

CANADA / JUDGMENT

Nouhi v. Pourtaghi

2023 BCSC 306

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 306 Nouhi v. Pourtaghi

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Nouhi v. Pourtaghi,

2023 BCSC 306

Date: 20230302

Docket: S184410

Registry: Vancouver

Between:

Massimo Aki Nouhi

Plaintiff

And

Nahid Pourtaghi, Naki Enterprises Inc.

Defendants

And

Massimo Aki Nouhi

Defendant by Way of Counterclaim

Before: The Honourable Mr. Justice Harvey

Reasons for Judgment on Costs

Counsel for Plaintiff/Defendant by Counterclaim:

C. Dennis, K.C.

E. Lennox

Counsel for Defendants:

R.J. Kaardal, K.C.

R. Androsoff

Place and Date of Hearing:

Vancouver, B.C.

October 12, 2022

Place and Date of Judgment:

Vancouver, B.C.

March 2, 2023

- [1] In May of this year, following an 18-day trial, I published reasons indexed as *Nouhi v. Pourtaghi*, 2022 BCSC 807 (the "Trial Reasons").
- [2] At the conclusion of the Trial Reasons, I invited the parties to return before me to make submissions on the issue of costs as they relate to both the discontinued notice of civil claim commenced by the plaintiff, Massimo Nouhi, and the counterclaim brought by the defendant Nahid Pourtaghi and Naki Enterprises Inc. ("Naki") for contractual or, alternatively, equitable relief against the plaintiff.
- [3] In the Trial Reasons, I concluded that no contractual arrangements had been proven between the personal defendant and the plaintiff but found Dr. Pourtaghi was entitled to equitable relief based on the doctrine of unjust enrichment and that both defendants were entitled to relief against the plaintiff for slander of title arising from the plaintiff's repeated filings of certificates of pending litigation against property in each of the defendants' names.
- [4] The discontinuance of the plaintiff's notice of civil claim was made by order at the commencement of the trial. The defendants' only opposition to the application was as to the scale of costs payable by the plaintiff. While the plaintiff concedes that the defendants are entitled to party and party costs in respect of his discontinued claim, the defendants seek special costs of both the claim and counterclaim by virtue of the allegations of fraud, misappropriation of funds and other dishonest behaviour raised in the notice of civil claim, response to counterclaim, and the subsequent amendments to each.
- [5] Further, the defendants argue the action was commenced for an improper purpose, enmity by the plaintiff towards the personal defendant, and that the allegations against Dr. Pourtaghi were known, or ought to have been known, to be baseless from the commencement of the proceeding.

The History of the Litigation

- [6] The history of the litigation is summarized in the Trial Reasons but I shall summarize what I consider necessary to give meaning to the measure of costs I award in each of the claim and counterclaim.
- [7] On April 6, 2018, the plaintiff filed a notice of civil claim against both defendants asserting claims in conversion, breach of trust and misappropriation by the personal defendant of funds said to be the property of the plaintiff. In addition, the plaintiff sought a constructive trust with respect to four properties owned by the defendants (collectively the "Properties").
- [8] I note the plaintiff had not, as at the action's commencement, sought or received any accounting advice as to the transactions underlying the allegations of impropriety nor does it appear from the evidence at trial that the defendant was ever asked to explain them prior to proceedings being commenced.
- [9] Later, well after the allegations of fraud were asserted, a forensic accounting of both the corporate and personal bank accounts of the plaintiff was commissioned by the plaintiff. The resulting opinion was that some of the transactions examined were suspicious but more information was needed; presumably the corresponding transactions from accounts under the control or ownership of the personal defendant.
- [10] The evidence at trial leads me to conclude the plaintiff was aware, or ought to have been aware through reports of other employees of AKNO to whom the defendant regularly reported, of the nature and purpose of the transactions alleged to have been improper.
- [11] The defendant prepared spreadsheets detailing the transactions (including those impugned by the plaintiff) and I accept the spreadsheets were regularly provided by the defendant to the plaintiff through his various agents.
- [12] The litigation before me was/is not the only litigation involving the plaintiff and the defendant. At or near the same time as the commencement of these proceedings by the plaintiff, he, through one of his wholly controlled corporations commenced an action against the personal defendant in Michigan claiming similar misdeeds by the defendant with respect to corporate funds.
- [13] That action was ultimately dismissed on a summary trial. At trial, I was advised by then plaintiff's counsel that the matter was under appeal and, subsequent to the trial, the appeal was allowed based on jurisdictional issues.
- [14] Other litigation involving the plaintiff and the defendant's adult daughter was/is underway. In that action, the plaintiff seeks repayment of what he characterizes as a loan he advanced to the defendant's daughter to fund her education.
- [15] I believe, although it is unnecessary to the result, AKNO or the plaintiff personally have ongoing litigation involving the defendant, Dr. Pourtaghi.

[16] The plaintiff's litigation in B.C. proceeded slowly. The major focus, as gauged by the plaintiff's actions, appeared to be maintaining CPLs over the Properties which constituted, I find, the bulk of defendant's assets. She, by the time this action was commenced, was the singular shareholder of the defendant company "Naki". The defendants brought several applications to remove CPLs from the Properties, in no small part to raise funds to engage in this litigation.

[17] As to the registration of CPLs against the Properties, the plaintiff's rationale was set out in one of his affidavits in opposition to their removal as follows:

Given Pourtaghi's salary over the years and her history of carrying out unauthorized transactions with my funds, it is my belief that Pourtaghi must have used my funds without my permission to purchase the property she owns in her name and to service the mortgage debt on each of those properties.

[18] Further, in response to the first application brought by the defendant to remove all CPLs from the Properties, the plaintiff claimed that the personal defendant had "had fraudulently withdrawn funds from his accounts to fund her personal expenses and that of her family".

[19] Prior to the hearing of the first application by the defendants for removal of all the CPLs, the plaintiff filed a notice of application seeking a Mareva injunction as an alternative remedy if the CPLs were ordered to be removed.

[20] In support of the application for a Mareva injunction, the plaintiff alleged that the personal defendant had committed fraud and misappropriated over \$200,000 in US funds from the AKNO bank account.

[21] That same allegation was the subject matter of litigation in Missouri between AKNO and the personal defendant. The commencement of the same or similar litigation by the plaintiff or his company based on similar subject matter is telling, in my view, as to his motives.

[22] Justice Matthews heard both applications and issued written reasons for judgment, indexed at 2019 BCSC 794. In her reasons cancelling the CPLs, she noted the pleadings failed to state a claim to an interest in the Properties. She also dismissed the claim for a Mareva injunction noting that the plaintiff had failed to plead the essential elements of civil fraud and had "not led any evidence of a false statement or inducements".

[23] She found, as did I, that when the personal defendant was pressed for explanations of the transactions that the plaintiff claimed were "suspicious", adequate responses were given.

[24] Justice Matthews concluded the pleadings/evidence did not meet the standards of a good arguable case of fraud and that the evidence that Mr. Nouhi offered of dishonest behaviour by Dr. Pourtaghi was not strong.

[25] Costs of the application were awarded to the defendants but no scale of costs was determined.

- [26] The plaintiff then sought and was granted leave to amend the notice of civil claim. In the amended version, he remedied the defects noted by Matthews J. in her reasons with the result that the CPLs were re-registered against all of the Properties.
- [27] The defendant led evidence which I referenced in the Trial Reasons of the financial hardship occasioned by the CPLs in terms of the refinancing effort she made.
- [28] Despite reinstatement of the CPLs following amendment to pleadings, the plaintiff sought to press forward with the appeal of the Matthews' decision. The defendants argued the amendments, coupled with reinstatement of the CPLs, made the appeal moot. Despite the obvious lack of need in the subject litigation, the plaintiff pressed on.
- [29] On August 26, 2019, the defendants filed an application to dismiss the appeal as moot. The plaintiff, a non-resident of British Columbia, opposed the application acknowledging that although the appeal was moot, it raised issues of public importance and should be heard in any event. The defendant's application was granted and the appeal was dismissed.
- [30] The defendants were awarded costs of the appeal but acknowledge those fall outside of this application for enhanced costs. Rather they say that the plaintiff's action in pursuing the appeal is indicative of the plaintiff's collateral motive (financial harm to the defendants) and malice.
- [31] Such is consistent, says the defendants with the testimony of Nadia Pourtaghi who testified at trial that the plaintiff told her to tell the defendant that he would spend three million dollars to defend the counterclaim but nothing to settle it.
- [32] In July 2020, the defendants filed a further application to cancel the re-registered CPLs and claimed urgency owing to the necessary refinancing on one of the Properties owned by the defendant personally.
- [33] In opposition to the application, the plaintiff, in his application response noted "the money was stolen from him and was used to purchase the properties". Other than the bare assertion of theft, no evidence was advanced in support that allegation but rather it was "to be explored further through the discovery process once COVID-19 procedures had been settled".
- [34] On July 23, 2020, Horsman J., as she then was, ordered the cancellation of the CPL registered against the property at 2205 - 977 Mainland (the "Mainland Property") and adjourned the application in respect of the other three subject properties. No order was made as to costs. According to the defendant, after the CPL was removed, no new lender was found prepared to refinance the mortgage so as to effectively require the property to be sold. The defendant argued at trial that it was sold below its assessed value with a resultant loss to her as owner but no evidence was provided other than that bare assertion.

- [35] At a trial management conference in June 2021, the presider granted the plaintiff's application to adjourn the trial but ordered that the defendant's application for cancellation of the remaining three CPLs be reset to July 2021.
- [36] Justice Skolrood, as he then was, heard the application and cancelled the remaining three CPLs in reasons for judgement indexed at 2021 BCSC 1779, primarily on the basis of hardship and inconvenience and the fact that in the three years during which the CPLs had been covering the properties "the plaintiff had made minimal effort to set the matter for trial". He awarded the defendants costs at Scale B.
- [37] Justice Skolrood also concluded that the plaintiff's claim to an interest in the properties was weak.
- [38] The defendant attempted to raise a mortgage on the Mainland Property so funds could be obtained to pay her legal fees as well as other debts. A group of private lenders agreed to a 12-month mortgage of \$500,000 on that property however, plaintiff's counsel sent a letter to the lenders asserting that if the mortgage was funded the plaintiff would have a superior claim against the property and the potential lenders resiled from the arranged arrangement (affidavit #6 of Nahid Pourtaghi). The mortgage was eventually funded after further intervention by the defendant's solicitors. The mortgage, as referenced in the Trial Reasons included in a number of disadvantageous terms including a lender's fee, a brokerage fee and interest of 7.5% per annum; an interest rate presumably well over the prevailing interest rates in 2019.
- [39] The defendants argue for enhanced costs not only based on the unproven allegations of fraud and dishonesty against the personal defendant but, as well, based on the plaintiff's relentless pursuit of maintaining CPLs on the Properties so as to hamstring the defendants' ability to raise funds either to defend the plaintiff's claim or to prosecute the counterclaim.
- [40] Once a new trial date was set, the defendant filed all necessary documentation to conduct the trial management conference including the filing of a trial brief and a requisition. The plaintiff failed to file his trial brief on time but applied to file it late.
- [41] The original trial management conference was adjourned until June 21, 2021, at which time the plaintiff sought to adjourn the trial swearing in an affidavit "I would like to attend the trial in person so that I can give in-person testimony and participate fully in the trial". An adjournment was granted and rescheduled to begin October 4, 2021.
- [42] Subsequently, and in short order following an adjournment predicated, at least in part on the plaintiff's desire to participate in person, the plaintiff applied to give his evidence remotely. That application was adjourned over to the trial date and, at the commencement of the trial, I granted leave based upon evidence of health concerns and the ongoing prevailing climate of COVID-19.

- [43] Following her discovery in summer 2021, the defendants were advised the plaintiff wanted to discontinue the proceedings. Save for the issue of costs, the application to discontinue was unopposed on the first morning of the scheduled trial.
- [44] The counterclaim proceeded but not before various amendments were granted (unopposed) to the response to counterclaim. New defences were raised: non-compliance with the provisions of the Real Estate Act and a limitation defence. However, despite review by counsel leading to the 'new defences', the allegations of financial misconduct were not withdrawn.
- [45] During the trial, over the objection of the defendant, the plaintiff sought to examine the defendant on various of the transactions said to show the defendant could not pursue her equitable claim because of the "clean hands doctrine".
- [46] The plaintiff proceeded to examine the defendant on a variety of transactions without demonstrating any impropriety on her part. The plaintiff did not pursue the matter in argument but, nonetheless, I dealt with the matter at paras. 143-144:
- [143] Despite dismissal of fraud claims in the U.S., the discontinuance of the claims in B.C. and over the objection of the defendant's counsel, plaintiff's counsel cross-examined the defendant on some of the impugned transactions where funds were transferred from the joint account in the names of the plaintiff and defendant into the defendant's account. I overruled counsel's objection and allowed the questions based on plaintiff's counsel's argument that the transactions he sought to examine on were different than those already litigated or abandoned in the present litigation and would show, alternatively, that (1) the defendant derived benefits greater than the salary paid to her by AKNO Enterprises or (2) demonstrate she was disentitled to equitable relief based on the premise equity will only assist those with "clean hands".
- [144] As will become apparent later on in these reasons, the assault on the defendant's honesty in respect of those transactions was wholly without foundation. From the documents already in evidence, together with those I allowed in response to counsel's questions, the propriety of the transactions is apparent to anyone with basic accounting skills. The transfers suggested to have been inappropriate were, in essence, repayments of amounts advanced by the defendant into the accounts needed to service expenses on Langston when the plaintiff failed to maintain a balance in the joint account operated specifically to pay for Langston's expenses.
- [47] In the result, the defendant seeks special costs of the notice of civil claim arguing the litigation was commenced for an improper purpose and made scandalous, unwarranted allegations against the defendant accusing her of fraud, misappropriation of the plaintiff's funds and an improper allegation of an equitable claim as against properties owned both by the defendant and Naki (in which the plaintiff was formerly a shareholder) without reasonable foundation.

- [48] As to the registration of CPLs against the Properties, the plaintiff's rationale was, as stated above, that her salary was insufficient to allow for the acquisition of the Properties so the seed money must have flowed from the 'unauthorized transactions' as noted in his affidavit material.
- [49] Further, in response to the first application brought by the defendant to remove all CPLs from the Properties, the plaintiff claimed that the personal defendant had "had fraudulently withdrawn funds from his accounts to fund her personal expenses and that of her family".
- [50] The defendants suggest further evidence of the plaintiff's mala fides can be seen in the lawsuit commenced by him on July 19, 2019, as against the defendant's daughter, Ania Salehirad, seeking repayment of monies advanced to her to provide for her university education between 2008 and 2012. The plaintiff referenced that litigation in the within litigation as well as made threats, or what I took to be threats, of seeking similar repayment from his niece, the defendant's sister, Nadia Pourtaghi, for repayment of approximately \$100,000 in educational expenses he advanced to her during what I conclude were happier times.
- [51] The defendants argue I am entitled to consider conduct outside this litigation as informing me as to the motivation driving the plaintiff in the within litigation such that I should find his behaviour and the allegations raised in the notice of civil claim scandalous and reprehensible and as such worthy of rebuke of special costs.
- [52] Special costs are not sought in respect of the appeal taken of Justice Matthews' decision and the defendants agreed that costs have been set by Justice Skolrood in respect of the application heard by him albeit not referenced in the entered order. They do not seek to vary that and do not suggest I have jurisdiction to do so.
- [53] As to the counterclaim, the defendants note the continued pleading of dishonest behaviour on behalf of the personal defendant coupled with the cross-examination undertaken by the plaintiff in respect of various transactions where money was taken by the defendant, Dr. Pourtaghi, from accounts in the name of the plaintiff or AKNO so as to reimburse herself for expenditures she paid on behalf of the plaintiff or AKNO.

Position of the Parties

- [54] On behalf of the defendants it is argued that they are entitled to special costs of both the notice of civil claim and the counterclaim save for the costs already set at Scale B by Justice Skolrood and costs of the appeal of Justice Mathews' decision. The defendants argue that the plaintiff's conduct, in both the claim and counterclaim, is so scandalous and outrageous as to attract censure from the Court in the form of special costs.
- [55] Further, the defendants say that I should tax those costs as special costs summarily based on the bills presented to the defendants by their various counsel without the need of a taxation of those bills by a Registrar of the Court.

- [56] The bills before me, according to the defendants "are already discounted" by the solicitors who issued them vouchsafing, I assume, their reasonableness because such has already been assessed by the lawyer(s) performing the services.
- [57] The argument advanced in favour of this admittedly unique approach to the assessment of special costs is founded on the findings I am asked to make concerning the plaintiff's motivation and the inference(s) I am to draw that the taxation of the various accounts of the defendants' solicitors will result in delay and significantly more expense to the defendants.
- [58] The plaintiff is not a resident of British Columbia and it is unclear to me whether he has any remaining assets exigible in Canada. The defendants argue that the bills, as is apparent on their face, have already been discounted in many instances by the lawyers issuing them and that the sum claimed, approximately \$500,000, is reflective of the value of the work performed by those solicitors for the defendants or, alternatively, I am invited to exercise my discretion to further discount bills and set a lump sum for costs so as to avoid the need of taxation and what are perceived as the consequent costs thereof.
- [59] The plaintiff, for his part, acknowledges, given my characterization of the plaintiff's actions in respect of the CPLs as "weaponizing the litigation," it may be appropriate to order special costs in respect of discrete portions of the notice of civil claim; in particular those associated with the application for cancellation of the CPLs, but otherwise the notice of civil claim should be dismissed with party and party costs at Scale B.
- [60] The plaintiff also asserts that given the failure on the "main claim", the contract asserted by the defendant Nahid Pourtaghi which would have seen her recover something in the order of \$6 million from Mr. Nouhi; that her success on the "secondary claims", equitable relief and slander of title should result in the parties each bearing their own costs of the counterclaim or, alternatively, that the defendants recover costs of the counterclaim at Scale B. Or, in the further alternative, a small portion of the claim (slander of title) attract costs as special costs.
- [61] The plaintiff opposes the assessment of costs other than by the Registrar on whatever level noting the rarity of assessments of costs, other than party and party costs, by the presiding judge and generally the expertise of the Registrar in the assessment of costs and the need for evidence underlying them if other than party and party.

The Law

- [62] Costs are governed by Rule 14-1(9) of the Supreme Court Civil Rules, B.C. Reg. 168/2009 [Rules], which provides as follows:
- (9) Subject to subrule (12), costs of a proceeding must be awarded to the successful party unless the court otherwise orders.
- [63] The scale of costs is discretionary.

- [64] In *SWS Marketing Inc. v. Xavier*, 2022 BCSC 1818 at para. 17 [SWS], Madam Justice Adair noted that a counterclaim is a separate cause of action included in the litigation "for convenience". For the purpose of assessing costs, the counterclaim stands alone and, in this unique situation, it is easily severable from the notice of civil claim which did not proceed from the trial's commencement.
- [65] Admittedly, there will be an intermingling of steps taken within the notice of civil claim and the counterclaim up to the date of discontinuance. SWS also dealt with discontinuance of an action once set for trial. Such is governed by Rule 9-8 and reads as follows:

Discontinuance after action set for trial

- (2) After a notice of trial is filed in an action, a plaintiff may discontinue the action in whole or in part against a defendant with the consent of all parties of record or by leave of the court.

Costs and default procedure on discontinuance or withdrawal

- (4) Subject to subrule (2), a person wholly discontinuing an action against a party or wholly withdrawing his or her response to civil claim filed in response to a notice of civil claim of a party must pay the costs of that party to the date of service of the notice of discontinuance or the notice of withdrawal, as the case may be, and if a plaintiff who is liable for costs under this subrule subsequently brings a proceeding for the same or substantially the same claim before paying those costs, the court may order the proceeding to be stayed until the costs are paid.
- [66] The Rule respecting discontinuance of an action provides no different guidance as to the manner in which costs are awarded. Here, the defendant seeks special costs by virtue of the allegations raised in the notice of civil claim and upon the assertion the action was an abuse of process.
- [67] It is uncontroverted that the court has authority to order special costs under Rule 14-1(1)(b) and/or Rule 14-1(15) of the Rules. Special costs are reserved for instances where the conduct of the party to the litigation can be characterized as "reprehensible": *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 at para. 17, 1994 CanLII 2570 (C.A.).
- [68] Here, the defendants argue that seen cumulatively, the behaviour of the plaintiff in both the claim and counterclaim meets the threshold required for an award of special costs. Notably, the plaintiff refers to remarks within the Trial Reasons when I concluded that the plaintiff had weaponized the litigation and, given his vast financial resources, far outweighing those of the defendants, sought to make the proceeding a David versus Goliath type affair. He should recall how that confrontation ended.

- [69] On behalf of the plaintiff it is argued that my remarks should be seen as only referring to the plaintiff's conduct in unreasonably, and without regard to expense, continuing to maintain an assault upon the ownership of the Properties owned by the defendants when no evidence was presented making such a viable proposition.
- [70] I decline to follow the plaintiff's submission to narrow the characterization of my remarks concerning 'weaponizing the litigation'. My remarks were intended to embrace the entirety of the civil claim.
- [71] In my view, I am entitled to look to extraneous, but relevant, factors to determine the plaintiff's motive. It is unnecessary, in my view, to have put those motives to the plaintiff during the course of the trial.
- [72] The plaintiff had an opportunity to present or detail his bona fides in submissions respecting costs but chose to file no materials other than reference to the aforementioned forensic report prepared well after the proceedings were commenced and, in any event, devoid of sufficient information on which to offer a meaningful opinion.
- [73] As I noted in the Trial Reasons, anybody with basic accounting skills, having both sides of the ledger, that is the accounts of the plaintiff and the corresponding accounts of the defendant or defendants into which sums were deposited, could readily ascertain the purpose to which funds were put and the reason for their replacement from the accounts of the plaintiff into the personal account of the defendant and/or the defendant and her daughter.
- [74] I accept that spreadsheets detailing the financial intermingling of funds were provided routinely to the plaintiff or his agents and his failure to assess those properly prior to the commencement of the notice of civil claim or to even seek an explanation from the defendant as to what he characterized as fraudulent misappropriation of funds is indicative of the plaintiff's attitude throughout.
- [75] Whether because the defendant was seeking compensation based upon what I earlier determined were representations made by the plaintiff which created an expectation of such compensation by the defendant or whether the intervention of the plaintiff's children swaying him against the defendant and the defendant's children, is immaterial to the result.
- [76] I essentially agree with the submissions of the defendant that on various levels, the actions of the plaintiff throughout the entirety of the conduct of the civil claim reaches the level of reprehensible, as that word is described in the case law.
- [77] In making this assessment I include the plaintiff's wrongful encumbering of the Properties; the only vehicle which she could use to meaningfully defend the action against her and pursue her own claim; the seeming disinterest in moving the action properly forward and simply leaving the defendants in the untenable position of having to make application for removal of these CPLs on three separate occasions; the allegations of dishonest conduct without, I find, any meaningful objective evidence that such was sustainable and, even when

such was noted to the plaintiff in the original reasons for judgment of Justice Matthews, the plaintiff persisted with amendments which although legally sufficient to sustain the reinstatement of the CPLs, were not supported by any evidence other than bare assertions made by the plaintiff in affidavits sworn in support of the reinstatement of CPLs. Further, I look to the multiple actions commenced by the plaintiff, in Missouri as against the defendants, and as against the defendant's daughter for what appears at first blush to have been an act of benevolence on the part of the plaintiff when he was supportive of his niece's aspirations to improve her family situation after the separation from her husband.

[78] The plaintiff, out of the blue, responded to questions about his dealings with Nadia Pourtaghi, with a suggestion that maybe he would sue her for return of money he advanced for a tuition in a business course she took while in Switzerland.

[79] The evidence of Nadia Pourtaghi, which I accept as true, as to his war chest designed to prosecute, or more properly persecute, the defendant buttress my conclusion that the underlying foundation of the notice of civil claim was that of revenge or malice; not the recovery of money the plaintiff honestly believed had been taken from him and/or his company.

[80] In short, based on the improper and unfounded allegations of fraud and dishonesty coupled with, at best, a vague belief of a connection between the improper allegations of fraud and the acquisition of property by the defendants, I find that the plaintiff has acted in like manner as was found to have occurred in Garcia where, at para. 25, the court observed:

If the proceedings are taken, not in the reasonable expectation of a satisfactory outcome, but in order to impose the burden of the proceedings themselves on the opposing party in circumstances where one party is financially much stronger than the other, then the absence of merit, coupled with the improper motive is a combination which may well amount to reprehensible conduct sufficient require an award of special costs.

[81] Those words are fitting here and, in the result, it is in my view appropriate that the defendants be awarded special costs of the notice of civil claim including the costs of taxation, save for the award of costs made by Justice Skolrood which will be as ordered by him. I have no jurisdiction over costs in the Court of Appeal and not been asked intervene in those.

[82] For reasons that will become apparent, the matter will have to proceed to taxation before the registrar. Even were I to conclude special costs were warranted throughout for both the claim and counterclaim, which I do not, I am not persuaded that there is sufficient evidence before me that I could assess costs as special costs as is sought by the defendants.

The Counterclaim

[83] As noted the counterclaim is a distinct proceeding tied to the original claim as a matter of convenience because of the common parties and, perhaps, overlapping evidence.

- [84] The defendants, wrongly in my view, rely on the characterization of the plaintiff's initial claim and seek to integrate into my findings respecting the initiation and conduct of the plaintiff's claim.
- [85] The defendants initiated the counterclaim seeking over six million dollars (U.S.) in damages. The plaintiff was entitled to mount a robust defence. Indeed, the claim in contract was successfully defended resulting in the plaintiff's submission that the counterclaim met with mixed success such that each of the parties should bear their own costs.
- [86] While acknowledging the plaintiff's right to vigorously defend the claims against it, I disagree with the submission that the parties each bear their own costs of the counterclaim given the 'mixed success'.
- [87] In my view, the defendants achieved substantial success in the counterclaim and are entitled to their costs. The issue is the scale of costs.
- [88] *Fotheringham v. Fotheringham*, 2001 BCSC 1321, leave to appeal ref'd 2002 BCCA 454, remains the seminal authority in the awarding of costs. While the Rules have changed, the intent of the existing Rules are the same as the previous Rule 57(9).
- [89] Costs follow the event unless the court otherwise orders.
- [90] In *Fotheringham*, Mr. Justice Bouck noted the applicant was only entitled to recover costs if substantially successful on the event.
- [91] In analysing the term of event, Bouck J. noted the following:
- [10] What is the meaning of the word "event" in Rule 57(9)? Stroud's Judicial Dictionary, 4th Ed. Vol. 2, p. 948 quotes several definitions from reported cases:
1. The event is the outcome or result of the trial and although there may be one verdict and one judgment, there still may be more than one event.
 2. "Event" in this phrase (the costs shall follow the event) was therefore to be read distributively as "events."
 3. The result of each distinct issue, in an action or an inquiry, was its "event": the costs of which went to the party who succeeded on it.
- [11] Early British Columbia case law adopted Stroud's interpretations of the word "event" in *Victoria Saanich Co. v. Wood Motor Co. Ltd.* (1915), 23 D.L.R. 79 at 81 (B.C.C.A.) where the court said:

By statute costs are to follow the event except in certain cases not in point here, and subject to a power in the court to deprive a successful party of them for good cause. Where that power is not exercised the costs are not in reality awarded by the Court but by the statute. Now, it has been decided that "event" must be read distributively so as to include where necessary one or more events, as there can be more than one in the result of a law suit.

[Emphasis in original.]

- [92] Here, in my view "the event" was the defendant's claim for compensation for actions taken by her in respect of the development of the AKNO Michigan properties. She succeeded in that claim as well as the claim respecting slander of title on the four properties owned collectively by the two defendants. Accordingly, there is no question but that the defendant is entitled to costs of the counterclaim.
- [93] The evidence in the counterclaim centred on the value of the personal defendant's contribution to AKNO and/or the plaintiff and the manner of compensation to which those effort entitled her.
- [94] While I found there was no contractual obligation to pay the defendant, Dr. Pourtaghi, contractual damages, the same description in the evidence of her efforts in the U.S. and the conversations with her uncle, the plaintiff, were necessary to establish the claim in equity.
- [95] As well, the defendants were successful establishing slander of title. My earlier remarks concerning the weaponization of the litigation by the plaintiff have equal application to this narrow aspect of the counterclaim; such was conceded in submissions by Mr. Dennis.
- [96] The length of the trial was only marginally longer owing to the claim in contract.
- [97] The plaintiff had the ability to make an offer to settle within the parameters of the claim in equity and defend the claim in contract if the offer was not accepted.
- [98] Accordingly, the defendants are entitled to costs of the counterclaim. The remaining question is the scale of costs.
- [99] The defendants argue that the allegations improperly advanced in the civil claim were equally advanced in the response to counterclaim thus the same results should accrue.
- [100] The plaintiff and defendant by counterclaim, notes, and I agree, the counterclaim is an entirely separate proceeding (SWS) and should be treated as such. Mala fides found to have existed in the notice of civil claim cannot be imported into the counterclaim. Mr. Nouhi was entitled to defend, and did successfully defend, a portion of the claim advanced by the defendant Dr. Pourtaghi. In doing so, did he engage in the type of reprehensible conduct I found in the prosecution of the notice of civil claim?
- [101] The response to the counterclaim, despite amendment after the determination to discontinue the civil claim, still alleges dishonest behaviour on the personal defendant's part. The defendants additionally argue the plaintiff failed to properly respond to Notices to Admit; a matter referenced in Justice Skolrood's judgment from July 2021.
- [102] For the following reasons, I disagree the degree of litigation misconduct in the counterclaim rises to the same level as in the plaintiff's civil claim.

- [103] Firstly, I repeat that the actions are separate from one another and the conduct in one does not, of necessity, import itself into the other. The plaintiff rightfully defended the defendant's assertion of a contract entitling her to millions in damages.
- [104] The misconduct, or reprehensible conduct was the continued assertion of financial misconduct of the defendant, Dr. Pourtaghi, after the decision to discontinue the original claim and the amendment of the response to counterclaim.
- [105] In particular, the plaintiff continued, in the third amended response to counterclaim, filed October 22, 2021, that the defendant Dr. Pourtaghi was dismissed from AKNO's employ for "fraudulently using corporate funds for her own personal benefit".
- [106] Counsel then sought and was granted permission to examine the defendant about some of the impugned transactions during the course of the trial over opposing counsel's objection.
- [107] While such is worthy of rebuke in my mind, it does not rise to the level of an award of special costs for the whole of the counterclaim.
- [108] In assessing the relative weight of the parties' 'misconduct,' I observe that the counterclaim was replete with allegations not dissimilar to those in the response. While no doubt the pleadings in the notice of civil claim were more pointed and objectionable than those in the counterclaim, (and I have dealt with those separately), it should be noted that in the original counterclaim, the defendants alleged: damages for breach of fiduciary duty, damages for unlawful conspiracy and constructive fraud.
- [109] Unlike the cross examination of the defendant on the transactions said to give rise to an equitable defence to the claim of unjust enrichment, the defendant(s) never pursued the alleged misconduct of the plaintiff in cross examination.
- [110] Taking into account all of the above, together with the plaintiff's successful defence of the contractual claim, I conclude an award of special costs to the defendants would be disproportionate relative to the conduct of each within the counterclaim.
- [111] That said, in my view, costs at Scale B would not provide the necessary rebuke to the plaintiff for a number of reasons which I shall shortly refer to.

Increased Costs

- [112] The authority for awarding increased costs is contained in Section 2(5) of Appendix B to the Rules:
- (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).

[113] As noted in *Kemp v. Coastal Health Authority*, 2016 BCSC 1541:

[26] Increased costs require "unusual circumstances" that render the costs awarded on the scale determined by the court "grossly inadequate or unjust". This is a fact-specific inquiry based on the nature of the litigation and the conduct of the parties: *Bajwa v. British Columbia Veterinary Medical Assoc.*, 2008 BCSC 905 at para. 73 [Bajwa]. Before a party's conduct can constitute unusual circumstances, it must be deserving of some form of rebuke, although the conduct may fall short of what would be required to attract an award of special costs: *Luu v. Wang*, 2012 BCSC 626 at paras. 65-66 [Luu]. Circumstances that do not necessarily involve misconduct, but which constitute "unusual" circumstances may also attract such costs: *Chandler v. Rasmussen*, 2013 BCSC 1461 at para. 43 [Chandler]. Unlike special costs, increased costs are not intended to punish the offending party; instead, they are meant to indemnify the other party for the increased costs associated with the time and effort required to respond to misconduct in the litigation or deal with a trial that is lengthened or delayed unnecessarily: *National Hockey League v. L.A. Kings Ltd.* (1995), 2 B.C.L.R. (3d) 13 (C.A.).

[27] In 380876 *British Columbia Ltd. v. Ron Perrick Law Corp.*, 2009 BCSC 1209 at para. 37 [Ron Perrick], Madam Justice Allan identified the following factors that may constitute unusual circumstances and justify increased costs:

§ Misconduct by the unsuccessful party in the litigation;

§ The serious nature of the allegations;

§ The complexity or difficulty of the issues in the litigation; and

§ The importance of the litigation to the parties or to the development of the law.

[Citations omitted.]

[28] To these factors, I would add that increased costs have also been awarded in circumstances where:

- there was a multiplicity of proceedings, a party failed to provide particulars or abide by document disclosure obligations, and there was a general non-compliance with the Rules: *Bajwa*;
- evidence at trial was unnecessarily lengthy, uninformative and irrelevant, which needlessly and significantly prolonged the trial: *D. v. D.*, 2008 BCSC 1260 [D.];
- false and misleading affidavits were provided, and unnecessary time and expense was spent on an issue that was unrelated to the central issue in the case: *Ron Perrick*;
- issues were placed before the court that needlessly complicated the matter and the party seeking costs was forced to spend a great deal of time responding to the other party's misconduct: *On Call Internet Services Ltd. v. TELUS Communications Company*, 2010 BCSC 1031;

- unfounded and unsupported allegations of fraud and misappropriation were made, and there were repeated failures to comply with the Rules concerning document production: Luu;
- critical documents were disclosed just before trial and a considerable time after the claim had arisen, which necessitated an adjournment and late disclosure of further documents at the eventual trial: Chandler; and
- a limitation defence was raised at the last minute, a witness for the party seeking costs received worrisome communication from an opposing party and there was hostility in the courtroom as well as at the examinations for discovery: Antrobus v. Antrobus, 2012 BCSC 613.

[114] Here, a number of the factors identified in Kemp are present.

[115] The response to counterclaim contains serious allegations of misconduct which were unproven albeit minimally pursued during the trial and not referred to in final submissions.

[116] Significant delay was occasioned by the plaintiff's lackadaisical attitude towards the litigation as well as adjournments sought by him in respect of his intention to attend the trial in person and, on one occasion, his failure to file a trial brief, necessitating the adjournment from earlier in 2021 to the actual trial start date in October.

[117] The repetitive nature of the filing of CPLs against the defendants' property impeded the defendants' ability to advance the counterclaim.

[118] Last-minute amendments were made to the response to counterclaim raising new defences with which the defendants had to deal at trial and were found, ultimately, to be baseless.

[119] There were a multiplicity of proceedings in other jurisdictions that assert similar relief by the plaintiff.

[120] I agree the plaintiff failed to properly make response to the notice to admit thus lengthening, to some extent, the trial's conduct.

[121] The combination of these factors, in my view, give rise to a conclusion that an award of costs on Scale B would be unjust and, more appropriately the defendant should be awarded costs at Scale B multiplied by 1.5 the value per unit as allowed for in s. 2(5) of Appendix B.

Assessment of Costs by the Trial Judge

[122] For obvious reasons, this is not available. I have directed the costs of the claim, including the costs of any assessment, be special costs in favour of the defendants. To be clear, this should include all applications made respecting the placements of CPLs on the Properties save for the already determined costs order in the event of Justice Skolrood and the costs awarded in the Court of Appeal.

[123] Given the different level of costs for the counterclaim, Scale B times 1.5, it would be impossible for me to ascertain the appropriate level of costs on the bills that were placed before me.

[124] In any event, I adopt, in the main, the submissions of the plaintiff in this regard that it is inappropriate, absent extensive affidavit material from the solicitor tendering the bills that are before me, to ascertain their reasonableness regardless of whether they apply to the claim or to the counterclaim.

[125] As such, I am of the view that the Registrar is in the best position to assess costs in this matter.

Costs of This Application

[126] Given the defendants have substantially succeeded on the costs issue, they will have their costs at Scale B.

"Harvey J."

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