
CANADA / JUDGMENT

Kitov Resources Corp. v. Alpha Aviation Inc.

2020 BCSC 820

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 820 Kitov Resources Corp. v. Alpha Aviation Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kitov Resources Corp. v. Alpha Aviation Inc.,

2020 BCSC 820

Date: 20200603

Docket: S192835

Registry: Vancouver

Between:

Kitov Resources Corp. and Rod Salinger

Plaintiffs

And

Alpha Aviation Inc. and The Corporation of Delta

Defendants

Before: The Honourable Mr. Justice Verhoeven

Reasons for Judgment

Appearing on his own behalf and as representative for Kitov Resources Corp.:

R. Salinger

Counsel for the Defendants:

L.K.L. Li

Place and Dates of Hearing:

New Westminster, B.C.

April 23, 2020

Place and Date of Judgment:

Vancouver, B.C.

June 3, 2020

I. Introduction

- [1] On October 4, 2019, on the summary trial application of the defendants, I made an order (the "order," or the "October 4 order") that, by consent: (1) dismissed this action, and (2) set aside a without notice order made in these proceedings by Mr. Justice McEwan on March 15, 2019, (the "McEwan order"). I also ordered that: (3) the plaintiffs were required to remove an aircraft from Boundary Bay Airport within 60 days, and (4) the plaintiffs were permanently prohibited from trespassing on the airport lands. The last of these orders was subject to being set aside on the application of the plaintiffs on not less than 30 days' notice.
- [2] The plaintiffs did not comply with the order to remove the aircraft. Their counsel withdrew November 6, 2019. They resumed self-representing. They declined to approve the form of the order, which remains unentered. They apply to set aside or vary the order. The defendants apply to settle the terms of the order, and seek to have the order entered.

II. Background

- [3] The plaintiff KiTov Resources Corp. ("KiTov") owns an aircraft, a 1972 twin engine Cessna model 421B (the "aircraft") that it acquired in January 2013. KiTov has stored the aircraft at various locations at Boundary Bay Airport (the "airport") since then. It has been non operational since February 2014, when the engines and propellers were removed. The seats have also been removed. The defendants' affidavits refer to the aircraft as a "shell". The plaintiffs object to this characterization.
- [4] The plaintiff Rod Salinger is the sole director of KiTov.
- [5] The defendant Alpha Aviation Inc. ("Alpha") operates the airport. Alpha is the lessee of the airport lands from the defendant the City of Delta ("Delta"), pursuant to a long term lease entered into in 2011. Under the terms of Alpha's lease with Delta, Alpha has the right to sublet or to enter into licenses of occupation for parts of the lands. Delta was known as the Corporation of Delta prior to September 22, 2017.

- [6] As of early 2018, KiTov was storing the aircraft on the subleased property of International Pacific Aviation Co. Ltd. ("IPAC"), a sublessee to Alpha. In July 2018 IPAC notified KiTov that it required the aircraft to be removed from its property, in order to accommodate construction of a hangar. After Alpha refused to enter into a parking agreement with KiTov directly, Alpha agreed to enter into a parking agreement with IPAC for the use of Alpha's tie down space no. 346 on Apron 3, which IPAC could utilize to park the KiTov's aircraft (the "IPAC parking agreement").
- [7] The IPAC parking agreement was for a three-month term, from August 10, 2018 to November 10, 2018. Alpha advised both IPAC and KiTov that the IPAC parking agreement was not renewable. KiTov advised Alpha that it was planning to find a hangar on Apron 3 in order to make the aircraft flightworthy, so it could be flown away from the airport. The aircraft was moved from IPAC's premises to parking tie-down space no. 346, where it remains.
- [8] In accordance with its terms the IPAC parking agreement expired November 10, 2018. The aircraft remained in parking tie-down space no. 346.
- [9] On November 28, 2018, IPAC requested that the plaintiffs remove the aircraft.
- [10] By letter dated March 4, 2019 to IPAC, and copied to KiTov, (the "Alpha demand letter") Alpha's solicitors demanded that IPAC remove the aircraft from the airport within 10 days, or Alpha would take all steps available to it to have the aircraft removed and would assume no responsibility for loss or damage. Alpha stated that the aircraft could be subject to sale for non-payment of costs Alpha could incur for removal and off-site storage.
- [11] On March 15, 2019 the plaintiffs commenced this action. On the same date, Mr. Salinger, representing himself and KiTov, appeared on a without notice application before Justice McEwan. The application was supported by two affidavits of Mr. Salinger. Among other things, Mr. Salinger and KiTov contended that Alpha was in breach of a parking agreement it had entered into with KiTov in 2018. They alleged that Alpha's demand letter was a threat to destroy the aircraft.
- [12] Based upon the evidence and submissions of Mr. Salinger, Justice McEwan made orders: (1) enjoining Alpha from moving or destroying the aircraft; and (2) for specific performance of an agreement with Alpha for parking the aircraft on Apron 3. The defendants were given leave to apply to set aside the order on seven days' notice.
- [13] On March 18, 2019 counsel for the defendants advised Mr. Salinger that she had instructions to apply to set aside the McEwan order. The defendants filed their Responses to Civil Claim on April 8, 2019. Alpha filed a counterclaim on the same date, alleging that KiTov was guilty of trespass in leaving the aircraft on Alpha's leased property since November 11, 2018, and seeking damages, and a permanent mandatory injunction restraining trespass by KiTov and requiring KiTov to remove the aircraft immediately. Alpha amended its counterclaim May 3, 2019, to add claims against Mr. Salinger personally.

- [14] On June 27, 2019 the defendants filed an application for summary trial determination and dismissal of the plaintiffs' claims, and for orders setting aside the McEwan order, for removal of the aircraft immediately, and for a mandatory injunction prohibiting the plaintiffs from trespassing on the airport property.
- [15] The plaintiffs have filed no Response to the Counterclaim.
- [16] The defendants set down the hearing of their application for July 19, 2019.
- [17] On July 15, 2019, in an email to Ms. Li, counsel for the defendants, Mr. Salinger requested an adjournment. He advised that he was overseas and had been bitten by a poisonous snake on June 17, 2019. The application was adjourned by consent to August 1, 2019. On July 19, 2019 Mr. Salinger advised counsel that he was back in Canada. In the early morning hours of August 1, Mr. Salinger sent an email to Ms. Li seeking a further adjournment of the hearing, based upon the continued effects of the snake bite, for which he had been seen at St. Paul's hospital the previous day. The plaintiffs had filed no response to the application and no affidavit materials. The defendants did not consent to the adjournment.
- [18] The parties appeared before Madam Justice Matthews on August 1, 2019. The plaintiffs provided no affidavit evidence in support of the request for an adjournment. Matthews J. ordered that the application be adjourned to October 1, 2019. She also ordered that the October 1, 2019 date was peremptory on the plaintiffs, unless they brought an application to adjourn by September 16, 2019, and that the application to adjourn was to be accompanied by admissible evidence. She ordered that the plaintiffs were to provide any affidavits in response to the defendants' application by September 6, 2019. She ordered that if the plaintiffs wished to bring their own summary trial application, their summary trial materials were to be provided by September 6, 2019, and the application would also be heard on October 1, 2019. By a consent order dated September 17, 2019, the October 1 date set out in the Matthews order was changed to October 4.
- [19] The plaintiffs did not provide affidavit material by September 6, and did not bring an application to adjourn the defendants' application by September 16.
- [20] On October 4, 2019 the parties appeared before me for the hearing of the defendants' application. The plaintiffs had very recently retained counsel, Mr. Soni, only a few days before the hearing. No response to the application had been filed. Mr. Soni brought with him a copy of an unfiled affidavit of Mr. Salinger, made October 3, 2019, in Detroit, Michigan.
- [21] The plaintiffs consented to dismissal of the action, and to setting aside the McEwan order. The defendants were prepared to allow the plaintiffs 60 days to remove the aircraft. Mr. Soni contended that the plaintiffs should be allowed 120 days to remove the aircraft from the airport. I decided that, in the circumstances, the defence agreement to allow a further 60 days was reasonable, and in fact generous.

- [22] Notwithstanding that the hearing date was peremptory upon the plaintiffs by order of Justice Matthews, Mr. Soni sought to adjourn the application for an injunction restraining the plaintiffs from trespassing on the airport property. For purposes of that application Mr. Soni sought to rely on the unfiled affidavit of Mr. Salinger, contrary to the order of Justice Matthews requiring an application to adjourn to be brought by September 16, accompanied by admissible evidence. I examined and considered the affidavit for the limited purpose of considering the adjournment application. I denied the application to adjourn, and made the injunction order, but ordered that the plaintiffs could apply on not less than 30 days' notice to set aside the injunction.
- [23] I ordered that the copy of Mr. Salinger's October 3, 2019 affidavit that was relied upon in court on October 4 be placed in the court file, and that the original affidavit be filed with the court within seven days. That was not done, and the copy of the affidavit that I ordered to be placed in the court file is missing.
- [24] As noted, the plaintiffs failed to comply with the order requiring the aircraft to be removed within 60 days. On December 4, 2019, Mr. Salinger applied for a stay of the October 4 order, pending an application for re-hearing before me, to be heard January 9, 2020. The defendants agreed to the stay, on the condition that the plaintiffs pay security for costs in the amount of \$6,442.06. The Court (Mr. Justice Branch) ordered the stay on the condition that security be paid into court by December 6. This was not done. On December 30, the plaintiffs applied without notice for a stay of the order of Branch J. Madam Justice MacNaughton varied the Branch J. order to allow payment by 4:00 p.m. on December 30. Payment was made.
- [25] On December 11, 2019 the plaintiffs filed an application to set aside the injunction. They did not file an application to set aside or vary the other orders made October 4, 2019, although that was the basis of Branch J.'s order. The hearing date of January 9, 2020 lapsed as no application was actually set for hearing. Another scheduled hearing on January 16, 2020 also lapsed for the same reason. On February 13, 2020 the defendants applied to settle the terms of the October 4 order. The parties appeared before me. I decided to allow the plaintiffs another opportunity to bring their application for reconsideration of the October 4 order. I made directions for filing of the application materials, for a hearing to take place March 26, 2019. The directions I made included that the plaintiffs were required to file their application materials no later than February 20, 2020, and that the March 26 hearing was peremptory on the plaintiffs. The scheduled hearing did not occur due the Covid-19 pandemic and the partial closure of the courts effective March 19, 2020. On April 8, 2020, on the application of the defendants for an urgent hearing, I gave directions for filing of the application record and written submissions for a telephone hearing to take place on April 23, 2020. The hearing took place, and I have received and reviewed the now voluminous application record, and the submissions of the parties.

III. Application to Re-Open The Summary Trial

[26] The plaintiffs' Notice of Application filed February 21, 2020 seeks the following orders:

1. variation of the order of October 4, 2020 to allow the Cessna 421B Aircraft to be moved to a private aircraft hangar at Boundary Bay Airport;
2. set aside the permanent mandatory injunction preventing the Plaintiffs from attending Boundary Bay Airport;
3. order Alpha accept payment for the rental of parking space for the Aircraft to date at the rate offered to the Plaintiffs in July 2018 as ordered by the Court on March 15, 2019 and not hereto complied with by the Defendant Alpha;
4. costs in the cause and variation of the costs order of October 4, 2019.

[27] The second order sought duplicates the relief sought in the plaintiffs' Notice of Application filed December 11, 2019. In effect, both applications are before me.

[28] Contrary to my order giving directions for the hearing made February 13, 2020, the plaintiffs filed a further (in effect, amended) Notice of Application on March 13, 2020, seeking a further, new order:

A declaration that the defendant Alpha is not operating the Boundary Bay Airport as a public airport.

[29] The defendants object to hearing this new matter.

[30] The plaintiffs' written submissions seek orders that are at variance with their notice of application. The submissions state that the plaintiffs seek:

1. To set aside the mandatory injunction preventing the Plaintiff for ever attending the Boundary Bay Airport (the "Airport" or "Aerodrome").
2. To vary the order of 4 October 2019 to clarify issues and to allow for a reasonable outcome for movement of the Cessna 421 (the "Aircraft").
3. In the alternative, for leave of the Court to file an application to reconsider or vary the dismissal of this action of 4 October 2019 based on what has now been discovered as false, deceptive and or misleading evidence presented to the Court by the Defendants and its counsel as to the nature of the Airport being a private Airport when it is not a private airport but is a facility that the Government of Canada requires to be open to the public. Whether the Airport is a public or private facility goes to the core of the Defendant's argument.

[31] In any event, in effect, the plaintiffs seek a complete re-hearing of the October 4, 2019 hearing, and a reversal of the results. The essence of the decisions made at that time were that the plaintiffs' claims to a contractual right to park the aircraft at the airport were dismissed, that the plaintiffs were guilty of a continuing trespass in allowing the aircraft to remain on Alpha's property over its objections, and that they were obliged to remove the aircraft from the airport within 60 days. The plaintiffs seek the reversal of these decisions,

and seek to compel Alpha to perform an alleged contract for parking the aircraft at the airport, and/or to allow a sublessee to agree to store the aircraft at the airport.

- [32] As noted, despite the Matthews order and the peremptory nature of the hearing, the plaintiffs had filed no response to the application, no response to the counterclaim, and no affidavit material. (There remains no response to the defendants' application of June 27, 2019 and no response to the counterclaim.) On October 4, their counsel consented to the dismissal of the action, and setting aside the McEwan order, which of course would have followed the dismissal of the action in any event. The only properly filed affidavits of the plaintiffs before me at that time were the same two affidavits of Mr. Salinger that were before Justice McEwan on March 15, 2019.
- [33] The plaintiffs have now filed eight new affidavits in support of their applications, and three rebuttal affidavits.

A. Legal Principles - Application to Re-Open Trial

- [34] The fundamental consideration in exercising the discretion to re-open a trial is whether a miscarriage of justice would occur if the trial were not re-opened: *Stevens v. Plachta*, 2006 BCCA 479, at para. 15, citing *Bell v. Bell*, 2001 BCCA 148; *Grewal v. Grewal*, 2016 BCCA 237, at paras. 70-71; *Hansra v. Hansra* 2017 BCCA 199 [Hansra], at para. 63.
- [35] The relevant principles were reviewed in *Hansra*. In that case, the trial judge released reasons for judgment in which he made an award of special costs of the trial in favour of Ms. Hansra. After the decision was released, and before the costs order was entered, Mr. Hansra sought to have the judge reconsider and rescind the order. The judge heard from the parties and received written submissions. The trial judge released supplementary reasons in which he reduced the special costs by 25%.
- [36] The Court of Appeal held that what had occurred could not be said to be anything other than a complete re-opening and reconsideration of an order made after both parties had made their submissions in full: para. 42.
- [37] Upon a review of the relevant authorities, the court decided that it was incorrect to refer to a judge's discretion to vary an unentered order as "unfettered" since, as with any exercise of judicial discretion, it must be exercised judicially, in a principled and consistent way: para. 44. The court held that the judge erred in not considering whether it was appropriate to revisit the costs order, and did not consider whether reconsideration of the first costs order was necessary to prevent a miscarriage of justice. For the court, Frankel J.A. stated:

62 To begin, the trial judge did not consider whether it was appropriate for him to revisit the first costs order. By not doing so he failed to have regard to the principle that a party cannot seek to reopen to "re-argue, re-cast, or re-state his or her case": *Moradkhan* at para. 31; see also *Grewal* at para. 71. This is an aspect of the overarching principle of finality. While I am not suggesting all re-argument is precluded--e.g., where a judge has failed to address a point previously advanced--this

was not such a case. In his second costs submissions, Mr. Hansra did no more than repeat submissions the judge had already rejected. To use the colloquial expression used by Mr. Justice Esson in *Menzie v. Harlos* (1989), 37 B.C.L.R. (2d) 249 at 253 (C.A.), in dismissing an application for the rehearing of an appeal prior to entry of the formal order, what Mr. Hansra sought and obtained was a "second kick at the cat".

63 Further, the trial judge never turned his mind to the question of whether a reconsideration of the first costs order was necessary to prevent a miscarriage of justice. I do not accept Mr. Hansra's submission that it is implicit in the second costs reasons that the judge found allowing the first costs order to stand would give rise to a miscarriage of justice.

[38] In *Hansra*, the court quoted *Moradkhan v. Mofidi*, 2013 BCCA 132, where Garson J.A. stated:

[31] I would summarize the main principles applicable to such an application in the following way:

- it is generally speaking in the interests of justice to consider that a trial is complete when each side has closed their case and the judge has delivered his or her judgment;
- a judge's unfettered discretion to reopen a trial should be exercised with restraint;
- a party may not use the rule to re-argue, re-cast, or re-state his or her case, rather the rule is available to remedy what might otherwise be a substantial injustice;
- it is not intended that a party should be able to lead substantial new evidence, nor does the rule generally permit the leading of new expert evidence;
- the reasons that the evidence was not led or submissions not made in the first place may be relevant to the exercise of the judge's discretion, particularly where the failure to do so in the first place was a considered or pragmatic decision; and
- the discretion should only be exercised if the reception of the new evidence would probably change the result of the trial.

I would add to this list that a judge may reasonably exercise such discretion where a relatively discreet error in math or some mechanical consideration of the evidence is clearly in error. Finally, the overarching consideration is whether it is in the interests of justice that the court reopen the case. (See also *Brown v. Douglas*, 2011 BCCA 521, 314 B.C.A.C. 143.)

[39] Other relevant considerations going to the question of whether it is in the interests of justice to allow a matter to be re-opened include: finality, the apparent cogency of the evidence, delay, fairness and prejudice: *Hansra*, para. 59.

B. Analysis - Reopening the Summary Trial Application

- [40] With one limited exception, it is not in the interests of justice to allow the summary trial to be re-opened. Put another way, re-opening the trial would not prevent what would otherwise be a miscarriage of justice.
- [41] The interests in finality, and in fairness, strongly favour refusing to allow re-opening.
- [42] As noted, the hearing of October 4, 2019 was peremptory on the plaintiffs, by order of Justice Matthews, unless they brought an application to adjourn by September 16, 2019, which they did not do.
- [43] Justice Matthews also set reasonable deadlines for the plaintiffs to file responding materials. These deadlines were ignored.
- [44] It was the choice of the plaintiffs to turn to the court for protection by obtaining the McEwan order, on a without notice basis. A without notice order is extraordinary relief. Having obtained the order, they ought to have had more regard for the rules of court, and the order of Justice Matthews. The plaintiffs had been on notice since March 18, 2019 that the defendants would be applying to set aside the McEwan order. The application for summary trial had been duly served more than three months before the hearing. The court granted the plaintiffs' adjournment request on August 1, 2019 despite there being no affidavit materials, and no response to the application on the merits. Having done almost nothing to prepare for the hearing of October 4, 2019, and now being very dissatisfied with the position they find themselves in, they seek now a complete do-over. The principles of fairness, finality, the rules of court and most especially the order of Justice Matthews ought to be respected.
- [45] The defendants have consistently abided by the rules of court and all of the Court's directions. The plaintiffs have not.
- [46] Although on October 4, 2019 plaintiffs' counsel had only recently been retained, the fact is that the plaintiffs were represented by counsel, Mr. Soni, and formally consented in open court to what amounted to the primary orders, to dismiss the action and set aside the injunction. Mr. Salinger does not deny that counsel had authority. He says only, somewhat ambiguously, that his instructions to Mr. Soni were to obtain an adjournment. Mr. Soni did indeed seek an adjournment, but only of the application to enjoin trespass. Thus, there is no basis for me to conclude that Mr. Soni did not have authority. The court and the other parties ought to be able to rely on the position that parties take.
- [47] In any event, as I will discuss in more detail below, the concessions made were well-justified.

- [48] Properly characterized, the further evidence the plaintiffs seek to now rely on is overwhelmingly fresh evidence, that is, evidence that was in existence at the time of the trial, as contrasted with new evidence, which is evidence of matters occurring after the trial: *Hellberg v. Netherclift*, 2017 BCCA 363, at para. 53.
- [49] The essential submission made by the plaintiffs to Justice McEwan was that KiTov was entitled to continue to store the aircraft at the airport on the basis of a contract with Alpha. The NOCC claimed specific performance of the alleged 2018 parking agreement with Alpha. Indeed, Justice McEwan ordered interim specific performance by Alpha of its alleged contractual obligations to allow parking of the aircraft. On October 4, the plaintiffs agreed to dismissal of this claim. In my view they were right to do so. On the evidence, it is quite clear that there was no contract with Alpha as asserted. Therefore, the plaintiffs have not established that the admission of fresh (or new) evidence would probably change the result of the October 4 order dismissing their claims.
- [50] The evidence of the plaintiffs and of Alpha for the October 4, 2019 hearing shows the following:
1. On July 19, 2018 Mr. Salinger advised Alpha that the aircraft had been sold and that the new owner would contact Alpha;
 2. On July 25, 2018, via email, Alpha's airport general manager, Ms. Sayers sent a standard form Aircraft Parking Agreement to Mr. George Smith, who was representing the new owners, for parking of the aircraft. Mr. Smith did not respond;
 3. On August 3, 2018, an individual named Fred Olsen sent Ms. Sayers an Aircraft Parking Agreement on behalf of KiTov, for a term of two months, ending October 2, 2018. He included payment for the two-month term as well as a one-month security deposit;
 4. The insurance certificate Mr. Olsen provided did not comply with Alpha's stipulations;
 5. The Alpha standard form agreement provides that the agreement is not valid until it is signed by all parties and certain other conditions are fulfilled;
 6. On the same day, August 3, 2018, Ms. Sayers advised Mr. Olsen in two email messages that Alpha would not accept the contract, due to the condition of the aircraft, requested requirements not having been met, and prior issues of non-payment and non-compliance. The prior issues she adverted to were in relation to KiTov and its aircraft;
 7. On August 8, 2018, Alpha sent a letter to IPAC and KiTov warning that the aircraft was not permitted to be moved, towed or stored on any apron space or paved surface airside of the airport, and that the matter of storage of the aircraft was up to KiTov and IPAC to resolve;
 8. Following receipt of Alpha's letter, on August 8, 2018, Mr. Salinger on behalf of KiTov wrote via email to Ms. Sayers on behalf of Alpha, twice, making various accusations and threats, and advising that he had reported matters to the Delta Police;

9. On August 10, 2018, Alpha agreed to provide tie down space no. 346 on Apron 3 to IPAC for a period of three months, non-renewable, which IPAC could use for parking of the aircraft, and Alpha agreed to allow the aircraft to be relocated to Apron 3 for this purpose;
 10. KiTov made a separate agreement with IPAC for parking the aircraft.
- [51] The evidence demonstrates that at best Alpha issued an invitation to treat to George Smith on behalf of an unidentified buyer of the aircraft. When KiTov subsequently made an offer to Alpha to lease the parking space, Alpha declined the offer, as it was legally entitled to do. There was no "2018 Aircraft Parking Agreement" between KiTov and Alpha as asserted in KiTov's NOCC and in its application to Justice McEwan. I conclude that the dismissal of its action was not a miscarriage of justice; it was the correct result.
- [52] In any event, the offer was for parking for two months, only, so even if Alpha had contracted with KiTov, the contract would have terminated long before the matter came before Justice McEwan.
- [53] Justice McEwan was not told that, at best, the "2018 Parking Agreement" that KiTov relied upon in obtaining the injunction was for a two-month term. This was a material misrepresentation of fact that alone is sufficient to set aside the injunction: *Gulf Islands Navigation Ltd. v. Seafarers International Union Of North America (Canadian District) et al.*, (1959), 18 D.L.R. (2d) 216, at paras. 19-20; *Kriegman v. Dill*, 2018 BCCA 86, at paras. 39-43.
- [54] When KiTov allowed the aircraft to remain on Alpha's property and failed to remove it upon demand, it was guilty of a continuing trespass: *Peter Ballantyne Cree Nation v. Canada (Attorney General)*, 2016 SKCA 124, at paras. 136-137.
- [55] I observe that in the fresh evidence sought to be introduced, the plaintiffs have produced a different form of alleged Aircraft Parking Agreement with Alpha than the one put before McEwan J., and which was before me on October 4. The "new" agreement is for parking the aircraft for two years, from August 3, 2018 to August 2, 2020. The signatory is Mr. Salinger, rather than whoever signed the earlier document. The plaintiffs say that the document was delivered on KiTov's behalf to Alpha by Mr. Moshe Elyakim on August 3, 2018, along with a cheque for \$3,000. In response, Ms. Sayers states that Alpha never received the document, or the cheque, and does not enter into parking agreements for a term exceeding one year. The defendants contend that the "new" parking agreement now presented is a fraud or a forgery intended to mislead the court.
- [56] In his original application materials, Mr. Salinger did not assert that KiTov had a parking agreement for a term of two years.
- [57] The authenticity of the new purported agreement is highly doubtful. I observe that this would not be the first time that Mr. Salinger has presented a false document to the court: see the comments of Justice Kent in *Skeena Resources Limited v. Eilat Exploration Ltd.*, 2016 BCSC 1076, at paras. 35-36. However I cannot conclusively decide that the document is a forgery and attempted fraud on an application of this nature; that is, without the benefit of

oral testimony and cross-examination, as at a conventional trial. However, the evidence clearly does allow me to conclude that the plaintiffs cannot establish that the "new" agreement was ever delivered to Alpha. Moreover, and in any event, Alpha never signed any such document, old or new. Therefore the result does not change - there was no parking agreement between KiTov and Alpha.

- [58] Mr. Salinger asserts that he suffered from health problems that prevented him from appropriately responding to the defendants' application. His affidavits sworn December 4 and December 30, 2019 provide details. Mr. Salinger states that he was bitten by a poisonous snake while on an archaeological project in Israel on June 16, 2019. He was not well enough to return to Canada until July 18, 2019. He was unable to review the defendants' summary trial application materials until July 15. At his request the defendants adjourned the hearing set for July 19. He states that he did not agree to the new date of August 1. On July 30 he suffered further effects of the snake bite, and went to St. Paul's Hospital where he was kept overnight.
- [59] Mr. Salinger saw his family doctor July 31. She provided a note "to whom it may concern" stating that Mr. Salinger requires one to two weeks away from work. In the early morning hours of August 1, 2019 he sent defence counsel an email requesting an adjournment, which was refused. He states that when he was forced to attend court before Matthews J., he was feeling sick, was in pain, and was under orders from his doctor to avoid work. He states that he advised Matthews J. that he was unwell. He states that he was not medically able to work until September 16, but remained unwell even after that. He says that due to the snake bite and its consequences, he was unable to instruct counsel until October 1, 2019.
- [60] The medical excuse is unpersuasive. Even if I accept that Mr. Salinger was unwell on August 1, the plaintiffs had ample opportunity to retain and instruct counsel well before October 4. If it was the intention of the plaintiffs to instruct counsel, they ought to have done so after obtaining the order of McEwan J., which was subject to being set aside on seven days' notice, or at least when advised on March 18, 2019 that the defendants would be applying to set aside the order. Instead, Mr. Salinger went to Israel to work on the archaeological project.
- [61] There was no reason that the plaintiffs could not simply retain and instruct counsel to represent their interests, notwithstanding Mr. Salinger's health condition. Mr. Salinger does not say that the plaintiffs could not afford to retain legal counsel. In his affidavit he explains that he is an experienced pilot, holding U.S. and Australian pilot licenses. He states that he is the director of multiple companies, which own several valuable aircraft, and that his companies do important business with large corporations such as Ballard Power Systems and Honeywell. In general, he portrays himself as a sophisticated businessman.

- [62] The plaintiffs contend that they must be allowed to keep the aircraft at Boundary Bay Airport because they say that it can only be removed by flying it away, which requires that it be made flightworthy, which in turn requires among other things the re-attachment of the engines and propellers. The work must be done at a hangar. They seek orders that would allow the aircraft to remain at the airport for such purposes. This practical problem is the core of the plaintiffs' contention that the order should be reconsidered and varied.
- [63] They say removing the aircraft by truck is highly impractical and unreasonable. Due to the size of the aircraft, the wings would have to be removed. They rely on an affidavit from a U.S. FAA certified mechanic, Mr. Groat, who says among other things that the aircraft could be made flightworthy in about 79 hours at a cost of \$89 per hour. I presume this is U.S. currency. This would be US \$7,031, or about \$10,000 at current exchange rates. In brief, Mr. Groat says the option of dismantling the aircraft for road transport is very costly, and is unreasonable and not recommended. I note that this is opinion evidence, in part at least, which is not in proper form. I also note that Mr. Groat has not personally inspected the aircraft or its components.
- [64] In response, the defendants rely on the evidence of Alpha's Airport Operations Manager, Mr. Smaaslet, who says in his experience he has often seen aircraft transported via flatbed truck with wings and other components removed. He attaches a portion of a Cessna model 421 manual showing how to re-install a wing that has been removed. His evidence suggests that removal of the wings and other components is at least feasible. He doubts whether the aircraft will ever be made flightworthy. The last comment would be opinion evidence.
- [65] The practical problem the plaintiffs assert is not new. It was identified when they applied for the injunction order granted March 15. Mr. Salinger asserted in his affidavit at that time that the aircraft was not currently airworthy due to it being "in the midst of" a refurbishment program. He stated that the only way to remove the aircraft is by flying it out, as it is too big to be put on a truck.
- [66] I do not accept that this problem should result in variation of the order.
- [67] The problem is of the plaintiffs own making. The plaintiffs knew from at least August 10, 2018 that the aircraft had to be removed from the airport.
- [68] Even after they wrongly obtained a reprieve, by way of the McEwan order of March 15, they did not take steps to make the aircraft flightworthy. Under the order they seek to vary, they were given another 60 days to remove the aircraft by any means. At the time, I was not persuaded that more time would make a difference.
- [69] There is no evidence (old or new) that the plaintiffs took any material steps to solve their problem, which ought to have been viewed as urgent. Instead, they chose to bring meritless legal claims against the defendants.

- [70] The plaintiffs still do not have a viable plan to make the aircraft airworthy. It is questionable whether any different order would resolve their problem. In this regard, I note the following:
1. If the time and the cost to make the aircraft airworthy is as reasonable as that suggested by Mr. Groat, I am left to wonder why it this was not done long ago.
 2. The plaintiffs do not have an agreement with any Alpha sublessee for storage or repair of the aircraft within a hangar at the airport. The plaintiffs entered into an agreement dated February 12, 2020 with Alpha's sublessee Delta Helitech Ltd. for rental of hangar space. However, the agreement requires Alpha's consent, which it has not provided. Delta Helitech's lawyers state that upon becoming aware of the plaintiffs' litigation history with Alpha, Delta Helitech terminated its business dealings with the plaintiffs.
 3. Mr. Salinger's evidence before McEwan J. was that the aircraft's airframe and engine log books went missing in 2015, which resulted in the refurbishment program being halted. Mr. Salinger stated that KiTov had recently recovered the airframe log book, but was still searching for the engine log books. He stated that it was not possible to install the engines and fly the aircraft without the engine log books. He told Matthews J. about the missing logbook or books on August 1, 2019. In his recent (new) affidavit sworn February 20, 2020, he says that he has had the engine log books recreated. It is of course odd that if this were possible to do, it was not done long ago, and also that Justice McEwan would not be told that this problem was surmountable.
 4. The evidence of another Boundary Bay Airport aircraft maintenance provider, Mr. Janmohamad of Safari Express Aircraft Maintenance Ltd., further tends to undermine the viability of the plaintiffs' stated plan to finally rehabilitate the aircraft and fly it away. Mr. Janmohamad states that after a dispute with Mr. Salinger in 2014 and 2015 over unpaid parking and storage fees for the aircraft, he made arrangements for an auction of the aircraft to take place June 9, 2015. However, Mr. Salinger obtained a without notice court order prohibiting sale of the aircraft; and a short leave extension to that order. (Evidently the plaintiffs' strategy of utilizing the courts in this way is not new.) Mr. Janmohamad says that Mr. Salinger continues to owe him \$8,000 as settlement money. Mr. Salinger denies this. Mr. Janmohamad says that one of the aircraft's engines was left on the floor of Safari's hangar several years ago, and is still there. When last seen by Mr. Janmohamad, the aircraft was missing its engines, legally required logbooks, and other necessary parts and instruments.
 5. Another conclusion that I draw from the evidence of the plaintiffs and of Mr. Janmohamad is that the aircraft and parts could have simply been sold as is, where is. No doubt, this might not achieve the price the plaintiffs would like, of course.
- [71] The plaintiffs say that Alpha has improperly restricted or prevented them from finishing the refurbishment of the aircraft. I do not accept this. The plaintiffs point to a letter from Alpha to IPAC and the plaintiffs dated August 8, 2018 demanding that the aircraft not be moved, towed or stored without Alpha's permission. This letter was sent before IPAC entered into

the three month parking agreement with Alpha on August 10. Alpha's concern that prompted the letter was that someone had already moved the aircraft to apron 3 without Alpha's permission. The letter was written in response to the circumstances at that time. The argument of the plaintiffs might have some force if Alpha had consistently blocked efforts to move the aircraft to a hangar. There is no evidence that KiTov made such a request. The plaintiffs never presented a plan to Alpha to remove the aircraft from the airport prior to this litigation. I accept the evidence of Ms. Sayers that if KiTov had sought permission from Alpha to remove the aircraft from the airport, Alpha would have agreed.

- [72] In my view, Alpha is justified in refusing to have any further dealings with the plaintiffs, either directly, or indirectly, via a sublessee or a licensee. Legally, Alpha has such contractual rights. That is sufficient. Moreover, from a commercial point of view, Alpha has had problems with the plaintiffs for years. This underpinned their decision in August, 2018 not to do business with the plaintiffs. KiTov had failed to pay rent to Alpha in the past. Alpha's experience with the plaintiffs since November 10, 2018 including this litigation clearly justifies Alpha's position.
- [73] In addition to the legal and commercial grounds for Alpha's refusal to deal with the plaintiffs any further, Mr. Salinger has made baseless personal attacks on Alpha's staff and legal counsel, and has sought to broaden the dispute by involving third parties needlessly.
- [74] As noted, on August 8, 2018, via emails to Ms. Sayers, Mr. Salinger made various threats and accusations against Alpha, including an accusation against Alpha and by extension Ms. Sayers personally of anti-Semitism. Clearly this communication would only serve to harden Alpha's position that it did not wish to have continued dealings with the plaintiffs.
- [75] Despite this, on August 10 Alpha agreed to allow the aircraft to remain at the airport for three months, but made clear that no extension would be allowed.
- [76] Mr. Salinger continued thereafter to make similar allegations of anti-Semitism. In addition he has accused defence counsel of deliberately misleading the court, of other professional misconduct, of anti-Semitism (repeatedly), and of attempting to engender anti-Semitic bias against him with the court. These accusations are all completely groundless and inappropriate.
- [77] The tone and tenor of his communications with Alpha's personnel and agents has been hostile and vitriolic. Alpha is entitled to protect its employees and its legal counsel from this kind of conduct.
- [78] Mr. Salinger contends that Alpha has contrived circumstances in order to further its objective of selling the aircraft and keeping the proceeds. I do not accept this. Alpha denies that it wants the aircraft or seeks any financial gain. It is concerned that the cost to remove and sell the aircraft may exceed its value, however. What is clear on the evidence and on the steps that Alpha has taken in these proceedings is that Alpha simply wants the aircraft removed, and it wants nothing more to do with the plaintiffs, ever again. I accept that Alpha

has no profit motive.

- [79] Ms. Sayers denies that Alpha wishes to "gain full ownership of the aircraft" as Mr. Salinger contends. She says that Alpha would like the plaintiffs to remove the aircraft from the airport immediately, at their cost, and seeks a mandatory injunction so that Alpha and its employees and agents no longer have any contact or dealings with them again.
- [80] The order as made states that if the plaintiffs fail to remove the aircraft within 60 days, the defendants shall be at liberty to dispose of the aircraft including by sale and to retain the net sales proceeds, if any. Of course, my expectation in making this order was that these steps should not occur, since by court order the plaintiffs were obliged to remove the aircraft. Rather than taking steps to remove the aircraft, or possibly ask for more time on reasonable grounds, the plaintiffs chose to attempt to re-litigate the issues.
- [81] However, now that the 60 days has passed, this last part of the order goes too far, in my view. It goes beyond what Ms. Sayers (reasonably) states that Alpha actually wishes to accomplish.
- [82] The defendants did not claim damages in trespass for lost parking fees, which in any event would have been a relatively small amount of money. The parking fees are minimal and Alpha did not assert a loss on this ground. Alpha refused payment of parking fees from the plaintiffs, for obvious reasons. But clearly the defendants should be entitled to retain their expenses of disposal and sale. This can be seen as remedies for the trespass following breach of the court order. They should also be entitled to retain any other monies owing to them for legal costs pursuant to court orders. Ms. Sayers states that given the condition of the aircraft (or "shell", as she describes it), the cost to remove and sell it may exceed whatever amount it could be sold for. Although the point may be moot, if there are net sales proceeds they should be paid to KiTov. I therefore order that the October 4 order is varied in this respect, only.
- [83] Therefore the order is varied to state that if the Plaintiffs do not remove the aircraft from the lands within 60 days, (which has now elapsed, of course) the defendants shall be at liberty to dispose of, including selling, the aircraft and shall be entitled to retain from the proceeds of sale the expenses they incur in disposing of and/or selling the aircraft, and the amount of any unpaid orders for costs made in these proceedings.

IV. Application to Set Aside Injunction

- [84] As my order of October 4 allows the plaintiffs to apply to set aside the injunction, this part of the plaintiffs' application does not engage the same principles as their application to set aside and vary the other parts of the October 4 order.
- [85] The amended counterclaim of the defendants filed May 3, 2019 sought a permanent mandatory injunction restraining the plaintiffs from trespassing on the airport lands, and their notice of application filed June 27, 2019 sought the same relief on the summary trial.

- [86] The order was granted in the terms sought, with the exception that the plaintiffs could apply to set aside the order on not less than 30 days' notice.
- [87] I gave brief reasons for this decision, stating:
- [36] The underlying relief sought is a permanent mandatory injunction, and I have received limited submissions on that. The concern of the defendants is that Mr. Salinger personally may attend the premises. There are some reasons for concern on the part of the airport -- operations manager was she?
- [37] MS. LI: She is the general manager.
- [38] THE COURT: Airport general manager, about Mr. Salinger's behaviour in the past, and some basis on her part for concern, and I would say fear, about the possibility of interaction with Mr. Salinger.
- [39] On the other hand, it seems to me that a mandatory injunction of a permanent nature is a very serious order. The affidavit that I have looked at from Mr. Salinger does not say much as to why he has a problem with that. My understanding is that once this aircraft that is the center of the dispute is gone, and I have made those orders, there is no real need for any further interaction between Mr. Salinger, or any corporate entity with which he is associated, to be involved with the Boundary Bay Airport. On the other hand, this notice of application has been in existence for quite some time. The order of Madam Justice Matthews is clear. Orders of that nature must be respected.
- [40] Therefore, in all the circumstances, I have decided not to grant the adjournment application with respect to paragraph number 2, that is the mandatory injunction application. However it seems to me that Mr. Salinger might persuade a judge that the injunction should be lifted or amended in some way in future, and at that point in time a court could hear all of the circumstances that pertain at that time as to whether the injunction should be continued.
- [41] Therefore, I will amend the order sought set out in the notice of application to provide that the permanent mandatory injunction restraining the plaintiffs from trespassing upon the lands will be subject to being set aside on not less than 30 days' notice on the application of either the plaintiff, Mr. Salinger, or -- well, on the application of the plaintiffs.
- [88] As noted, my expectation was that even after the aircraft had been removed, Mr. Salinger or KiTov should have an opportunity to persuade a judge that they had some legitimate personal or commercial need to attend at the airport.
- [89] However, having reviewed the materials in support of the application to set aside this order, I am not persuaded that it should be set aside.

- [90] Other than in respect of the aircraft that ought to have been removed by now, the plaintiffs have presented no persuasive evidence of any practical need to attend the airport, or any real and substantial prejudice in being prohibited from attending there. Nor has there been any material change in circumstances.
- [91] I referred previously to the hostile, inappropriate nature of interactions with Alpha, and its counsel. In my brief oral reasons on October 4, 2019 I referred to the concerns and indeed fears of the airport manager in relation to dealings with Mr. Salinger. The amplified record I now have has not altered the view of the matter I took at that time. Ms. Sayers deposes that her personal unease and her fears regarding Mr. Salinger has in fact increased since then, based upon his communications and accusations. Her concerns are well-founded.
- [92] In her affidavit of February 28, 2020, Ms. Sayers states:
15. In response to paragraphs 37 and 38, it is the nature of Mr. Salinger's comments and his conduct that causes me personal discomfort and unease, as set out in my Affidavit #1 and the Affidavit #1 of Kyle Smaaslet. Further, since this legal action has started, the nature of Mr. Salinger's comments has become more hateful and his conduct has escalated, including making allegations against Delta and to our legal counsel, as follows:
 - a) On August 7, 2019, he alleged that Alpha's counsel may have a racial/religious bias and a lack of human understanding;
 - b) On September 17, 2019, he threatened to have the matter brought up to the Human Rights Commission and the Jewish Federation, and he demanded the resignations of Alpha and Delta's employees who instructed Alpha's counsel;
 - c) On December 1, 2019, he alleged that I, along with Mr. Vanstone from Delta, instructed counsel to "include the mention of religion so as to score a point by generating anti-Semitic hatred" and he suggested and I knew or should have known that certain evidence was false and misleading to the court, which is not true. He also threatened a claim to be made against our counsel and Alpha "for the cruel and indignant manner" in which he claims he was treated on August 1, 2019;
 - d) On January 3, 2020, he alleged that our counsel was admitted to the bar in "PR China" and that her actions may be permitted in communist China but not in Canada, I am informed by Ms. Li and verily believe that she is not admitted to the bar in "PR China";
 - e) On January 6, 2020, he suggested that our conduct in the litigation was analogous to what happens "in certain well known communist countries, where freedom of speech is stamped out by CCP trained lawyers";
 - f) On January 6, 2020, he filed a complaint to the Law Society of BC against our counsel alleging, various issues, including her use of antisemitism to marginalize him;

- g) On January 6, 2020, he wrote a long email to the Mayor of Delta and all the Delta councillors, with copies to other organizations including the Ministry of Foreign Affairs in Israel and the Canadian Ambassador to Israel, making numerous false allegations against Alpha, Delta, and our legal counsel;
 - h) On January 7, 2020, he wrote to the Court Registry and repeated his accusations; and
 - i) On January 24, 2020, he wrote to Alpha's counsel and demanded an apology for "the deliberate persecution and demonization" of him for being Jewish and suggested he was going to address this matter to "each of those leaders who attended the world Holocaust remembrance day meeting in Israel".
- [93] These allegations are all amply supported by Mr. Salinger's written communications attached to the affidavit.
- [94] This is not to say that Mr. Salinger has made threats of violence. As I perceive it, what Alpha fears is continued abuse and harassment including personal interactions. Such conduct can have significant effects on human health.
- [95] In its application materials in the first instance, Alpha presented evidence contending that on February 12, 2019, Mr. Salinger had attempted to attend the aircraft on the airport apron without authority, and had failed to identify himself accurately when challenged. Mr. Salinger disputes all this. On the disputed evidence as to what occurred, I make no findings about this particular episode. However, it is necessary to comment upon Mr. Salinger's allegations about this minor event. He says that he is being vilified merely for using what he describes as his actual Jewish first name, Avraham, on that occasion. This contention forms part of his allegations of anti-Semitism. I have already stated that I consider Mr. Salinger's accusations of anti-Semitism groundless and inappropriate. The concern raised by Alpha has nothing to do with the name "Avraham" as such, or Mr. Salinger's ethnicity or religion. It was that Mr. Salinger had sought to mislead Alpha's operations manager as to his true identity, and was on the airport's airside without permission or authority.
- [96] The matter of Mr. Salinger's ethnicity and religion was raised by Mr. Salinger and has been repeated by him numerous times. Alpha and its counsel have made no discriminatory remarks, but have objected to the accusations Mr. Salinger has made.
- [97] Among other things, Mr. Salinger contends:
- 1. that the order affects his professional reputation and employment as a pilot;
 - 2. he has been attending the airport since 1989, (or 1990), for recurrent instrument training, and in his work as a pilot and in connection with aircraft business;
 - 3. several years ago he had to make an emergency landing at the airport.

- [98] The point about his reputation is a bare assertion and is not persuasive. As to instrument training, he does not provide facts demonstrating that instrument training at this airport is essential, or that attendance at this airport is essential to his work or business interests. Ms. Sayers states that Alpha would accommodate any emergency forced landing that might occur. She notes that the operation of the airport runways are governed by government rules and regulations. [Parking of aircraft at an airport apron is subject to regulation under the Airport Traffic Regulations, C.R.C., c. 886 (1978)]. I note that the order only prohibits trespass, a tort, which is not likely to be apply in such circumstances. Potential breach of the Trespass Act, R.S.B.C. 2018, c. 3 is not material here. There would be no need or purpose in a court order prohibiting an offence under the statute.
- [99] More broadly, Mr. Salinger argues that the airport is generally open to the public, and that there is no reason why he should not be allowed to attend there, just as any other member of the public may do. He argues that Alpha has no legal authority to obtain the injunction.
- [100] The airport is a private airport in the sense that there are no commercial, scheduled flights operating from the airport. No commercial airlines operate from the airport. Authorization is required to access the operations side of the airport. The defendants use the expression "private airport" not in a technical legal sense, but merely to describe the nature of the airport, as distinguished from an airport offering commercially scheduled flights to the public such as Vancouver (YVR) or Abbotsford. In any case, the distinction is not material to this case.
- [101] Mr. Salinger's complaint is not that he wishes to attend the airport as a member of the travelling public. He argues that Alpha cannot prohibit him from attending for commercial purposes as a pilot and as an aircraft or aircraft business owner.
- [102] Alpha's lease with Delta requires Alpha to operate the airport as a licensed public airport in compliance with the Aeronautics Act, R.S.C., 1985, c. A-2, and to conduct airport operations in a manner compliant with the operating agreement between Canada and Delta. The operating agreement requires the airport operator to manage, operate and maintain the airport as an aerodrome open to the public in accordance with the agreement, the Aeronautics Act, and the regulations made thereunder.
- [103] I have been directed to no part of the operating agreement, statute or regulations that goes further, for example by stipulating what is meant or required by "open to the public". More generally, I have not been directed to anything that would establish any particular rights or remedies to the plaintiffs that could be material to these proceedings. The plaintiffs are not parties to the agreements.

- [104] Whatever may be the limits of the expression "open to the public", I am satisfied that it does not mean that Alpha or Delta are required to allow the plaintiffs to keep the aircraft at the airport, or cannot obtain a court order prohibiting an individual member of the public from trespassing. Nothing in these voluminous documents has been drawn to my attention that affects Alpha's power to lawfully control who or what is permitted to be on the property.
- [105] As noted, flight operations are governed by federal law.
- [106] The airport lands are owned by the City of Delta, and leased to Alpha.
- [107] Parking and use of airport lands are governed by regulations and private agreements. I agree with the submission of the defendants that the management of an airport requires that the airport's management be able to control certain conduct and activities.
- [108] In *Perimeter Transportation Ltd. v. Vancouver International Airport Authority*, 2008 BCSC 1515, this Court (Justice Wedge) held that the airport (YVR) was not obliged under common law as a public utility to provide access to the terminal to the plaintiff, a ground transportation company. The plaintiff had for many years offered a scheduled bus service from YVR to Whistler, B.C., known as the "Whistler Express", pursuant to a license with YVR for which it paid license fees. YVR entered into an agreement with another operator. Wedge J. held that the airport authority was entitled to regulate and limit access by ground transportation companies to the airport: para. 230. She held that air terminals owe public utility duties to the travelling public but not to commercial ground transportation companies. By analogy, as operator of Boundary Bay Airport, Alpha does not owe public utility duties to the plaintiffs for commercial purposes connected with the airport.
- [109] In *Harrison v. Carswell*, [1976] 2 S.C.R. 200, the Supreme Court held that notwithstanding the unrestricted invitation to the public to enter upon the premises, the owner of a shopping plaza had sufficient control or possession of the common areas so as to enable it to invoke the remedy of trespass.
- [110] I accept the contention of the defendants that Mr. Salinger has engaged in a campaign designed to harass them, and their employees and agents, including their legal counsel.
- [111] In my view, where the injunction may serve to prevent such conduct in future, and where the plaintiffs have not satisfied me of real and substantial practical prejudice arising from the injunction, it should not be set aside. I therefore decline to set aside the trespass order.

V. Terms of the Orders

- [112] The order of Branch J. made December 4, 2019 staying my October 4, 2019 order is set aside.
- [113] In relation to my October 4, 2019 order, I will approve the form of order as submitted by defendants, except that:

1. The order should indicate that the original version of the affidavit of Mr. Salinger made October 3, 2019 is to be filed within seven days;
2. The draft is to be amended to indicate that both plaintiffs were granted liberty to apply to set aside the injunction upon 30 days' notice.

[114] I order that the October 4 order is varied to reflect the variation I have made in relation to the net proceeds of sale.

[115] Due to the refusal of the plaintiffs to approve the form of the October 4, 2019 order, I order that the approval of the plaintiffs as to the orders of October 4, 2019 and the orders arising from these reasons for judgment is not required.

VI. Costs

[116] The defendants apply for special costs of the proceedings commencing with the application on December 4, 2019 heard by Justice Branch. Special costs were not sought on October 4, 2019, although the defendants might have sought them then, based upon the misleading evidence and submissions presented to Justice McEwan. I therefore confine myself to the conduct of the plaintiffs since that time.

[117] In *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352, Justice Gropper summarized the relevant case authorities regarding the award of special costs, stating:

73 I have undertaken a thorough review of the cases involving special costs. Having examined the authorities provided by both sides, it is apparent to me that the courts have been somewhat inconsistent in their determination of what amounts to reprehensible conduct and that those authorities must be reconciled. Based upon my review of the authorities, I have derived the following principles for awarding special costs:

- 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.

[118] More recently in *Sandhu v. Mangat*, 2019 BCCA 238 the Court of Appeal summarized the principles in this way:

4 The leading authority on special costs, *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 (C.A.), set out the threshold for special cost awards as "reprehensible conduct". Lambert J.A., for the court, noted the continuum of circumstances in which special costs could be awarded, ranging from "milder forms of misconduct deserving of reproof or rebuke" to "scandalous or outrageous conduct":

[17] ... it is my opinion that the single standard for the awarding of special costs is that the conduct in question properly be categorized as "reprehensible". As Chief Justice Esson said in *Leung v. Leung*, the word reprehensible is a word of wide meaning. It encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke. Accordingly, the standard represented by the word reprehensible, taken in that sense, must represent a general and all encompassing expression of the applicable standard for the award of special costs.

5 Special costs are punitive, not compensatory, and are awarded when a court seeks to disassociate itself from some misconduct in the course of litigation: *Smithies Holdings Inc. v. RDV Holdings Ltd.*, 2017 BCCA 177 at paras. 56-57, 134. They can be awarded against both parties and non-parties: see *Dyer v. Dyer*, 2016 BCSC 1115 at para. 54, citing *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352 at para. 73.

[119] The defendants rely principally on the allegedly fabricated new parking agreement, and the unfounded allegations of anti-Semitism made against them and their counsel, and disseminated to third parties. I was unable to conclude that the "new" agreement Mr. Salinger produced is a forgery, for the reasons I stated. However, I am satisfied that the conduct of the plaintiffs in relation to the allegations of anti-Semitism repeated and expanded since October 4, 2019, together with what I earlier described as a campaign of harassment is reprehensible conduct and is deserving of rebuke, which ought to result in an award of special costs.

"Verhoeven J."

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