

CANADA / JUDGMENT

McIsaac v. David

2020 BCSC 1741

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Supreme Court of British Columbia

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2020 BCSC 1741 McIsaac v. David

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

McIsaac v. David,

2020 BCSC 1741

Date: 20201117

Docket: S28331

Registry: Cranbrook

Between:

John Robert McIsaac

Plaintiff

And

Bruce Patrick Paul David, Deborah Susan David, Cathy-Anne David, and Columbia View Homes Ltd.

Defendants

And

Columbia View Homes Ltd. and John McIsaac

Defendants by Counterclaim

Before: The Honourable Mr. Justice Blok

Reasons for Judgment

Counsel for the Plaintiff and Defendant by Counterclaim, John McIsaac:

A. Bird

Counsel for the Defendants Cathy-Anne David and Columbia View Homes Ltd.

B. Fairley

Place and Date of Hearing:

Cranbrook, B.C.

October 21, 2020

Place and Date of Judgment:

Cranbrook, B.C.

November 17, 2020

I. Introduction

- [1] The parties each apply for special or, alternatively, increased costs following the discontinuances of their respective claims.
- [2] On the face of things, the litigation in question concerned mutual allegations of misdeeds or misbehaviour in the affairs of two companies. However, in essence these proceedings were merely an extension of existing matrimonial litigation between a separated couple, the plaintiff John McIsaac and the defendant Cathy-Anne David.
- [3] Ultimately, the parties agreed to discontinue their claims, but subject to costs and subject to Ms. David's argument that the discontinuance of the claims should be granted only on certain terms. This arrangement was confirmed by a consent order dated March 16, 2020, which granted leave to discontinue.
- [4] Each side says the claims of the opposing party or parties were unfounded, and because those claims involved allegations of fraud or dishonesty, special costs are called for. The parties argue, in the alternative, that increased costs should be awarded in their favour.

II. Background

- [5] I will not attempt a comprehensive review of the background of this matter as it has already been described in detail by Mr. Justice Saunders in an earlier decision, found at 2019 BCSC 931. I will summarize that matter later in these reasons. While very similar, the facts relevant to these applications are somewhat narrower in scope.
- [6] Mr. McIsaac and Ms. David are residents of Alberta. They married in October 1993 and separated in July 2015. Through at least three companies (two Alberta companies and one British Columbia company), they conducted business as homebuilders and real estate developers, and they owned a large property south of Golden, B.C. on which they operated a campground and paragliding facility.

- [7] The two companies relevant to the current applications are Great Divide Enterprises Ltd. ("Great Divide") and Columbia View Homes Ltd. ("CVH"). Great Divide is an Alberta corporation that was incorporated in 1998. Mr. McIsaac and Ms. David each own 50 percent of the voting shares in Great Divide, with the remaining shares owned by the parties' family trust.
- [8] CVH is a British Columbia corporation that was incorporated in 2000. Its shares are owned by Great Divide. Since 2010, CVH has owned and operated a campground and paragliding park known as Golden Eco-Adventure Ranch (referred to by the parties as the "GEAR property"), and it holds a vacant lot in Golden for development purposes ("Lot 4").
- [9] Great Divide's main asset is its shares in CVH.
- [10] In the earlier years of these companies, Ms. David was the sole director of Great Divide and Mr. McIsaac was the sole director of CVH. In 2016, Ms. David removed Mr. McIsaac as the director of CVH and installed herself as director in his place.
- [11] Following the separation of Mr. McIsaac and Ms. David in July 2015, Mr. McIsaac commenced a family law action in the Court of Queen's Bench in Calgary (the "Divorce Action"). In September 2016, that court ordered a corporate oppression action commenced by Ms. David, involving one of the Alberta companies, to be consolidated with the Divorce Action. The Divorce Action remains outstanding.
- [12] Mr. McIsaac filed the current action in May 2018 and registered certificates of pending litigation (CPLs) against the GEAR property and Lot 4. I will address those claims in more detail later, but for the moment I will say they concern various corporate transactions of CVH, carried out by Ms. David, that Mr. McIsaac alleges were improper. The registration of the CPL against the GEAR property prompted Ms. David to provide further information that satisfied Mr. McIsaac the CPL should be removed from title, and the CPL was then discharged.
- [13] In June 2018, Ms. David filed a counterclaim against Mr. McIsaac and CVH, alleging various improprieties by Mr. McIsaac, both in his capacity as a director of CVH and in his personal capacity.
- [14] Both sides sought interlocutory relief. Ms. David sought orders restraining Mr. McIsaac from filing any further CPLs against the GEAR property, restraining him from entering onto the GEAR property or communicating with anyone associated with CVH, and requiring Mr. McIsaac to post security for costs. Mr. McIsaac sought various orders in the nature of injunctive relief under s. 227(3) of the Business Corporations Act, S.B.C. 2002, c. 57 [BCA].
- [15] The matter came before Mr. Justice Saunders in December 2018. He declined to order the injunctive relief sought by Mr. McIsaac, finding that Mr. McIsaac had not shown irreparable harm and concluding that the balance of convenience also did not favour him. With one minor exception, Saunders J. dismissed Mr. McIsaac's application for interim relief.

- [16] Mr. Justice Saunders allowed Ms. David's application in part, ordering that Mr. McIsaac be restrained from communicating with persons associated with CVH in a manner that implied he had any right to control or direct them, though he allowed Mr. McIsaac to use the GEAR property as a participant in aerial sports activities and camping. He dismissed Ms. David's application for an order requiring Mr. McIsaac to post security for costs.
- [17] It appears there were only a few formal steps taken in the action after that. The parties exchanged lists of documents but no examinations for discovery were conducted. Mr. McIsaac filed a notice of discontinuance against Bruce David and Deborah David, the transferees of an interest in Lot 4, on August 17, 2018. The action was set for a four-day trial commencing in April 2020. A trial management conference took place on January 21, 2020.
- [18] On February 19, 2020, Ms. David notified Mr. McIsaac that she would not be pursuing seven of the 12 claims for relief in her counterclaim. On March 10, 2020, Mr. McIsaac filed a notice of application seeking leave to discontinue the action. Ms. David opposed the discontinuance application, but ultimately the parties agreed to discontinue their claims, but subject to costs and subject to Ms. David's argument that the discontinuance of the claims should be granted only on certain terms. As noted earlier, this arrangement was confirmed by a consent order dated March 16, 2020.

III. The Claims

A. The Plaintiff's Claims

- [19] The plaintiff's claims, as pleaded in the notice of civil claim, may be summarized as follows:
- a) Lot 4: Mr. McIsaac alleged that in 2008 Ms. David caused CVH to transfer a one-half interest in Lot 4 to Bruce David and Deborah David (the defendant Cathy-Anne David's brother and his spouse), a transaction he described as "secret". Mr. McIsaac alleged the transfer was done to delay, hinder or defraud him as a "creditor or other" and thus it constituted a fraudulent conveyance under the relevant legislation. He also alleged Ms. David converted the proceeds of that transfer to her own use.
 - b) GEAR property: Mr. McIsaac alleged that in October 2017 Ms. David caused CVH to grant a mortgage to Liberty Investments Ltd., a transaction he said was carried out to delay, hinder or defraud him. He also alleged Ms. David converted the proceeds to her own use.
 - c) Removal of Mr. McIsaac as director of CVH: Mr. McIsaac alleged that in July 2016 Ms. David, without his knowledge, removed him as director and installed herself in his stead. He alleged she did so in order to carry out the transactions described earlier.
 - d) Ms. David paying director's fees to herself: Mr. McIsaac alleged Ms. David, without his knowledge, paid herself director's fees totalling about \$40,000 in fiscal year 2016-2017.

- e) Excluding Mr. McIsaac from management and withholding information: Mr. McIsaac alleged Ms. David excluded him from all management of CVH and refused to provide financial information.
- [20] The relief sought by Mr. McIsaac included relief under both the Fraudulent Conveyance Act, R.S.B.C. 1996, c. 163, and Fraudulent Preference Act, R.S.B.C. 1996, c. 164, for the transactions involving Lot 4 and the GEAR property, plus a tracing remedy for any proceeds, as well as damages. He sought various remedies under the oppression provisions of the BCA, including the removal of Ms. David as director of CVH, the appointment of himself as director, orders prohibiting Ms. David from exercising her rights, as director of Great Divide, to change the directors of CVH, and prohibiting her from dealing with CVH's property.

B. The Defendants' Counterclaim

[21] Ms. David made the following claims:

- a) Filing of CPL against GEAR property: Ms. David alleged that Mr. McIsaac had no standing or cause to file a CPL. She also alleged the filing of the CPL damaged the standing and reputation of Ms. David and CVH in the building and construction industry and was a serious interference with the business relations of CVH.
- b) Diverting business opportunities: Ms. David alleged Mr. McIsaac breached his fiduciary duty to CVH by diverting to himself business opportunities that came to him through his position at CVH.
- c) Deceiving Ms. David about his efforts to divert business opportunities: Ms. David alleged Mr. McIsaac misrepresented these activities to her.
- d) Failure to exercise proper skill and diligence in purchase of Lot 4: Ms. David alleged Mr. McIsaac failed to exercise the care, diligence and skill required of an officer and director in causing CVH to pay a "massively inflated value above over fair market value" for Lot 4. She alleged further that Mr. McIsaac abused alcohol and drugs to an extent that it affected his ability to make rational decisions in the best interests of CVH.
- e) Using CVH profits for personal use: Ms. David alleged Mr. McIsaac used corporate profits for purchase an airplane and hangar, items that were of no benefit to CVH.
- f) Interfering with and obstructing the management of CVH: Ms. David alleged Mr. McIsaac interfered in a manner damaging to the interests of CVH.

[22] The relief sought by Ms. David included: (1) damages for wrongful filing of the CPL; (2) damages (including exemplary and punitive damages) for breach of fiduciary duty; (3) a declaration that he had conducted the affairs of CVH in an oppressive manner; (4) a declaration that Mr. McIsaac appropriated corporate assets of CVH for his own purposes; (5) damages for wrongful appropriation of corporate assets; (6) an injunction prohibiting Mr. McIsaac from entering CVH property; (7) an injunction prohibiting Mr. McIsaac from interfering or communicating with employees or contractors of CVH; (8) damages for

wrongful interference with business relations; and (9) damages for deceit.

IV. The Chambers Decision

[23] The chambers decision of Saunders J. featured prominently in the submissions before me and so I will review it in some detail.

[24] In his reasons for judgment, Saunders J. described the applications before him as follows:

[41] John brings his application under s. 227(3) of the BCA, which grants the Court broad jurisdiction to remedy oppressive or prejudicial conduct by way of making any interim or final order it considers appropriate. He seeks restoration of the status quo ante, through being re-appointed as director of CVH pending a decision in this action on the merits; and alternatively, interlocutory injunctive relief to prevent dissipation of corporate assets.

[42] John seeks the following interlocutory orders:

- a) That Cathy-Anne be removed as director of CVH, and he be appointed in her place;
- b) That Cathy-Anne provide all accounting records of CVH, including an accounting of all proceeds of the sale of Lot 4;

And alternatively, if Cathy-Anne remains as director of CVH, he seeks:

- c) Interlocutory injunctions that restrain Cathy-Anne, without the agreement of John or further order of the Court, from:
 - i. Operating CVH in any manner other than the normal operation of the GEAR campground and aerial park;
 - ii. Entering into transactions or purchases of a value greater than \$5,000;
 - iii. Disposing of assets of CVH;
 - iv. Causing CVH to borrow funds, encumber its assets, or pledge security;
 - v. Causing CVH to pay wages, salaries, dividends or benefits to non-arm's length parties;
 - vi. Using CVH to pay her legal costs in defending this proceeding;
 - vii. Causing CVH to refuse access to GEAR and its services;
- d) Orders against Cathy-Anne:
 - i. That she provide detailed financial information related to CVH from 2015 to the present, and on an ongoing basis;
 - ii. That she repay to CVH \$40,500 in director's fees;
- e) Orders:
 - i. Authorizing John to act on CVH's behalf in management of GEAR;

ii. Removing Bruce Fairley as lawyer for CVH, and that CVH obtain independent counsel;

[43] Cathy-Anne seeks the following interlocutory orders:

- a) That John be restrained from filing any further CPL against the GEAR lands, without leave of the Court;
- b) That John pay security for costs in this action;
- c) That John be restrained from entering onto the GEAR lands at any time;
- d) That John be restrained from communicating in any fashion with employees, contractors, guests, and managers of CVH;

[25] Mr. Justice Saunders began his discussion by reviewing authorities on interlocutory injunctions and oppression remedies. He addressed Mr. McIsaac's application first, doing so by discussing the elements of fair question to be tried, irreparable harm and balance of convenience. His comments are as follows:

- a) Fair question to be tried:

The application easily meets the first element of the test for an interlocutory injunction. The allegations are not frivolous or vexatious. There are allegations to be tried (para. 57).

- b) Irreparable harm:

I do not find that depriving John of enjoyment of the GEAR Property, even if that were to come about, could not be adequately compensated in damages.

John presents no plan for this family addressing its debt levels; certainly, no plan that could address the significant personal and corporate indebtedness without using the GEAR lands as security against business debt, as Cathy-Anne has done through the Hillcroft Venture. The whole flavour of John's affidavits is that he should be free to pursue his passion of aerial sports, without regard to the financial consequences of underutilizing the GEAR lands.

The prospect of Cathy-Anne disposing of CVH's property for less than full market value, or otherwise dissipating corporate assets, appears remote. John presents no evidence that the Lot 4 sale was at less than fair value. He has not demonstrated that Cathy-Anne is acting irresponsibly or other than in the best interests of Great Divide and CVH. What she has done with the proceeds of her undertakings is quite another thing; if John can establish oppression, or some other ground for liability, he may be entitled to an accounting. But that is not a basis for granting interlocutory relief (para. 60 for all).

- c) Balance of convenience - who altered the status quo:

Mr. Justice Saunders said (at para. 62) the parties' separation was the real factor behind the altering of the status quo and, as such, it was a neutral factor. At most, it was a factor that was not to be given much weight.

d) Balance of convenience - strength of the applicant's position:

Mr. Justice Saunders said (at para. 63) if there was oppressive conduct here, it was rooted in the affairs of Great Divide, an Alberta corporation, the sole shareholder of CVH, and so it would be a matter for the Alberta courts. He added:

The gravamen of John's complaints is the use and possession of family property in the context of an ongoing divorce proceeding. Aside from the allegations of wrongful payment of director's fees, the misconduct alleged to have been committed by Cathy-Anne does not fit neatly within the scope of shareholder oppression.

[26] Mr. Justice Saunders concluded his discussion of balance of convenience as follows (at para. 63):

John's evidence simply does not make out a strong case of malfeasance on the part of Cathy-Anne. As I have noted, there is no evidence that the Lot 4 sale was at less than fair value. Likewise, there is no evidence that the Hillcroft Venture is particularly risky - certainly not that it is any more risky than any other real estate-related venture the parties engaged in over the years, including CVH's purchase of Lot 4. Cathy-Anne presents a prima facie case for entitlement to director's fees. Her efforts seem focused on promoting the best interests of CVH through managing its assets to the benefit of its shareholders. In contrast, John's complaint is that he is no longer able to use the GEAR lands to pursue his personal interests. John argues that he has a reasonable expectation to the use of the GEAR lands that is deserving of protection under the oppression remedy. But, the circumstances of the parties' indebtedness, and the need eventually to divide family property, are such that in the absence of a plan to manage the parties' debt, John does not have strong grounds for believing that he will continue to enjoy unfettered use of the GEAR lands beyond the conclusion of the Divorce Action. Finally, his rush to file the CPL against the GEAR lands to further his personal interests, without regard to how that step might be to the detriment of CVH's business in relation to potential breaches of the development agreement under which the Liberty Mortgage was granted, calls into questions his ability to manage or resume directorial duties for CVH dispassionately, in a manner that will advance the best interests of the company and others concerned.

[27] Mr. Justice Saunders added (at para. 65) that Mr. McIsaac's claim for accountings and for disclosure of financial records was "not properly grounded as interlocutory injunctive relief in the context of oppression allegations", and was better left to be dealt with through discovery.

[28] With the exception of enjoining Ms. David from interfering with Mr. McIsaac's use of the GEAR property as an aerial sports participant and camper, Mr. McIsaac's application was dismissed (at para. 67).

[29] Mr. Justice Saunders dealt with Ms. David's application as follows:

- a) Restraining the filing of further CPLs against the GEAR property: the judge noted that this order was not strongly opposed and concluded it was appropriate in the circumstances (at para. 68).
 - b) Security for costs: the judge noted this type of order is only made under very special circumstances. Although he had concerns about the weakness of Mr. McIsaac's case, and the possibility that his claims might expose him to an order of special costs, these did not amount to the "egregious circumstances" necessary for such an order (at para. 70).
 - c) Injunction prohibiting access to GEAR property: the judge noted the evidence of Mr. McIsaac interfering in CVH management was "slight", though even Mr. McIsaac recognised having dual lines of authority over the management of GEAR was untenable (at para. 71).
- [30] In the result, Saunders J. ordered that Mr. McIsaac be restrained from communicating with CVH's employees, managers and contractors "in any manner that implies or asserts a right to control, direct, or query them in relation to their activities in relation to GEAR and the GEAR property". However, he also allowed Mr. McIsaac to continue to use the GEAR property as a participant in aerial sports activities and camping (at para. 72).

V. Positions of the Parties

[31] I summarize the positions of the parties in the order they were presented.

A. The Defendants

Special/Increased Costs

- [32] The defendants argue that the conduct of the plaintiff in this litigation was "reprehensible" within the meaning described in the authorities. The defendants emphasize that the plaintiff alleged various forms of dishonest conduct on the part of Ms. David, including fraudulent transfers of property, conversion of property and secret payments. They maintain that it is a longstanding practice that where fraud is alleged but not proven, special costs will be awarded.
- [33] The defendants also rely on the following matters in submitting the plaintiff's conduct was reprehensible:
- a) the plaintiff had no standing to file a CPL against the GEAR property. The defendants also rely on the observation of Saunders J. that the plaintiff filed the CPL "to further his personal interests" and did so improperly;
 - b) the judge's warning to the plaintiff about the potential for special costs given the weakness of his case. The defendants note that, despite this warning, the plaintiff did not apply to discontinue his action until the trial was approaching, doing so only to avoid costs; and

- c) the plaintiff's action imposed an unnecessary financial burden on the company, a factor that was taken into account in *Garcia v. Crestbrook Forest Industries Ltd. No. 2* (1994), 9 B.C.L.R. (3d) 242 (C.A.) [Garcia].

[34] In submissions, counsel for the defendants spent some time explaining his clients' version of events concerning some of the events or transactions challenged by the plaintiff. In brief, these explanations were as follows:

- a) Lot 4: This was purchased in 2006 for \$1,050,000 and was an "extremely improvident purchase". Bruce and Deborah David provided funds for the original purchase, and a joint venture agreement gave them 50 percent ownership. Lot 4 was intended for a condominium project, but ultimately there was no market for that venture. By 2016, Lot 4's assessed value was just \$366,000 and, despite marketing, no buyers were interested.

As of March 2018, CVH had debts totalling about \$2.5 million. The parties had personal debts totalling \$1.8 million. To raise money to deal with these collective debts, Ms. David sold the other half-interest in Lot 4 to her brother and his spouse for \$125,000. The defendants note the plaintiff has never produced any evidence showing that this sum was less than market value.

- b) GEAR property: Ms. David entered into an arrangement with Liberty Investments Ltd. ("Liberty") in order to "leverage" the property so that she could service the family debt, which was then costing about \$8,000 per month. Mr. Justice Saunders described the arrangement as follows:

[24] Further, in October 2016 Cathy-Anne caused CVH to grant a sizeable mortgage over the GEAR lands to Liberty, to secure a loan used to finance a residential development project on lands in Canmore, Alberta, owned by Hillcroft Developments Inc. ("Hillcroft", and the "Hillcroft Venture"). She describes in her 1st affidavit that in October 2017 CVH entered into commercial agreements with Bow View and two Alberta companies, NuAlpine Homes Ltd. (NuAlpine) and Hillcroft, whereby NuAlpine would build homes, Liberty would provide financing secured by the Liberty Mortgage, and in consideration of CVH granting the Liberty Mortgage it would receive half the total profits, and Bow View would be retained as project manager on a flat fee. Cathy-Anne deposed in her 1st affidavit that the Hillcroft Venture was expected to yield a profit, to CVH, exceeding \$177,000.

No money was advanced through the mortgage as it was collateral security only; it was granted merely as additional security to the lender so that the project could proceed.

The CPL filed by Mr. David interfered with the project because Liberty became aware of the CPL and refused to advance a scheduled draw. Although Mr. David quickly agreed to withdraw the CPL, the process still took six weeks and it caused the development partners to incur additional interest charges.

- c) **Director's Fees:** The defendants say director's fees of \$3,000 per month have been paid to her throughout, and have been shown in the annual financial statements of CVH as "management fees paid to director". These were fully disclosed in the Divorce Action.
 - d) **Withholding Information:** The defendants submit the plaintiff could have found out what was going on by conducting a discovery in the Divorce Action, something he did not do until December 2019. He could also have pursued documents and information through document discovery in that same action, which he did not do.
- [35] The defendants argue that they effectively won the "cause", given their success in the chambers application.

Discontinuance on Conditions

- [36] The defendants say they have been subjected to very serious allegations that they wish to see resolved, and they oppose any result that allows the plaintiff to delay resolution of those matters.
- [37] In these circumstances, the defendants argue that a discontinuance by the plaintiff should be subject to an order that either bars the plaintiff from later recommencing a similar action or entitles the defendants to raise the discontinuance as a defence in any subsequent action.

B. The Plaintiff

- [38] The plaintiff notes that the defendants, in their counterclaim, claimed against Mr. McIsaac for breach of fiduciary duty, misappropriation of business opportunities and deceit; in other words, they alleged dishonesty on the part of Mr. McIsaac. The defendants also made scandalous allegations against Mr. McIsaac concerning alcohol and drug abuse.
- [39] The plaintiff says the issue on costs is whether any allegations of fraud were unfounded. He says the plaintiff's allegations were well founded, but the defendants' allegations were not.
- [40] The plaintiff also submits the defendants demonstrated bad faith in seeking to bar him altogether from the GEAR property and in pursuing a meritless application for security for costs.
- [41] For those reasons, the plaintiff seeks special costs or, alternatively, increased costs against the defendants.
- [42] The plaintiff responds as follows to the issues raised by the defendants:
- a) **The plaintiff's application for discontinuance:** The plaintiff rejects the defendants' submission that the application was brought to avoid costs. Because a notice of trial had been delivered, the plaintiff was required to obtain leave of the court to discontinue. The context is also important: the defendants dropped the majority of their claims on February 19, 2020, and Mr. McIsaac filed his application for leave to discontinue shortly afterward (March 10, 2020), having concluded that the essential dispute could be resolved within the

Divorce Action.

- b) Lot 4: although the defendants allege this was an improvident purchase for which the plaintiff was responsible, this purchase occurred at the height of the real estate market in the area, a market that collapsed in the 2008 global financial crisis. Whether the purchase or sale of Lot 4 was or was not provident is unknown as neither side obtained any property appraisals.
- c) The plaintiff's action generally: Mr. McIsaac says he commenced his action to protect assets that, indirectly, were family assets, in circumstances where his efforts to get information had been rejected. A 2016 injunction issued in the Divorce Action protected the dissipation of any assets associated with Bow View Homes Ltd., but it did not protect any assets located in British Columbia. Ms. David never notified Mr. McIsaac of the sale of Lot 4 or the mortgaging of the GEAR property and, when he discovered these had occurred, Ms. David refused to provide him any information. These matters caused him to be concerned about asset dissipation.
- d) Being excluded from management of CVH: Mr. McIsaac asserts that the management of CVH was always joint. It was only later that Ms. McIsaac said she had sole control. Importantly, she never told Mr. McIsaac that she was removing him as director.
- e) Payment of director's fee: Mr. McIsaac maintains that no directors' fees were paid in prior years, and so Ms. David's payment of fees provided further cause for suspicion.
- f) The CPL: Mr. McIsaac filed the proceeding and registered the CPL against the GEAR property because he was concerned Ms. David was absconding with assets that were ultimately family assets. The CPL was registered (it would appear) in or around May 11, 2018. The defendants' solicitor wrote on May 31 to demand that the CPL be removed. The solicitor included in his letter, for the first time, a fairly detailed explanation of the reasons for the mortgage as well as related documents. Once provided with this information, Mr. McIsaac agreed the same day (May 31) to discharge the CPL, though the unavailability of his lawyer for a few days delayed the actual discharge until June 8.

Mr. McIsaac answers the allegation that he had no standing to file the CPL by noting the Fraudulent Conveyance Act protects "creditors or others", a phrase interpreted in *Mawdsley v. Meshen*, 2012 BCCA 91, as including claims that may be brought by spouses who have a right they could have asserted in an action.

- [43] Mr. McIsaac emphasizes that he has been in an inferior financial position as compared to Ms. David. He notes she remains in the matrimonial home, she had \$500,000 in former matrimonial assets available as a result of her withdrawals, and she restricted his income from their company, Bow View Homes Ltd. to \$2,500 per month despite the company earning much more than that and despite his need to pay both rent and child support.

- [44] Mr. McIsaac also noted Ms. David made various false, irrelevant and defamatory allegations about him in her affidavits, including allegations of drug and alcohol problems, hearsay statements about his allegedly poor reputation in the local construction industry, misconduct in relation to their children and allegations suggesting he was a "deadbeat dad" for failing to pay child support.
- [45] As a final submission on costs, Mr. McIsaac refers to a settlement offer he made on February 4, 2020, where he proposed that aside from certain interim orders made by Saunders J., the action be stayed pending the result in the Divorce Action and that each side bear their own costs. He emphasizes that this is essentially the current result, as the interim orders have in fact been extended, the parties have each agreed to discontinue their claims and, had the offer been accepted, both the March 2020 application to discontinue and the present application would have been unnecessary.

Discontinuance on Conditions

- [46] Mr. McIsaac does not strongly oppose the discontinuance conditions sought by the defendants, but argues that the order should be mutual and it should be worded in a way that it does not constrain Court of Queen's Bench in making any adjustment necessary to carry out a fair division of property between the parties.

C. Defendants' Reply

- [47] In reply, the defendants submit:
- a) at the point the plaintiff's offered to resolve the action by way of a stay of proceedings, the Divorce Action had not been set for trial; and
 - b) Ms. David refused to divulge any information to Mr. McIsaac because her (previous) lawyer told her not to.

VI. Legal Principles

- [48] For convenience, I refer to *Globalnet Management Solutions Inc. v. Aviva Insurance Company*, 2020 BCSC 1361 [Globalnet], where I summarized the general principles relating to special and increased costs:
- [27] I begin with the burden of proof. The party who seeks to displace the usual rule as to costs has the burden of persuading the court that the rule should be displaced: *Grassi v. WIC Radio Ltd.*, 2001 BCCA 376, at para. 24; *Giles v. Westminster Savings and Credit Union*, 2010 BCCA 282, at para. 75.
- [28] Special costs may be awarded where a litigant has engaged in conduct that is reprehensible. In *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177, the Court of Appeal said:

- [57] The leading authority on special costs is this Court's decision in *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 (C.A.). There, Mr. Justice Lambert, writing for the Court, set out that the threshold for special cost awards is "reprehensible conduct". He noted the continuum of circumstances in which special costs could be awarded, ranging from "milder forms of misconduct deserving of reproof or rebuke" to "scandalous or outrageous conduct":
- [17] Having regard to the terminology adopted by Madam Justice McLachlin in *Young v. Young*, to the terminology adopted by Mr. Justice Cumming in *Fullerton v. Matsqui*, and to the application of the standard of "reprehensible conduct" by Chief Justice Esson in *Leung v. Leung* in awarding special costs in circumstances where he had explicitly found that the conduct in question was neither scandalous nor outrageous, but could only be categorized as one of the "milder forms of misconduct" which could simply be said to be "deserving of reproof or rebuke", it is my opinion that the single standard for the awarding of special costs is that the conduct in question properly be categorized as "reprehensible". As Chief Justice Esson said in *Leung v. Leung*, the word reprehensible is a word of wide meaning. It encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke. Accordingly, the standard represented by the word reprehensible, taken in that sense, must represent a general and all encompassing expression of the applicable standard for the award of special costs.
- [29] Increased costs are provided for under s. 2(5) of Appendix B of the Rules, which reads as follows:
- (5) If, after it fixes the scale of costs applicable to a proceeding under subsection (1) or (4), the court finds that, as a result of unusual circumstances, an award of costs on that scale would be grossly inadequate or unjust, the court may order that the value for each unit allowed for that proceeding, or for any step in that proceeding, be 1.5 times the value that would otherwise apply to a unit in that scale under section 3 (1).
- [30] Factors which may be relevant to "unusual circumstances" include positions or behaviour which have added to the complexity of the litigation, the importance of the matter to a party, misbehaviour by a party that added to the expense incurred by the party claiming costs, and the degree of disparity between costs calculated at Scale B and actual legal fees incurred: *On Call Internet Services Ltd. v. TELUS Communications Company*, 2010 BCSC 1031, at paras. 11-12 [On Call]. See also *Monenco Ltd. v. Commonwealth Insurance Co.*, 1999 BCCA 133; and *National Hockey League v. L.A. Kings* (1995), 2 B.C.L.R. (3d) 13 (C.A.). In the latter case, the Court of Appeal noted that the misconduct in question need not be "reprehensible":

- [33] But where one party to an action is guilty of misconduct in the litigation, and the innocent party is required to spend time and effort responding to such conduct, in most cases it would be unjust if the latter was not adequately indemnified for the costs associated with defending against that which should never have happened. It is in that sense that, whether reprehensible or not, the misconduct of one party is relevant when a court is considering or exercising the discretion to award increased costs to the other.

VII. Discussion

A. Defendants' Claim for Special or Increased Costs

- [49] I note, at the outset, that in their respective claims each side made allegations of improper or dishonest conduct on the part of the other. At the hearing of these applications, each side made indignant submissions about the claims of the other without saying much about the aggressive nature of their own claims.
- [50] I will examine these claims in turn, but before doing so, I must emphasize that although the parties went on at great length about the merits of their respective cases, the deficiencies of the other side's case, and who prevailed before Saunders J., I did not conduct a trial here. My role is limited to assessing whether some or any of the allegations were improper, and thus "reprehensible".
- [51] The defendants rely, in essence, on the longstanding principle that a person making baseless allegations of fraud will expose themselves to an order of special costs. However, the defendants state that principle too widely.
- [52] In *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, the Supreme Court of Canada held that an unsuccessful attempt to prove fraud or dishonesty does not inexorably lead to the conclusion that the unsuccessful party should be held liable for solicitor-client costs (or in British Columbia, special costs). The court said:
- [26] In *Young v. Young*, [1993] 4 S.C.R. 3, at p. 134, McLachlin J. (as she then was) for a majority of this Court held that solicitor-and-client costs "are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties". An unsuccessful attempt to prove fraud or dishonesty on a balance of probabilities does not lead inexorably to the conclusion that the unsuccessful party should be held liable for solicitor-and-client costs, since not all such attempts will be correctly considered to amount to "reprehensible, scandalous or outrageous conduct". However, allegations of fraud and dishonesty are serious and potentially very damaging to those accused of deception. When, as here, a party makes such allegations unsuccessfully at trial and with access to information sufficient to conclude that the other party was merely negligent and neither dishonest nor fraudulent (as Wilkins J. found), costs on a solicitor-and-client scale are appropriate: see, generally, M. M. Orkin, *The Law of Costs* (2nd ed. (loose-leaf)), at para. 219.

- [53] The situation is different where an examination of all the circumstances shows the allegations of fraud were unwarranted or completely unfounded (*Chaplin v. Sun Life Assurance Company of Canada et al.*, 2004 BCSC 116, at para 28 [*Chaplin*]) or were brought for an improper purpose or with improper motives (*Garcia*, at para. 23).
- [54] In one of the cases cited by the defendants, *Ip v. ICBC*, 1994 CanLII 2340 (B.C.S.C.) [*Ip*], the principle was described as applying where the allegations of fraud "are not withdrawn or abandoned prior abandoned before trial". Here, both sides abandoned their claims by discontinuances before trial.
- [55] The authorities indicate the rationale for that caveat is that plaintiffs should be able to make claims, even claims involving alleged dishonesty, without having immediate exposure to special costs because they may have to develop proof through discovery or other means. Aside from cases where the claims are baseless or improper from the start, the sanction of special costs is for cases where a plaintiff, despite having a full opportunity to develop the case, persists with allegations of dishonesty through to trial and fails to make them out: see, for example, *Chaplin*, at para. 39, where the court said:
- [39] Some claims may need to be pleaded and then carefully considered on an ongoing basis for the existence of a *prima facie* case following within a reasonable period allowing for pre-trial procedures and investigation to occur before continuing through to trial.
- [56] I fully appreciate that Mr. McIsaac made several claims against Ms. David that involved allegations of dishonest or other improper behaviour, but ultimately these were dropped. I also would not characterize Mr. McIsaac's claims as baseless, particularly given the circumstances outlined earlier. Mr. Justice Saunders came to a similar conclusion; he said Mr. McIsaac's claims were not frivolous or vexatious, and concluded there were "allegations to be tried" (at para. 57).
- [57] Moreover, I conclude Ms. David's refusal to answer questions or provide requested information played a part in prompting the plaintiff to commence his action. It is reasonably clear that Ms. David's failure to respond to seemingly reasonable requests by Mr. McIsaac for information relating to corporate assets, assets that her counsel conceded were family property, contributed significantly to suspicion on Mr. McIsaac's part, and ultimately to the filing of his action and the registration of the CPLs. The fact that Ms. David blames her former counsel's puzzling advice for her refusal to provide information does not change that conclusion, because it is the effect of her refusal, not the cause of it, that is important here. In my view, this is a relevant factor in considering whether Mr. McIsaac's claims were improper in the circumstances.
- [58] I also conclude that the filing of the CPL against the GEAR property was not obviously improper. It may be that it would not have survived a challenge in court, but the plaintiff's submissions satisfy me that the point was at least arguable.

- [59] In arguing that Mr. McIsaac acted improperly in filing the CPL against the GEAR property, Ms. David also pointed to a comment by Saunders J. that Mr. McIsaac rushed to file the CPL "to further his personal interests" without regard to how that might affect CVH. However, in her submissions Ms. David failed to refer to the remaining part of the judge's reasons where he made it clear he was weighing, as part of the balance of convenience test for an injunction, Mr. McIsaac's suitability as director of CVH instead of Ms. David. It seems to me that Mr. McIsaac was still entitled to protect his personal interests.
- [60] It is true that that Saunders J. warned Mr. McIsaac about his exposure to special costs in view of the weaknesses in his case but, consistent with the principle outlined earlier in Ip and other cases, this would tend to apply only if Mr. McIsaac failed to withdraw or abandon those claims prior to trial.
- [61] In brief, the plaintiff's claims were not groundless, they were withdrawn by way of a discontinuance prior to trial, and they were prompted at least in part by Ms. David's unreasonable refusal to provide requested information or otherwise notify him of important matters relating to assets ultimately owned by the parties. I conclude that special costs are not warranted here.
- [62] Increased costs stand on a somewhat different legal footing insofar as they require a finding that "as a result of unusual circumstances, an award of costs on that scale would be grossly inadequate or unjust": s. 2(5) of Appendix B of the Supreme Court Civil Rules. In Globalnet, quoted earlier, I noted that the factors to consider included: (1) positions or behaviour which have added to the complexity of the litigation; (2) the importance of the matter to a party; (3) misbehaviour by a party that added to the expense incurred by the party claiming costs; and (4) the degree of disparity between costs calculated at Scale B and actual legal fees incurred.
- [63] Neither side led any evidence on the disparity between ordinary costs and actual legal fees incurred. The only specific misbehaviour-related expense alleged was the defendants' complaint that additional interest was paid because a construction financing advance was temporarily delayed due to the registration of the CPL, an item that falls short of establishing an entitlement to increased costs for the proceeding generally.
- [64] Given the absence of evidence relevant to "unusual circumstances", and given my earlier conclusions relating to the propriety of the plaintiff's claims, I conclude the defendants have failed to establish a basis for an award of increased costs.

B. Plaintiff's Claim for Special or Increased Costs

- [65] In their counterclaim, the defendants also made allegations of dishonesty, or at least suggestive of dishonesty, claiming against Mr. McIsaac for alleged breaches of fiduciary duty, deceit, misrepresentations, and diverting corporate assets and business opportunities for his personal use. Like the plaintiffs' claims, these were dropped by way of a discontinuance.

- [66] The defendants also alleged in their counterclaim that the plaintiff abused alcohol and drugs, which in the context of the particular pleading in question, appears to be gratuitous and therefore scandalous, in the legal sense of that term.
- [67] The plaintiff also complains of various statements, hearsay and otherwise, contained in Ms. David's affidavits, which cast a negative light on Mr. McIsaac's character in various ways. I agree this has a significant mudslinging aspect to it, but given the opposing "point-counterpoint" affidavits, I am unable to conclude the allegations were baseless or, in the context of the dispute, completely irrelevant. While unfortunate, they do not provide grounds for an order of special costs.
- [68] To address the matter more generally, the plaintiff's application for special or increased costs fails for many of the same reasons that caused the defendants' costs application to fail. The defendants' allegations may have been "slight" in some instances (see para. 71 of the reasons of Saunders J.), but they were not groundless, and ultimately the counterclaim was discontinued.
- [69] While I find that the allegation of drug and alcohol abuse crossed the line because it was unnecessary in its particular context and therefore gratuitous, I conclude that this, in itself, does not warrant an order for special costs for the entire proceeding. Both sides pleaded in an aggressive fashion, both sides made allegations of dishonesty against the other, but both sides discontinued their claims.
- [70] I conclude the plaintiff has failed to make a case for special costs against the defendants.
- [71] As for the plaintiff's application for increased costs, this fails for essentially the same reasons as did the defendants' application.

C. Conclusion on Costs

- [72] The applications of the plaintiff and the defendants for special or increased costs are dismissed. Each side will have costs at Scale B against the other up to the date of the discontinuances, with the respective costs to be set off against one another.
- [73] Mr. McIsaac submitted that the Court should assess the parties' costs summarily in order to spare them the expense of a registrar's assessment. I decline to do so. First, there would have to be a basis for such an assessment and here, there are no draft bills of costs. Second, leaving aside an action where virtually nothing was done, it is difficult to conceive of a situation where a summary assessment of costs for an entire proceeding would be appropriate because such a process would essentially be the same as an assessment before the registrar.

D. Conditions of Discontinuance

- [74] The parties do not differ substantially on this issue. I will briefly review the basis for the order sought.

[75] Rule 9-8(8) provides:

Unless the court otherwise orders, the discontinuance of an action in whole or in part is not a defence to a subsequent proceeding for the same or substantially the same cause of action.

[76] In *Blum v. Blum* (1964), 47 D.L.R. (2d) 388 (Ont. C.A.), at paras. 7-8, the court observed that discontinuances, particularly discontinuances filed late in the proceedings, deprive defendants of the opportunity to have their rights determined. Without some form of control, a plaintiff could commence a new action at a time when evidence is lost or witnesses become unavailable.

[77] Given that the substantive issues between the parties will be adjudicated upon in the Divorce Action, I am satisfied that some control should be exercised here in order to deter multiple and unnecessary proceedings. I am also satisfied that the terms should be mutual.

[78] Accordingly, the respective discontinuances of the parties shall be subject to a condition that they may be raised as a defence to any later proceedings brought by the discontinuing party or parties involving the same or substantially similar claims, except that this term shall not in any way impair the Court of Queen's Bench in the Divorce Action from effecting any adjustment necessary to carry out a fair division of property between Mr. McIsaac and Ms. David.

VIII. Conclusion

[79] The respective applications of the plaintiff and the defendants for special or, alternatively, increased costs, are dismissed. Each side will have costs against the other at Scale B up to the date of the discontinuances, with the respective costs to be set off against one another.

[80] The discontinuances of the parties shall be subject to a condition that they may be raised as a defence to any later proceedings brought by the discontinuing party or parties involving the same or substantially similar claims, except that this term shall not in any way impair the Court of Queen's Bench in the Divorce Action from effecting any adjustment necessary to carry out a fair division of property between Mr. McIsaac and Ms. David.

[81] As to costs of this application, neither side was successful in achieving the main relief they sought. For that reason, there will be no costs of this application to either party.

"Blok J."

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