant intends to make an application to have the costs order set aside, but has not done so. In the interim, the order is valid and binding. Therefore, the amount of special costs is reduced by \$31,000, consisting of the advance paid by the respondent to the claimant, and the costs owed to her by the claimant pursuant to the order of Master Muir.
- [68] The balance owing in special costs by the respondent to the claimant is therefore \$102,672.48.
- [69] A certificate in form of F72 may be submitted through the registry for signature. As the certificate will be for the sole benefit of the claimant, its entry may be delayed to await the claimant's application to set aside, or vary, Master Muir's costs order. Should the claimant be successful, the special costs order herein will be varied accordingly, and a certificate reflecting that change may be submitted for signature.

"District Registrar Nielsen"

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