

CANADA / JUDGMENT

Price v. Robson

2017 BCCA 419

COURT

British Columbia Court of Appeal

DECIDED

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2017 BCCA 419 Price v. Robson

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Price v. Robson,

2017 BCCA 419

Date: 20171201

Docket: CA44622

Between:

Michael James Price

Respondent

(Plaintiff)

And

Sabrina Yasmeen Robson and Katrina Robson also known as Sheena Robson

Appellants

(Defendants)

Before:

The Honourable Mr. Justice Fitch

(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated August 21, 2017 (Price v. 481530 B.C. Ltd., 2017 BCSC 1071, Vancouver Docket S149212)

Counsel for the Appellants:

M. Buttery

Counsel for the Respondent:

A. Narod

Y. Li-Reilly

Place and Date of Hearing:

Vancouver, British Columbia

September 26, 2017

Written Submissions Received:

October 3 and 10, 2017

Place and Date of Judgment:

Vancouver, British Columbia

December 1, 2017

Summary:

Two defendants in the underlying action apply for leave to appeal a special costs order made against them. They argue the judge failed to particularize specific conduct on the part of the two applicants that was deserving of rebuke. In the alternative, the applicants argue that the special costs award should have been allocated proportionately as between all of the defendants found liable. Held: Leave to appeal refused. Leave was required because the main appeal had been abandoned and the costs order was therefore the only matter being appealed. An evidentiary basis existed for the special costs award against the two applicants. There was no reasonable prospect that a division of the Court would interfere with the judge's discretionary decision to award special costs. In addition, the issue of the apportionment of costs was not raised below. It was not in the interests of justice to grant the applicants leave to raise this issue for the first time on appeal.

Reasons for Judgment of the Honourable Mr. Justice Fitch:

Introduction

- [1] Katrina Robson ("Katrina") and her mother Sabrina Robson ("Sabrina"), defendants in the court below, seek leave to appeal an order awarding special costs against them following a 32-day trial. The order was made on June 26, 2017, and entered on August 21, 2017.
- [2] If the appellants are successful in obtaining leave to appeal, the respondent, Michael Price, makes a number of ancillary applications. First, he applies for security for costs of the appeal, security for the trial judgment, and security for costs of the trial. Second, he applies for an order staying the appeal until security is posted and an order that the appeal be

dismissed if security is not posted within 14 days of the order. In the alternative, he seeks leave to apply to dismiss the appeal if security is not posted within 14 days of the order. Third, he applies for an order expediting the appeal. Finally, he applies for leave to enforce the special costs order in Ontario while the appeal of the order is pending.

- [3] Three issues arise on the application for leave to appeal. The first question is whether the appellants require leave to appeal. If they do, the second question is whether the test for leave to appeal has been met. If it has, a third question arises as to whether some or all of the ancillary orders sought by the respondent should be granted.

Procedural History

- [4] In the underlying action, Mr. Price successfully sued: (1) Farrukh David Robson ("Mr. Robson") and two numbered companies controlled by him, 481530 B.C. Ltd. ("481") and 8577935 Canada Corporation ("857"), for wrongful dismissal; and (2) Mr. Robson, his wife, Sabrina, and their children, Katrina and Jonathan, for civil conspiracy. Mr. Price was a minority shareholder in 481 and its managing director until his constructive dismissal in June 2013.
- [5] The trial judge found that the personal defendants agreed to take concerted action to deny Mr. Price any ability to recover on a judgment he might obtain against 481 for wrongful dismissal. They were found to have done so primarily by diverting the assets and revenues of 481 to 857, and by using funds belonging to 481 to pay off debts that were not 481's responsibility. The judge found that if the conduct of the defendants was lawful, they intended to cause damage to Mr. Price by "gutting" 481, thereby putting its assets out of his reach. If the conduct of the defendants was unlawful, the judge found that the conspirators knew or ought to have known that their actions would harm Mr. Price by denying him recovery on any judgment he might subsequently obtain for wrongful dismissal.
- [6] Mr. Price was awarded \$129,600 in damages for wrongful dismissal plus pre-judgment interest in the amount of \$2,535.90. Mr. Price was also awarded aggravated damages in the amount of \$50,000 relating to the manner of his dismissal. In this regard, the judge found that Mr. Robson constructively dismissed Mr. Price when Mr. Price was, to Mr. Robson's knowledge, recovering from surgery for cancer. Further, Mr. Robson and the other defendants were found to have made numerous unfounded allegations against Mr. Price, including theft, in aid of Mr. Robson's position that the dismissal was with cause. Mr. Price was also awarded \$24,145.89 for mitigation expenses he incurred. Finally, the judge ordered that the four individual defendants (Mr. Robson, Katrina, Jonathan and Sabrina) be jointly and severally liable to pay compensatory damages for civil conspiracy in the amount of \$100,000 plus pre-judgment interest in the amount of \$3,057.50.
- [7] Reasons for judgment in the main action were delivered on October 24, 2016, and are indexed as 2016 BCSC 1940 ("Trial RFJ"). The parties were given leave to speak to costs.

- [8] By notice of appeal dated November 23, 2016, the defendants appealed the underlying decision challenging, among other things, the judge's conspiracy finding. That appeal (CA44083) was abandoned on January 30, 2017, after the defendants failed to pay into court security for costs of the appeal (\$10,000) and security for the judgment below (\$175,000) pursuant to the order of Mr. Justice Harris made on December 23, 2016.
- [9] After the appeal from the main action was abandoned, Mr. Price applied for special costs against all the personal defendants. Following a hearing on May 12, 2017, the judge allowed the application against Mr. Robson, Sabrina, and Katrina, but refused to award special costs against Jonathan. Reasons for judgment in relation to the costs award were delivered on June 26, 2017, and are indexed as 2017 BCSC 1071 ("Costs RFJ").
- [10] The Costs Order reads as follows:
- The Defendants, Farrukh David Robson, Sabrina Yasmeen Robson and Katrina Robson shall pay the Plaintiff's costs of this proceeding as Special Costs.
- [11] The parties agree that the effect of the order is to make the personal defendants named therein jointly and severally liable for the costs award.
- [12] Only Katrina and Sabrina seek leave to appeal the special costs award. Their notice of motion for leave to appeal was filed on July 25, 2017.

The Underlying Action

- [13] The underlying dispute involved the acrimonious breakdown of the friendship and business relationship between Mr. Price and Mr. Robson. Both Mr. Robson and Mr. Price are very ill. Mr. Robson has required regular dialysis since late 2007. Mr. Price is terminally ill with cancer. He was diagnosed with stage four colorectal cancer and began treatment in December 2012. He has three children, two of whom are school-aged. His 13-year-old son is autistic and requires care. His wife works part-time as a result. Mr. Price is currently being treated on a palliative basis in an effort to manage his symptoms.
- [14] Mr. Price was employed by 481 from 1994 to 2013. Mr. Robson was the majority shareholder, a director, and the president of 481. The company operated a hair loss clinic and sold hair loss products.
- [15] In late 2012, Mr. Price discovered what he considered to be financial irregularities in the running of 481. In December 2012, he e-mailed Mr. Robson regarding the funnelling of funds from 481 by the Robson family for purposes he considered to be unrelated to the running of the company. Over the course of the winter and spring of 2013, e-mail exchanges between Mr. Price, Mr. Robson, and Katrina became increasingly acrimonious as Mr. Price attempted to make offers to buy 481. During this time, Mr. Price was also undergoing treatment for cancer.

- [16] The judge found that Mr. Price was constructively dismissed from 481 in June 2013. She rejected the defendants' argument that Mr. Price was dismissed for cause for various transgressions, including: theft; misappropriation of funds; misappropriation of company property; misappropriation of a corporate opportunity; and other fraudulent and dishonest conduct. The judge awarded aggravated damages against Mr. Robson in conjunction with the wrongful dismissal claim, finding that Mr. Robson's conduct as an employer was unfair, insensitive, and in breach of his duty to act in good faith in dealing with Mr. Price.
- [17] With respect to the civil conspiracy claim against Mr. Robson, Sabrina, Katrina, and Jonathan, the judge found the "[e]vidence shows the Robsons were making payments from the bank account of 481 to CRA to pay off personal tax debts and other debts not belonging to 481" (Trial RFJ at para. 278). She found that "on Mr. Robson's own admission, the revenues of 481 were transferred with the intention of removing them from Mr. Price's reach" (Trial RFJ at para. 281). She also found that the Robsons "in effect agreed to protect their family by denying Mr. Price an ability to recover on an unfavourable judgment against 481" (Trial RFJ at para. 300). Each personal defendant was found to have taken actions to achieve this goal. For example, Mr. Robson and Jonathan moved assets from 481 to 857, which company was incorporated one month after the dismissal, in order to deprive Mr. Price of relief on any judgment he might obtain. Although Mr. Robson was the "mastermind", the other personal defendants "made significant contributions with the overall intent (actual or constructive) of causing Mr. Price harm" (Trial RFJ at para. 311).
- [18] The judge reviewed the participation of Katrina and Sabrina in the civil conspiracy. She found that Katrina "made a significant contribution to the conspiracy, most notably by typing e-mails according to her father's dictation under her name and using the weight of her position as a lawyer with the intent of harming Mr. Price" (Trial RFJ at para. 323). The judge found that Katrina used her status as a lawyer to influence Mr. Price and deceive him into dropping his claims (Trial RFJ at paras. 318, 320). Even though she was a non-practicing lawyer and claimed she provided no legal advice to her father, the e-mails she sent to Mr. Price falsely claimed that she was handling the situation in her capacity as a lawyer (Trial RFJ at para. 318). She claimed multiple times during the trial that she was merely a "buffer" between Mr. Price and Mr. Robson and simply transcribed the e-mails for her father (Trial RFJ at para. 317). The judge found, however, that Katrina allowed "her position as a lawyer to be abused" in the e-mails in order to "manipulate" Mr. Price (Trial RFJ at para. 320). She found that this deception "made her role more than a mere buffer" (Trial RFJ at para. 320).
- [19] Sabrina was found to have contributed to the tort of civil conspiracy by becoming a shareholder and director of some of Mr. Robson's companies and facilitating the corporate actions of those companies in stripping 481 of assets (Trial RFJ at para. 327). The judge did not accept that Sabrina was "just a housewife" with no involvement in the business (Trial RFJ at para. 326).

[20] The judge characterized Sabrina and Katrina as "combative" witnesses at trial (Trial RFJ at paras. 317, 326). Katrina "repeatedly noted she was extremely busy and did not have time to be a witness" (Trial RFJ at para. 317).

The Special Costs Order Sought to be Appealed

[21] As noted earlier, the judge allowed Mr. Price's application for special costs in relation to both causes of action against Mr. Robson, Sabrina, and Katrina. Special costs were not awarded against Jonathan.

[22] Citing *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177 at paras. 57 and 132, the judge noted that an order for special costs requires some form of "reprehensible conduct", which can include "scandalous or outrageous conduct as well as milder forms of misconduct deserving of reproof or rebuke" (Costs RFJ at para. 13).

[23] The judge repeatedly emphasized this Court's holding in *Smithies Holdings* at paras. 133-34 that pre-litigation conduct is irrelevant in determining whether to award special costs, as special costs serve only to punish and deter reprehensible conduct during the course of litigation (Costs RFJ at paras. 14, 23).

[24] In the Costs RFJ at para. 16, the judge also cited *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352 at para. 73, for the following principles:

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

[Emphasis added.]

[25] In applying these principles to the case at bar, the judge said this:

- [17] I conclude special costs should be awarded against the defendants in this matter. I do so on the basis of what I conclude was reprehensible conduct by the defendants during the course of this litigation. The conclusion is reached largely on the basis the defendants misled the court and abused the court processes in doing so, with persistent breaches of the Rules of Court to prejudice Mr. Price in his claim.
- [18] My reasons will be brief. The background of this matter has largely been set out in my Reasons for Judgement at 2016 BCSC 1960. I note however this decision is based on conduct which occurred during the course of the litigation as per the recent direction by the Court of Appeal in *Smithies*.
- [Emphasis added].
- [26] The judge concluded that the conduct of Katrina, Sabrina, and Mr. Robson in the course of the litigation "went above and beyond simply resisting the claim" and constituted misconduct worthy of a special costs award (Costs RFJ at para. 22). Under the heading of "Did the defendants engage in reprehensible conduct in the litigation such that special costs should be awarded?" she said this:
- [19] At the outset, I note the defendants participated in persistent breaches of the Rules of Court that prejudiced the applicant. The defendants did not comply with various orders for production of documents and particulars in a timely way. While some leeway can be said to be necessary in the early days of the trial as it was advanced to trial relatively quickly, the trial continued some months later and document production problems persisted. These in particular related to financial documentation and consequent issues, an important part of the matter due to the allegations of just cause against Mr. Price.
- [20] Furthermore, Mr. Robson interrupted family witnesses during their cross-examination, despite repeated directions from the court to stop interfering with their testimony. This was with the apparent intention of correcting or interfering with their evidence on critical points in the case. I find to be a direct interference with the evidence to perpetuate the misrepresentation of the actual facts. Indeed I conclude as in *Jogia v. Aetna Life Insurance Company of Canada*, [1999] B.C.J. No. 1502 (S.C.), there has been a deliberate attempt to mislead the court through fabricated evidence. Such conduct can found an order for special costs.
- [21] The defendants made unfounded allegations of dishonesty against Mr. Price with total disregard for the consequences of their actions. To perpetuate these claims, the defendants abused the court processes and mislead the court throughout the litigation process. Most notably, the defendants fabricated a self-serving story about why Mr. Price was fired for cause and constructed evidence to suit their purposes. They adduced fabricated negative employee letters about Mr. Price which were obtained from staff under pressure and promises of reward. They continued this action at trial by presenting these letters and as a witness, the author of one of the fabricated negative employees' letters in support of their case. In her testimony a second employee recanted her allegations in a negative letter about

of Mr. Price, noting Mr. Robson's pressure to provide such a letter. This misconduct which continued in the course of the trial, in and of itself, weighs strongly in favour of awarding special costs: Westsea at para. 73(d).

- [23] While the defendants say the alleged conspiracy was commenced pre-litigation and therefore actions taken under it may not be considered in assessing special costs: Smithies at para. 133, the defendants perpetuated these actions throughout the litigation by presenting false evidence and with Mr. Robson in particular, attempting to interfere with witnesses. This conduct committed during the litigation in furtherance of the conspiracy is therefore relevant. I had excluded conduct committed pre-litigation as per the recent direction of the Court of Appeal in Smithies.
- [25] The defendants also seek a reduction to account for what they maintain was Mr. Price causing the trial to extend as long as it did. They say the manner in which he presented his case was the direct cause of the lengthy trial, saying he raised over a dozen different causes of action and argued each one fully at trial. While I agree the materials were lengthy and even duplicative at times, the defendants are primarily responsible for the trial's length. Mr. Price, in view of his failing health, took steps to move the trial along in a speedy fashion, requesting short turnarounds and early hearing dates. The defendants were the source of delay in the delay in providing documents. They also denied the conspiracy all along, necessitating a full and lengthy presentation of evidence to establish the claim.
- [26] Lastly, the defendants say that not all of them should bear the responsibility to pay special costs if ordered. They say that their conduct was not equally blameworthy and that the court should only make the order against those whose conduct was reprehensible. Although some defendants did engage in milder forms of misconduct, especially compared to the others, their conduct may still qualify as reprehensible, so long as it is deserving of rebuke: Smithies at para. 132. They should not avoid liability simply because some were worse than others.
- [Emphasis added.]
- [27] It is important to note that the judge found reprehensible not just the conduct of Mr. Robson, but the conduct of "the defendants" including Sabrina and Katrina.
- [28] In declining to award special costs against Jonathan, the judge said this:
- [27] In considering this point, I conclude the evidence does not support a finding of reprehensible conduct against Jonathon Robson. His testimony was relatively straightforward; indeed it was his testimony in particular that Mr. Robson sought to correct. Unlike the other defendants, I do not conclude he was engaged in a deliberate attempt to deceive in the course of the litigation proceedings.

Is Leave to Appeal Required?

[29] The narrow issue to be decided is whether appellants, who have previously abandoned an appeal on substantive issues, have a right to appeal a subsequently imposed costs order without leave.

[30] Leave to appeal is required if the order under appeal is a "limited appeal order": Court of Appeal Act, R.S.B.C. 1996, c.77, s. 7. Limited appeal orders are defined in R. 2.1 of the Court of Appeal Rules to include:

an order granting or refusing costs, or granting or refusing security for costs, if the only matter being appealed is that grant or refusal;

[31] The parties initially proceeded on the footing that leave is required to appeal the special costs order because, given the abandonment of the appeal from the order made following the trial, "the only matter being appealed" is the order granting special costs.

[32] At the outset of the hearing, I brought to the attention of counsel this Court's judgments in *Telus Communications Inc. v. Telecommunications Workers Union*, 2007 BCCA 196 at para. 3 (Chambers) [Telus], and *MacLachlan v. Nadeau*, 2016 BCCA 410 at para. 20 (Chambers), aff'd 2017 BCCA 326, both of which suggest that whether leave is required to appeal a costs order when a substantive appeal from the underlying action has been abandoned remains an unsettled question. At the parties' request, they were given leave to file further written submissions on this issue.

[33] On reflection, the applicants for leave now take the position that, while the law on this point is unclear, since leave was not required for the substantive appeal, leave should not be required for issues ancillary to that appeal.

[34] Mr. Price submits that leave to appeal is required. In support of this position, his counsel filed the first affidavit of Glenda Powroznik on October 3, 2017. It attaches the notice of application for special costs and application response filed in the court below. The admission of this material is unobjectionable because it forms part of the record of proceedings in the court below and is responsive to issues that only arose in the course of the hearing of the leave application.

[35] In addition, on October 10, 2017, counsel for Mr. Price presented for filing in this Court the second affidavit of Glenda Powroznik. This affidavit attaches some of the materials filed on the Telus appeals that were obtained by counsel for Mr. Price following a recent search of this Court's records. This affidavit also addresses, to a limited extent, the recollections of counsel for Mr. Price who also acted on behalf of Telus in 2007. This affidavit was not accepted for filing by the registry, but was referred to me for consideration. The admission of the second affidavit of Ms. Powroznik is opposed by counsel for the applicants.

[36] I direct the registry staff to date stamp this affidavit as having been filed on October 10, 2017. I decline, however, to admit this evidence on the applications before me. The material attached to the second affidavit of Ms. Powroznik appears to challenge certain factual findings made by Mr. Justice Low in *Telus* to the end of distinguishing that case from the

case at bar. Specifically, the respondent seeks to argue on the basis of its searches that the appellants in Telus did not abandon their substantive appeals as suggested by Low J.A., but chose to pursue only issues pertaining to the costs award.

- [37] In my view, it is not in the interests of justice to admit this material. First, a search of a court file of unspecified parameters, undertaken by unidentified personnel a decade after a case has been decided, cannot displace findings made by the judge who heard the matter. More importantly, Low J.A. did not purport to resolve the issue that is before me in his judgment in Telus. The admission of this evidence would not, therefore, meaningfully assist in the resolution of this application for leave to appeal.
- [38] I conclude that the appellants do require leave to appeal in the circumstances of this case. In coming to this conclusion, I have considered and relied on a number of cases including: *Laurin v. Ford Credit Canada Ltd.* (1992), 86 B.C.L.R. (2d) 282, 1992 CanLII 1752 (C.A. Chambers); *Chouinard v. Insurance Corp. of British Columbia*, 2000 BCCA 396 (Chambers); *Kapelus v. U.B.C. et al.*, 2003 BCCA 109 at paras. 8, 11; *418486 B.C. Ltd. v. Newport City Club Ltd.*, 2005 BCCA 441 at paras. 1-6 (Chambers); *Bradshaw v. Stenner*, 2012 BCCA 481 at para. 25 (Chambers), *aff'd* 2013 BCCA 61; *Friedlander v. Claman*, 2015 BCCA 355 at para. 54 (Chambers); *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2016 BCCA 311 at para. 6 (Chambers).
- [39] In *Laurin*, leave was refused to appeal an order for costs alone.
- [40] In *Chouinard*, the defendant filed a notice of appeal from an order addressing both substantive issues and costs, but then abandoned the appeal on the substantive issues leaving only the matter of special costs in issue on the proposed appeal. The chambers judge held that *Laurin* governed and that leave to appeal the matter of costs alone was required.
- [41] In *Kapelus*, this Court held that where an appeal from the main judgment has been dismissed, leave is required to appeal a costs order made subsequent to the dismissal. Similarly, the Court concluded that leave was required to appeal a costs order after the main appeal was dismissed in *418486 B.C. Ltd.* and in *Friedlander*.
- [42] I would note that neither *Kapelus* nor *418486 B.C. Ltd.* was referred to by Low J.A. in *Telus*, likely because the appellants proceeded on the basis that leave to appeal was required. As a result, an extensive analysis of the jurisprudence on point was not required.
- [43] In *Bradshaw*, the chambers judge concluded that leave to appeal a separate costs order was required where a notice of appeal from the order for costs was filed before the appeal from the main judgment was heard and dismissed. Hinkson J.A. (as he then was) concluded at para. 26 that, "[l]ike the proposed appeal in *418486 BC Ltd.*, the proposed appeal is an appeal from an order respecting costs only, and requires leave of a justice of this Court". On a review application, a division of this Court concluded at para. 6 that the chambers judge was "entirely correct in determining that leave to appeal is required".

- [44] Most recently, in *Smithies Holdings (Chambers)*, *Saunders J.A.* held that the costs orders at issue were limited appeal orders because they were unrelated to substantive issues that were under appeal as of right. The costs orders were also entered as distinct orders and made on different days from the substantive orders under appeal. In concluding that the costs orders required leave to appeal, *Saunders J.A.* said this:
- [6] Although Rule 2.1(f) is part of the 2012 enacted leave to appeal provision, it is consistent with the longstanding rule in this court that an appeal engaging only costs required leave to appeal. This applied even to a costs order made ancillary to a substantive order that was appealed, where the appeal on the substantive issue was abandoned. It is said this rule reflects the discretionary nature of a costs order and the deference this court must show trial judges on orders made in the exercise of the judge's discretion. In other words, the rule reflects the high hurdle to success that the appellant must navigate.

[Emphasis added.]

- [45] In the case at bar, the applicants seek leave to appeal a costs order. It is "the only matter being appealed". Consistent with the language of R. 2.1(f) and the weight of the authority on point, I am of the view that leave to appeal is required.

Has the Test for Leave to Appeal Been Met?

Law

- [46] The test for leave to appeal requires consideration of the following factors:

- 1) Is the point on appeal significant to the practice?
- 2) Is the point raised of significance to the action itself?
- 3) Is the appeal *prima facie* meritorious, or is it frivolous?
- 4) Will the appeal unduly hinder the progress of the action?

(See *British Columbia (Director of Civil Forfeiture) v. Johnson*, 2014 BCCA 268 at para. 19 (Chambers) [*Johnson*]; *Goldman, Sachs & Co. v. Sessions*, 2000 BCCA 326 at para. 10 (Chambers).)

- [47] The party seeking leave bears the onus of establishing that the conditions for leave have been met: *Gichuru v. Law Society of British Columbia*, 2012 BCCA 159 at para. 16 (Chambers).

- [48] The overarching requirement is that it is in the interests of justice that leave be granted: *Hanlon v. Nanaimo (Regional District)*, 2007 BCCA 538 at para. 2 (Chambers). Even if all four of the above requirements are met, leave may be denied if granting leave would not be in the interests of justice: *Johnson* at para. 20.

- [49] In assessing the merits of an appeal as one of the factors to be considered on an application for leave to appeal, it is important to have regard to the standard of review that would be applied to the proposed appeal.
- [50] Costs orders are discretionary. They are subject to limited appellate review. As a result, the test for granting leave to appeal costs orders is particularly stringent: *Neufeld v. Foster*, 2000 BCCA 485 at para. 14 (Chambers). It has been said that an applicant for leave to appeal on the sole issue of costs bears an "onerous burden" because of the reluctance of this Court to interfere with determinations that are fact-intensive and inevitably the product of the exercise of broad judicial discretion: *Oliveira v. McIntyre*, 81 A.C.W.S. (3d) 226, 1998 CanLII 6519 at para. 9 (Chambers). In *Fraser v. Desmond* (1996), 71 B.C.A.C. 14 at para. 7 (Chambers), Newbury J.A. put it this way:

I think it must be acknowledged that a person appealing an order for costs made at the close of detailed Reasons for Judgment faces an uphill battle in attempting to persuade an appellate court that a trial judge failed properly to assess the relative success or failure of each party. The trial court has before it not only the pleadings and final result of the case, but is able to assess as well how the evidence went in, who was responsible for any prolongation or shortening of the trial, the reasonableness of the positions taken by the parties, and what the "real issues" turned out to be. In my opinion, we should accord a good deal of respect to such an assessment and should not require a trial judge to list in detail the many factors behind it.

- [51] The trial judge is obviously in the best position "to appreciate the course of the proceedings" and to assess the case-specific application of well-established factors that are generally considered in determining whether to make an order for special costs: *Seminoff v. Seminoff*, 2007 BCCA 403 at para. 4 (Chambers). Accordingly, leave to appeal a costs order is only warranted if the trial judge misdirected himself or herself on a matter of legal principle, committed a palpable error in assessing the facts, or if the award was "so clearly wrong as to amount to an injustice": *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9 at para. 27; *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71 at paras. 42-43; *Seminoff* at paras. 2, 4.
- [52] An appellate court must not interfere with the trial judge's exercise of discretion to award costs "if there was a sound basis for its exercise": *Yung v. Jade Flower Investments Ltd.*, 2012 BCCA 168 at para. 20 (Chambers); *Currie v. Thomas* (1985), 19 D.L.R. (4th) 594 (B.C.C.A.).
- [53] Obviously, the discretion must be exercised judicially, which is to say not arbitrarily or capriciously. While the trial judge is not required to itemize in detail the many factors that may have been taken into account in making a costs award, appellate intervention may be required where the reasons do not reveal the foundation upon which the trial judge exercised his or her discretion: *White v. Nuraney*, 2000 BCCA 675 at para. 10.

- [54] The high standard of review established in relation to a costs award applies equally to an award of special costs: *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, 2011 BCCA 425 at paras. 17-18.

The parties' positions

- [55] The applicants recognize that the bar is set high on applications for leave to appeal costs awards. Nonetheless, they submit that granting leave is appropriate because the judge failed to identify specific conduct on the part of Sabrina or Katrina that warrants an award of special costs. I take this as a submission either that the special costs award is unsupported by the evidence and, thus, does not constitute a judicial exercise of discretion, or that it is impossible to determine from the reasons the evidentiary foundation upon which the judge awarded special costs against the applicants.
- [56] The applicants submit that, although the judge specifically discussed Mr. Robson's conduct in her reasons for the special costs order, she only discussed the conduct of Katrina and Sabrina in a vague manner. The applicants contend that the judge lumped together the conduct of all the defendants without specifically articulating what each of them did. They submit that the reasons for the trial judgment also provided no basis for a special costs order against Sabrina or Katrina, pointing out that discussion of Sabrina's conduct in the trial judgment was scant. Further, although the judge said that the defendants as a group breached the rules of court in her reasons for the special costs order, the applicants submit that the trial judgment only supports a finding that Mr. Robson committed such breaches.
- [57] In addition, the applicants argued in their written materials that the judge erred by considering pre-litigation conduct in ordering special costs contrary to *Smithies Holdings*. This point was not, however, pressed in oral argument.
- [58] In oral argument on the leave application, counsel for the applicants (who was not counsel at trial) raised a further issue not addressed in the applicants' written argument or in the court below. Specifically, the applicants argue that it is wrong, as a matter of principle, to make a special costs award without some proportional allocation of costs as between defendants, particularly where, as here, some defendants are only responsible for a portion of the damages award. In support of this position the applicants rely primarily on the discussion in *Westsea Construction* at paras. 122-141.
- [59] As this issue was raised for the first time in oral argument, the parties were again given leave to address the point in supplementary written submissions.
- [60] Finally, the applicants submit that the issues in the proposed appeal are significant to the parties because the applicants were not principals of the businesses implicated in the underlying action. In addition, they submit that the issues in the appeal are significant to the practice because litigants need to know what constitutes reprehensible conduct in the context of emotional litigation.

- [61] Mr. Price submits that, far from failing to specify how the applicants' conduct justified an award of special costs, the judge made findings against the two applicants when she described the conduct of the defendants as a group. For example, she found that the defendants tried to mislead the court by fabricating evidence and attempted to obstruct the plaintiff's claims. Mr. Price submits that the judge carefully considered whether each defendant should face a special costs award, as demonstrated by her decision to exempt Jonathan from paying special costs. Mr. Price also points out that, although the judge found some of the defendants' conduct to be less reprehensible than others, she concluded that the defendants should not escape liability for conduct deserving of rebuke just because the conduct of other defendants was worse.
- [62] Mr. Price further submits that there is no merit to the suggestion that the judge erroneously considered pre-litigation conduct in making the special costs award.
- [63] In response to the applicants' reliance on *Westsea Construction* in oral argument of the leave application, Mr. Price submits that the usual rule is to hold unsuccessful parties jointly and severally liable for costs. Mr. Price acknowledges that there are exceptions to this general practice, namely where awarding costs jointly and severally would create an unfairly disproportionate burden. Mr. Price argues that even if costs are not apportioned equally amongst defendants, courts generally take the view that they should remain jointly and severally liable for all costs, with each having a claim against the others for any excess amount paid: see, for example, *Giles v. Westminster Savings and Credit Union*, 2010 BCCA 282 at para. 92 (joint and several liability for costs against unsuccessful plaintiffs found to be reflective of the usual rule); *Michael Wilson & Partners, Ltd. v. Desirée Resources Inc.*, 2014 BCSC 2055 at para. 63.
- [64] Mr. Price submits that, although the special costs award is significant to the parties, the proposed appeal engages no broader issues of significance to practice generally or to the development of the law. Mr. Price cites *Gulamani v. Chandra*, 2009 BCCA 206 at para. 15, for the proposition that case-specific orders arising from unique circumstances have limited significance to the practice. He submits that the factual and legal circumstances of this case are unique, thus limiting the precedential value of the proposed appeal.
- [65] Finally, Mr. Price submits that the interests of justice require that leave to appeal be refused. Counsel points out that Mr. Price is now terminally ill and has yet to see voluntary payment of the trial judgment because of the defendants' efforts to hinder his recovery. Mr. Price wants some assurance before his death that his family will benefit from the judgments below.

Analysis

- [66] As noted earlier, the test for leave to appeal discretionary costs orders is stringent.

- [67] In my view, the applicants' argument that the judge incorrectly considered their pre-litigation conduct has no merit. In her reasons for ordering special costs, the judge cited Smithies Holdings, emphasized that pre-litigation conduct was irrelevant, and said that it formed no part of her analysis (Costs RFJ at paras. 14, 23). There is no indication that she failed to follow this self-direction.
- [68] In my view, the applicants have not demonstrated an arguable case that the special costs award against them is unsupported by the evidence or the factual findings of the judge, that the evidentiary foundation for the award cannot be discerned, or that the order is "so clearly wrong as to amount to an injustice".
- [69] The factual findings made by the judge and set out herein at paragraphs 26 and 27 appear to me to afford an ample evidentiary basis upon which she could properly exercise her discretion to award special costs against the applicants. In my view, there is no reasonable prospect that a division of this Court would interfere with the judge's exercise of discretion in this regard. In fact, much of the applicants' argument is to the end of re-litigating the issue resolved against them in the court below.
- [70] In addition, this proposed ground of appeal is case-specific and raises no issue of general importance to the practice.
- [71] I turn next to consider the merit of the applicants' contention that the judge erred in principle by failing to apportion costs between the personal defendants to reflect the liability findings and damages awards. I accept that there may well be merit in this proposed ground, and that it might be characterized as an issue of general importance. I am also inclined to the view that the argument advanced by the respondent does not meet this point head-on. I am not, however, inclined to grant leave to appeal on this point for the following reasons.
- [72] First, the issue was not raised below (see Special Costs Application Response at para. 16). In response to the application for special costs, the applicants conceded that costs should be awarded against all defendants at Scale B. Along with the other defendants, they sought a reduction in the amount of costs payable to account for the fact that they were successful on one issue and that the length of trial was attributable to the manner in which Mr. Price conducted his case. Their position on this point was rejected by the judge (Costs RFJ at paras. 24-25).
- [73] The applicants did not seek the apportionment of costs as between defendants. In the event that special costs were awarded, the applicants submitted that they were only justified as against Mr. Robson.

- [74] In my view, the failure to raise this issue in a timely way is an important factor to be taken into account in determining whether the interests of justice favour granting leave. In *R. v. Trieu*, 2010 BCCA 540 at para. 56, Prowse J.A. noted that this Court's discretion to hear new issues on appeal "is generally exercised sparingly and only where the interests of justice require it": see also *L.S. v. G.S.*, 2014 BCCA 334 at para. 108.
- [75] The appellate function involves the review of decisions made by courts of first instance. This function is compromised if the court of first instance had no opportunity to address an issue: *Trieu* at para. 56; *Gorenshtein v. British Columbia (Employment Standards Tribunal)*, 2016 BCCA 457 at para. 46. While the rule applies most forcefully to circumstances where new issues cannot be resolved in the absence of a proper factual foundation, it is not limited to this situation. As the Court explained in *Trieu* at para. 56, "appellate courts should not be forced to sit as courts of first instance by entertaining arguments that could have been made at trial, but for reasons of professional judgment, efficiency or tactics were not pursued".
- [76] As a general rule, therefore, applicants for leave should have no reasonable expectation that this Court will grant leave for the purpose of addressing issues not raised below.
- [77] While there are undoubtedly exceptions to this general rule, I am of the view that this case is not among them. No explanation has been given for why this issue was not raised in the court below. Further, despite the musings in *Westsea Construction* at para. 130 that "it is not so clear that the 'usual' rule is that defendants are held jointly and severally liable for costs", I can find no post-*Westsea Construction* case from this jurisdiction in which the appropriateness of the "usual rule" has been questioned. The law in this area does not require immediate clarification. In all the circumstances of this case, I am of the view that the interests of justice do not favour granting leave so this Court can address, at first instance, an issue that was not raised below and has not been shown to be the subject of controversy in the trial court.
- [78] I appreciate that there is a second, related argument that might be advanced in the circumstances. It concerns whether it is appropriate to award special costs for conduct related to the wrongful dismissal claim against the defendants to the conspiracy claim. Once again, this argument was not raised in the court below. Further, it was not raised before me as a proposed ground of appeal justifying an order granting leave. For the reasons given, this issue should also be resolved in a case where the arguments were developed and ruled on in the court below.
- [79] For the foregoing reasons, the application for leave to appeal is dismissed. As a consequence, I need not address the ancillary applications for relief brought by Mr. Price.

"The Honourable Mr. Justice Fitch"

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