

CANADA / JUDGMENT

Roussy v. Savage

2020 BCSC 487

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 487 Roussy v. Savage

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Roussy v. Savage,

2020 BCSC 487

Date: 20200331

Docket: 169159

Registry: New Westminster

Between:

Raymond Joseph Roussy also known as Ray Roussy, 466372 B.C. Ltd. and Sonic Holdings Ltd.

Plaintiffs

And:

Thomas Charles Savage, Susan Joan Savage, TCS Industries Ltd., Jenor Steel Inc., Trevor Thomas Savage, Kerry Frances Savage and Jennifer May Savage

Defendants

Docket: 175379

Registry: New Westminster

Between:

Sonic Holdings Ltd.

Plaintiff

And:

Thomas Charles Savage

Defendant

Before: The Honourable Madam Justice Watchuk

Costs Reasons for Judgment

Counsel for the Plaintiffs:

J.B. Thompson

Counsel for the Defendants:

C.J. Ramsay

S. Tessarolo

Place and Dates of Written Submissions:

New Westminster, B.C.

October 31, 2019

November 29, 2019

Place and Date of Judgment:

Vancouver, B.C.

March 31, 2020

Table of Contents

Paragraph Range

I. INTRODUCTION

[1] - [6]

II. COSTS GENERALLY

[7] - [10]

III. SPECIAL COSTS

[11] - [48]

A. Law

[11] - [23]

1. Allegations of fraud and breach of fiduciary duty

[17] - [21]

2. Certificate of Pending Litigation

[22] - [23]

B. Positions of the Parties

[24] - [29]

1. Defendants' Submissions

[24] - [26]

2. Plaintiffs' Submissions

[27] - [29]

C. Analysis

[30] - [48]

IV. SCALE OF PARTY-AND-PARTY COSTS

[49] - [63]

A. Law

[49] - [52]

B. Positions of the Parties

[53] - [54]

C. Analysis

[55] - [63]

V. UPLIFT IN COSTS

[64] - [73]

A. Law

[64] - [66]

B. Positions of the Parties

[67] - [69]

C. Analysis

[70] - [73]

VI. OFFER TO SETTLE

[74] - [96]

A. Law

[74] - [79]

B. Facts

[80] - [83]

C. Positions of the Parties

[84] - [90]

D. Analysis

[91] - [96]

VII. SUMMARY

[97] - [98]

I. Introduction

- [1] This case concerned the manufacture and sale of drilling rigs built with the new technology of sonic drill heads. The nature of these two actions, which were heard together, is outlined in paras. 2 to 6 of the Reasons for Judgment reported at 2019 BCSC 1669 (the "Reasons").
- [2] Ray Roussy and Tom Savage were the individuals who together made the business decision to incorporate SDSI. Their respective holding companies, 466372 B.C. Ltd. ("466") and Jenor Steel Inc. ("Jenor") each held 50% of the shares in SDSI. For ease of reference, Mr. Roussy and Mr. Savage will be referred to collectively as the parties.
- [3] After a Receiver was appointed in November 2013, SDSI was assigned into bankruptcy in March 2014 leaving a debt of approximately \$4,000,000.
- [4] Mr. Roussy was and remains firmly of the view that the cause of the failure of SDSI was the poor management of Mr. Savage.
- [5] These two actions were commenced in 2015. In action number 169159, the plaintiffs are Sonic Holdings Ltd. ("SHL") (Mr. Roussy's operating company), 466, and Mr. Roussy ("the Plaintiffs"). Named as defendants are Mr. Savage, TCS Industries ("TCS") (Mr. Savage's operating company), Jenor, and Mr. Savage's wife and children, Susan, Jennifer and Trevor Savage, and Trevor's wife, Mrs. Kerry Savage (collectively, "the Defendants"). The plaintiffs allege that Mr. Savage breached his fiduciary and trust duties owed to the plaintiffs and that members of his family unlawfully benefitted from the operation of SDSI. This is referred to as the Roussy Action.

[6] In action number 175379, SHL is the plaintiff and Mr. Savage is the defendant. SHL alleges that Mr. Savage breached his fiduciary and trust duties owed to SDSI and was in a conflict of interest with SDSI. As this action was commenced pursuant to the provisions of s. 38 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 ("the Bankruptcy Act") it is referred to as the Bankruptcy Action.

[2] In the Reasons the following orders were made:

Action

Plaintiffs

Defendants And Claims Pleaded Against Them

Reasons For Judgment

SCBC Action No.

1. Ray Roussy

1.

Thomas Charles

All claims

169159 (the

("Mr. Roussy")

Savage ("Tom")

dismissed

"Roussy Action")

2. 466372 B.C.

2.

TCS Industries Ltd.

All claims

Ltd. ("466")

("TCS")

dismissed

3. Sonic Holdings

3.

Jenor Steel Inc.

Jenor is liable to

Ltd. ("SHL")

("Jenor")

466 for \$22,355.06 on account of rental income withheld

4.

Trevor Thomas Savage

All claims

("Trevor")

dismissed

5.

Jennifer May Savage

All claims

("Jennifer")

dismissed

6.

Kerry Frances Savage

All claims

("Kerry")

dismissed

7.

Susan Joan Savage

All claims

("Susan")

dismissed

SCBC Action No.

1. SHL

1.

Tom

All claims

175379 (the

"Bankruptcy

Action")

dismissed

[3] With regard to costs, I stated at para. 459:

[459] As the parties requested, the matter of costs is to be dealt with after the decision is released. The parties may make submissions in writing within thirty days, and reply submissions fifteen days thereafter.

[4] In these Costs Reasons, I will refer to the parties in both actions collectively as the plaintiffs and the defendants.

[5] In their written submissions the defendants seek: special costs; or in the alternative, costs at Scale C with an uplift in unit values to 1.5 times; and double costs from the date of their formal Offer to Settle.

[6] The plaintiffs submit that costs should be awarded, at best, on Scale B for both actions together.

II. Costs Generally

[7] Rule 14-1(9) of the Supreme Court Civil Rules [SCCR] requires the costs of a proceeding to be awarded to the "successful party" unless the court otherwise orders. In cases where multiple causes of action are in issue, as in the instant case, the "substantial success" test is applied to determine the successful party: *The Owners, Strata Plan LMS 3259 v. Sze Hang Holding Inc.*, 2017 BCCA 346 at paras. 90-92.

[8] In this case there is no dispute that the defendants were substantially successful. As such, they are entitled to an award of costs.

[9] The parties agree that the costs of the Roussy Action and the Bankruptcy Action should be considered together. In both actions the same counsel represented all of the parties. The issues in the two proceedings were intertwined. The actions were joined for trial by an Order early in the proceedings. The parties relied on the same documents and evidence for both actions at the trial.

[10] In the result, one set of costs will be awarded with the exception of additions for any tariff items required because of the second action.

III. Special Costs

A. Law

- [11] I will first deal with the defendants' claim for special costs.
- [12] Rule 14-1(1)(b) of the SCCR permits the court to award special costs in certain circumstances.
- [13] Special costs are a punitive measure whose purpose is to punish "reprehensible" conduct on the part of one of the parties. In *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177, the Court of Appeal summarised the general principles regarding special costs as follows:
- [56] Special costs are typically awarded when there has been some form of reprehensible conduct on the part of one of the parties: *Young v. Young*, [1993] 4 S.C.R. 3 (S.C.C.) at 134-138. Special costs are not compensatory; they are punitive; *Grewal v. Sandhu*, 2012 BCCA 26 (B.C. C.A.) at para. 106. They are awarded when a court seeks to disassociate itself from some misconduct: *Fullerton v. Matsqui (District)* (1992), 74 B.C.L.R. (2d) 311 (B.C.C.A.) at para. 23
- [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 (B.C. 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.
- [14] As an order of special costs is punitive in nature, the court must focus on a party's "blameworthiness and intent" in order to determine whether punishment is appropriate: *Wong v. Rashidi*, 2011 BCSC 66 at para. 18. This requires an objective retrospective assessment of the mind-set of the party at various points over the course of the proceedings. As Mr. Justice Holmes stated in *Chaplin v. Sun Life Assurance of Canada*, 2004 BCSC 116:

- [38] I am alive to the fact that the courts should guard the need for counsel and parties to raise issues regarding honesty and morality that may be unpopular, embarrassing and difficult of proof, but that are relevant and reasonably based.
- [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.
- [15] In *Finness Yachting Inc. v. Michael Menzies*, 2015 BCSC 2351, Justice Fleming articulated various principles guiding this analysis (at para. 7):
- (a) the court must exercise restraint in awarding specials 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.
- [16] In *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914, Justice Walker enumerated the following list of specific circumstances in which an award of special costs may be justified (at para. 11):
- (a) where a party pursues a meritless claim and is reckless with regard to the truth;
 - (b) where a party makes improper allegations of fraud, conspiracy, fraudulent misrepresentation, or breach of fiduciary duty;
 - (c) where a party has displayed "reckless indifference" by not recognizing early on that its claim was manifestly deficient;
 - (d) where a party made the resolution of an issue far more difficult than it should have been;
 - (e) where a party who is in a financially superior position to the other brings proceedings, not with the reasonable expectation of a favourable outcome, but in the absence of merit in order to impose a financial burden on the opposing party;
 - (f) where a party presents a case so weak that it is bound to fail, and continues to pursue its meritless claim after it is drawn to its attention that the claim is without merit;

- (g) where a party brings a proceeding for an improper motive;
- (h) where a party maintains unfounded allegations of fraud or dishonesty; and
- (i) where a party pursues claims frivolously or without foundation.

[underlining added]

1. Allegations of fraud and breach of fiduciary duty

- [17] As discussed by Walker J., unfounded allegations of fraud or dishonest behaviour, including a breach of fiduciary duties are a circumstance that may attract an award of special costs. An award of special costs in these circumstances recognizes "that such allegations are potentially damaging to those accused of practising such deception and, accordingly, should not be made lightly": *International Hi-Tech Industries Inc. v. FANUC Robotics Canada Ltd.*, 2007 BCSC 1724 at para. 11.
- [18] Even where fraud is not expressly pleaded as a cause of action, the court may approach the matter as if it had been, where the claim is based on allegations of dishonest conduct: *O'Connell Electric Ltd. v. British Columbia Hydro & Power Authority*, 2006 BCSC 1632 at para. 21.
- [19] That an allegation of dishonest conduct ultimately proves unsuccessful, however, is not enough in itself to justify an award of special costs. Instead, the court must consider whether the allegations were "obviously unfounded", "recklessly made", or "made out of malice": *Bradshaw v. Stenner*, 2012 BCSC 237 at para. 10; *Hung v. Gardiner*, 2003 BCSC 285 at para. 16. This assessment is made from the point of view of the plaintiff at the time the allegations were made or maintained. Ultimately, this is a question of "whether the party's allegations were reasonable at the time they were made": *Seagull Paving Ltd. v. Terasen Gas (Vancouver Island) Inc.*, 2006 BCSC 347 at para. 23. At the very least, "a prima facie case must exist and if it does not then special costs by way of 'chastisement' is a reminder to the defendant to exercise better care in the future": *Ip v. Insurance Corp. of British Columbia*, [1994] B.C.J. No. 81 (S.C.) at para. 8.
- [20] As such, where a plaintiff advances unreasonable or unfounded allegations of dishonest conduct, the incendiary nature of these allegations may be sufficient to merit the censure of an award of special costs. As set out in *Hi-Tech Industries* (at para. 7):

where the totality of the circumstances reveal that allegations of fraud have been made frivolously, are without foundation, or made in circumstances where the alleging party had access to information sufficient to conclude that the defendant was merely negligent or had committed no wrongdoing at all, the allegations themselves are seen to be reprehensible warranting an order of special costs.

[21] On the other hand, special costs will generally not be warranted if there was at least an arguable case for the plaintiff's allegations at the relevant times: *Chan v. Stanwood*, 2002 BCSC 734 at para. 15. As explained in *Basha Sales Co. Ltd. v. Adera Equities Inc.*, 2017 BCSC 1715 (at para. 17):

it is not automatic that special costs await the unsuccessful plaintiff after a breach of fiduciary duty claim fails, nor should it be. There are cases in which it is entirely correct to make this very serious allegation. In such cases, the facts before trial at least indicated that the breach of fiduciary duty had occurred and that the particular breach was relevant, either standing alone or as part of the larger claim.

The same reasoning applies with equal force to any allegation of dishonest conduct.

2. Certificate of Pending Litigation

[22] In addition, the court may consider the circumstances surrounding the registration of a certificate of pending litigation ("CPL") in deciding whether to make an award of special costs. The registration of a CPL gives significant leverage to a plaintiff by tying up a defendant's property pending the resolution of a proprietary claim against it: *Basha* at para. 20. The misuse of a CPL to pressure a defendant or secure a tactical advantage is a serious abuse that may support an award of special costs: *Basha* at paras. 8-9.

[23] In assessing whether the filing of a CPL merits an award of special costs, the court must consider the intent of the plaintiff in light of the evidence available at the relevant time. At minimum, there must have been some basis for the plaintiff to assert a threshold entitlement to an interest in the land: *Basha* at para. 25. The court may also consider other relevant circumstances, including the timing of the registration of the CPL, to determine whether it was filed for a legitimate purpose: *Basha* at para. 22. A CPL filed without an evidentiary or legal basis, to secure a merely commercial advantage, will militate in favour of an award of special costs: *Basha* at paras. 23-27; *Hundal v. Border Carrier Ltd.*, 2012 BCSC 447.

B. Positions of the Parties

1. Defendants' Submissions

[24] The defendants' claim for special costs arises from the allegations of fraud or conduct tantamount to fraud by Tom Savage and members of his family. They do not rely on the plaintiffs' claims of breach of fiduciary duty in this regard.

[25] The defendants submit that at least six of the circumstances enumerated in Mayer (underlined for reference above) exist in the instant proceedings, each of which is an example of a scenario where special costs may be awarded. The three areas of most concern raised are: the pleadings and submissions made; Mr. Roussy's evidence at trial; and the unfounded claims of the plaintiff's expert that Tom Savage engaged in fraudulent conduct.

[26] The defendants submit further:

Where a plaintiff makes serious allegations against a defendant such as fraud and breach of fiduciary duty, and fails to make out those claims, a defendant who is successful in defending against those claims may be entitled to an award of special costs.

Even where fraud is not expressly pleaded as a cause of action, if underlying the cause of action alleged are allegations of dishonest conduct, the Court may approach the matter as if fraud had been specifically pleaded.

Claims pleaded in the Roussy Action by the Plaintiffs included claims that:

a. Tom committed fraud as follows:

On numerous occasions during the years 2007 through to and including 2013 Savage willfully and fraudulently mislead Roussy, the external accountants of SDSI, the BDC and the Royal Bank of Canada about the true financial circumstances of SDSI...

- b. Tom breached his fiduciary duty to SDSI, 466 and Mr. Roussy by, among other allegations of breach of fiduciary duty, fraudulent conduct including "providing false financial information to Roussy, 466, the SDSI external accountants, the BDC and the Royal Bank of Canada" and "misappropriating for his own use and/or benefit materials and equipment owned by SDSI";
- c. Tom "has benefitted personally by virtue of his breach of fiduciary duty and misappropriation of SDSI funds, and has wrongly used SDSI funds to provide personal benefits to his immediate family members, including but not limited to [Jennifer] and [Trevor]";
- d. Trevor had acted fraudulently by submitting "false time sheets and false travel expense claims to SDSI..." and claimed damages against him for same;
- e. Jennifer had acted fraudulently by submitting "false time sheets and false travel expense claims to SDSI..." and claimed damages against her for same; and
- f. Tom had used "misappropriated funds" to acquire real property himself and construct a dwelling on the said property, the property being the home of Tom and his wife, Susan Savage (the "Savage Home") and to have used "misappropriated funds" to assist Trevor and Trevor's Wife, Kerry Savage, and Jennifer, acquire real property (referred to hereafter as "Trevor's Home" and "Jennifer's Home", respectively).

Claims pleaded in the Bankruptcy Action by SHL included claims that:

- a. Tom breached his fiduciary duty to SDSI by, among other breaches of fiduciary duty, conduct tantamount to fraud or deceit, in that it claimed:
 - i. Tom provided "false financial information to the SDSI external accountants, and its principle lender, the Royal Bank of Canada";

- ii. Tom misappropriated for his own use and/or benefit materials and equipment owned by SDSI;
- iii. Tom personally benefitted from his financial misappropriation and breach of fiduciary and trust duties to SDSI;
- b. Tom was liable for aggravated and punitive damages.

Further, in their closing submissions, the plaintiffs alleged:

- a. "[S]DSI continued to struggle financially as a result of the Savage's misappropriation of funds...";
- b. "[T]o this day, Mr. Roussy has continued to be emotionally impacted by the loss and deception of Mr. Tom Savage...";
- c. under the section dealing with third party liability (knowing assistance) for Tom's breach of trust, a claim the plaintiffs were not permitted to advance at trial by way of an amendment to the Notice of Civil Claim in the Roussy Action, the plaintiffs alleged that Tom breached his fiduciary duties to Mr. Roussy, 466 and SHL "fraudulently and dishonestly" and that Jennifer and Trevor knew this due to their close working relationship with Tom.

The defendants submit that a relevant consideration for his Court includes the defendants' pleadings and the fact special costs were claimed from the outset of this litigation. The plaintiffs were made explicitly aware by the defendants that the claims for breach of fiduciary duty, fraud and the filing of CPLs against certain properties were without merit and entitled the defendants to special costs of the actions. The defendants, in their Response to Civil Claim filed in the Roussy Action, and Tom, in his Response to Civil Claim in the Bankruptcy Action, specifically pleaded an entitlement to special costs. For example, in the Roussy Action, at paras. 5-6 of Part 3, the defendants plead:

Special costs

- 5. The Plaintiffs have advanced an unmeritorious claim against the Defendants for breaches of fiduciary duties and breaches of trust, and have filed CPLs against their properties.
- 6. The Defendants seek dismissal of the Plaintiffs' claims against them, together with an award of special costs.

The claims pleaded by the plaintiffs, and the submissions made at trial, directly implicated Tom, Trevor and Jennifer in intentional, dishonest conduct, that was expressly pleaded to be fraudulent or, where not expressly pleaded as such, may only be reasonably interpreted as alleging deceit and tantamount to fraud. The claims as pleaded and advanced were highly prejudicial to the reputations of Tom, Trevor and Jennifer, as well as the entire Savage family. These claims were pursued by the plaintiffs despite the defendants making clear in their pleadings that the claims were without merit and that special costs would be sought. As identified below, these allegations were made recklessly and based on speculation at a time when the plaintiffs possessed information sufficient to determine the fraud and fraud-like claims were

without merit, as addressed below.

The information known by and available to Mr. Roussy was sufficient for him to determine, through a prudent investigation, that the allegations of fraud and misappropriation against Tom, Trevor and Jennifer were entirely without merit.

The plaintiffs' relied on a report (the "Sidhu Report") authored by their expert, Ms. Parveen Sidhu, which contained unfounded allegations akin to fraud against Tom and made assumptions of fact which the plaintiffs knew to be false. In the circumstances, the plaintiffs' acquiescence in allowing the Sidhu Report to be submitted as an expert opinion should be a factor militating in favour of the defendants' claim for special costs.

The allegations in the Roussy Action regarding the CPLs were that: (1) Tom had used misappropriated funds to acquire the Savage Home and to construct a building on that premises; (2) Tom had used the misappropriated funds to assist Trevor in acquiring Trevor's Home; and (3) Tom had used the misappropriated funds to assist Jennifer in acquiring Jennifer's Home. No claims for use of misappropriated funds to maintain or improve property were made against Trevor or Jennifer.

Amendments to the Notice of Civil Claim in the Roussy Action which would have amended the claim underlying the CPLs from use of misappropriated funds to "acquire" the Savage Home, Trevor's Home and Jennifer's Home, to use of misappropriated funds to maintain and/or improve those properties, were withdrawn by the plaintiffs at trial. Therefore, the only pleading on which the CPLs against Trevor's Home and Jennifer's Home were based was the use of misappropriated funds to acquire those properties.

The plaintiffs, in not attempting to elicit evidence that would substantiate their claims underlying the CPLs registered against Trevor's Home and Jennifer's Home gives rise to the inescapable conclusion that these claims were, from the outset, without merit and were improperly pursued through trial, warranting the Court's rebuke.

2. Plaintiffs' Submissions

[27] The plaintiffs submit that Mr. Roussy's conduct must be assessed in light of his knowledge and belief as they evolved over the course of the proceedings. In particular, the plaintiffs argue that his conduct was justifiable in light of the following:

- a. What information Mr. Roussy had prior to commencement of the proceedings in March 2015;
- b. What Mr. Roussy discerned from the Defendant's pleadings;
- c. What Mr. Roussy learned after initial document disclosure;
- d. What Mr. Roussy learned after Examinations for Discovery;
- e. What Mr. Roussy learned from the opinion of a Certified Fraud Examiner; and

f. What Mr. Roussy learned as the trial unfolded.

[28] An affidavit sworn by Mr. Roussy on November 15, 2019 sets out the state of his knowledge and belief at the relevant times. The contents of this affidavit were summarised in the plaintiffs' submissions as follows:

Pre-March 2015 information available to Ray Roussy

In December 2012 Mr. Roussy met with Tom and Trevor Savage to discuss SDSI finances. At that point Mr. Roussy had reason to believe SDSI was having financial difficulties. While he was aware of challenges, in his mind they were not life threatening. It is common ground Mr. Roussy was given internal income statements showing SDSI ended the 2011-2012 fiscal year with over \$326,776 in net revenues. Tom and Trevor Savage were clearly representing to Mr. Roussy that SDSI had had a profitable year. When the Deloitte prepared Financial Statements were generated some two months later the net revenue numbers were radically different; there was actually a loss of \$102,521.

What Mr. Roussy determined from the Pleadings

It is of significance, in my submission, that at paragraph 27(a) of the RCC Tom Savage acknowledged his use of SDSI facilities, materials and personnel, and asserted SDSI was fully paid for such use together with a 20% mark up. Tom Savage did not assert there was any agreement or understanding with Mr. Roussy, oral or in writing, that Tom Savage was authorized to make personal use of SDSI. His only assertion was that SDSI was fully paid. At no point in the RCC did Tom Savage assert there was a cost plus 20% agreement with Mr. Roussy.

The Response to Civil Claim in the Bankruptcy Action (RCCB) also influenced Mr. Roussy's thinking about what had, or had not transpired at SDSI. Specifically, and I submit profoundly:

- a. at paragraph 5 of the Notice of Civil Claim Sonic asserted that Tom Savage owed fiduciary duties to SDSI, including: c) A duty to avoid management decisions that placed him in a conflict of interest with SDSI. In Division 1 of the RCCB Tom Savage flatly denied this assertion.

In Division 2 of the RCCB Tom Savage did not address this assertion at all. He did, however, repeat the assertion advanced in the RCC, namely that SDSI was fully paid together with a 20% mark up.

There was no assertion in the RCCB to the effect there was a cost plus 20% agreement with Mr. Roussy.

Tom Savage denied owing fiduciary duties to SDSI. In Mr. Roussy's mind the denial of a duty to SDSI fueled his belief that Tom Savage knew he had acted inappropriately and was attempting to avoid being called to account.

What Mr. Roussy Learned From The Examinations For Discovery

The responses from Tom Savage at his initial Examination for Discovery conducted November 29, 2017 supported Mr. Roussy's views that Tom Savage was being less than forthright and in fact hiding the truth. For instance Tom Savage was categorical that after SDSI came into being TCS was put on the "backburner" and only active "once in a blue moon". Tom Savage's evidence was categorical. He denied TCS economic activity during the TCS years, under oath, but Mr. Roussy had good reason to believe that was false.

What Mr. Roussy learned from the Expert Report

There is no doubt Mr. Roussy's belief in the merits of the claim were reinforced by the Sidhu Report. It should be noted these matters were scheduled for trial commencing May 28, 2018. Ms. Sidhu's Report was served within the time limitations of the Rules. The defendants had not served an Expert Report, nor a responding report in anticipation of the trial May 28, 2018 trial date. This too reinforced Mr. Roussy's thinking about the merits of his claim. Fortuitously for the defendants the trial had to be re-scheduled when it was determined the time required to complete the matter greatly exceeded the number of days set aside.

What Mr. Roussy Did Not Know Until the Trial Unfolded

The evidence from Mr. Bublitz [the accountant for SDSI] had the potential for being a game changer. His evidence was an unexpected bombshell. In the end it appears to have been a game changer as Your Ladyship's acceptance of his evidence about a cost plus 20% agreement was a material finding of fact that influenced the outcome of the case. Mr. Roussy was blindsided by the evidence. At no point during pre-trial procedures did Tom Savage disclose he had a recollection consistent with that of Mr. Bublitz, nor did Tom Savage recall it when he gave his own evidence at trial.

[29] With regard to the CPLs, the plaintiffs submit as follows:

74. In this case Mr. Roussy was firmly convinced Tom Savage managed SDSI's business and finances in such a way as to create large revenues for TCS at the expense of SDSI, and use TCS revenues to finance the construction of his very large high end home. His theory was sound, and that Your Ladyship found the evidence did not support the theory isn't the issue in this context. The Certificate of Pending Litigation was not registered as a tactic, and it was founded on a claim to an interest in land. There was nothing mala fides behind the registration, and there was a legal basis for it.

75. The interest of Tom Savage in the Abbotsford and Saturna properties were already subject to a Judgment of \$507,232.94 in favour of the Royal Bank of Canada when the Certificates were registered. Those Judgment remained unpaid by Tom Savage and as such prevented any dealings with the properties. It cannot be said that the Certificates caused undue hardship. Tom Savage did not apply to the court for a discharge of the CPL, nor did he commence an action claiming damages.
76. The claims against the other Defendants properties has a related albeit less compelling theoretical basis. Mr. Roussy firmly believed the Savage children had been paid well in excess of what would be considered fair market, and it was with the assistance of those inflated incomes that they acquired the properties and subsequently serviced the mortgage debt and other incidents of ownership.
77. Trevor Savage and Jennifer Savage similarly had the option to apply for an Order discharging the Certificates in the event of hardship, or commence an action. They did neither, and did not offer any evidence in this proceeding that would indicate the registrations have caused them any loss or embarrassment.

C. Analysis

- [30] The starting point for the analysis regarding the defendants' claim for special costs is not in dispute. In both actions the plaintiffs alleged fraud and fraud-like behaviour by the defendants. Those allegations were not accepted in the Reasons, and the claims made by the plaintiffs were dismissed.
- [31] The law is also not in dispute. In such circumstances, special costs may be ordered. In determining whether to order special costs, the court must consider whether the conduct of the plaintiffs can properly be characterised as reprehensible.
- [32] In assessing whether the conduct is reprehensible, the courts have looked to such factors as: whether a prima facie case exists (Ip, cited in Bradshaw v. Stenner at para. 8); where a party maintains unfounded allegations of fraud or dishonesty (Mayer at para. 11); and the responsibility of a litigant that requires that the merits of claims be assessed as discovery unfolds (Hundal at para. 14). In making this determination, the court must bear in mind that some claims may need to be pleaded and then carefully considered on an ongoing basis (Chaplin at para. 39).
- [33] Thus, the court must consider how the claim existed over the course of litigation in light of the prevailing circumstances at the relevant times. Mr. Roussy's knowledge and intent are key considerations, insofar as he was both a party himself and the directing mind of the corporate plaintiffs.
- [34] In making the findings below, I accept without reservation the evidence of Mr. Roussy set out in his Affidavit dated November 15, 2019.

- [35] The pleadings in both actions were filed in 2015. The allegations of fraud and fraud-like conduct against the defendants are set out in the costs submissions of the defendants and summarised above. They were maintained up to and through the trial in 2019.
- [36] The essence of the actions was the failure of SDSI, a company founded by the two principals, Ray Roussy and Tom Savage, and owned by them through their holding companies. When it was assigned into bankruptcy in 2014, it had a debt of approximately \$4,000,000. Mr. Roussy believed that the cause of the failure of SDSI was the poor management of Mr. Savage, who was the partner in charge of day-to-day operations, and specifically his practice of completing the work of his company, TCS, in preference to that of SDSI. The fraud allegations arose from specific conduct of Mr. Tom Savage and his two children, Trevor and Jennifer, whom he hired as employees of SDSI.
- [37] The litigation was complicated by the poor state of SDSI's accounting records throughout its operation. Mr. Roussy became very concerned in late 2012 when the internal income statements differed significantly from the Financial Statements prepared by Deloittes. He pursued various avenues of investigation, but remained primarily concerned with the recording of inventory and work-in-progress. His concerns regarding payments to Trevor and Jennifer were confirmed by his bookkeeper who had reviewed the available records. Adding further fuel to his suspicions, Tom was constructing a large home at the time, and both Trevor and Jennifer had homes apparently of greater value than their relative salaries would permit.
- [38] I am satisfied that at the time the pleadings were filed in 2015 there was a prima facie case for the fraud alleged. Although there was an issue at trial as to the extent of Mr. Roussy's ongoing knowledge of and access to the financial records of SDSI, at the time of commencing the actions he had made sufficient enquiries.
- [39] After the initiating pleadings were filed, the defendants' responses exacerbated Mr. Roussy's belief that Mr. Savage had committed some kind of fraud. Mr. Savage denied facts that Mr. Roussy knew to be true, such as that he was the operating mind of and held a legal and/or beneficial interest in TCS, his operating company. Significantly, in the Bankruptcy Action Mr. Savage denied that he owed a fiduciary duty to SDSI.
- [40] Proceeding to document disclosure and examinations for discovery were appropriate next steps. I am satisfied that Mr. Roussy's concerns about Mr. Savage's conduct were reasonable at this time.
- [41] Mr. Roussy's concerns were only further reinforced by the disclosure process, which included late disclosure, heavily redacted documents, and failure to comply with orders for disclosure.

- [42] At the examinations for discovery, Mr. Savage failed to be forthright regarding the ongoing business activity of TCS. This was a major issue at the trial. In light of Mr. Savage's intransigence, it was reasonable for Mr. Roussy to take the next step and obtain an expert report from a Certified Fraud Examiner, Ms. Sidhu.
- [43] The report of Ms. Sidhu confirmed Mr. Roussy's belief that Mr. Savage had engaged in the wrongdoing alleged. Although at trial I preferred the responding expert report and evidence proffered by the defendants, the only expert report regarding the finances of SDSI at the time of the first trial dates in 2018 (adjourned due to inadequate time estimates) was that of Ms. Sidhu.
- [44] With regard to the filing of the CPLs by the plaintiffs against the residences of Mr. Savage and Trevor and Jennifer, I accept the submissions of the plaintiffs and find that that step in these proceedings was neither meritless nor for an improper motive in the circumstances.
- [45] To proceed to trial in these circumstances was not unreasonable. I am satisfied that what was known by Mr. Roussy at each stage of the litigation supported his allegations to the requisite level: they were not reckless or made for any improper motive.
- [46] Further, at trial the evidence of the accountant Mr. Bublitz came as a complete surprise to Mr. Roussy. His testimony that there was a prior agreement between the principals of SDSI for a cost plus 20% arrangement had not been pleaded or testified to by Mr. Savage. Although much turned on that evidence at trial, it was not available for consideration by Mr. Roussy before proceeding to trial or, indeed, before Mr. Bublitz took the witness stand.
- [47] After consideration of the totality of the circumstances over the course of conduct of the parties and the litigation, I do not find that the plaintiffs' conduct was reprehensible or deserving of rebuke.
- [48] The defendants' claim for special costs is therefore dismissed.

IV. Scale of Party-and-Party Costs

A. Law

- [49] Where special costs are not warranted, party-and-party costs are assessed at one of three scales under s. 2(3) of Appendix B of the SCCR:
- (a) Scale A is for matters of little or less than ordinary difficulty;
 - (b) Scale B is for matters of ordinary difficulty; and
 - (c) Scale C is for matters of more than ordinary difficulty.
- [50] In fixing the scale of costs, the court may take into account the following factors:
- (a) whether a difficult issue of law, fact or construction is involved;
 - (b) whether an issue is of importance to a class or body of persons, or is of general interest; and

- (c) whether the result of the proceeding effectively determines the rights and obligations as between the parties beyond the relief that was actually granted or denied.

[51] *Mort v. Saanich School District No. 63*, 2001 BCSC 1473 sets out the following considerations in assessing the difficulty and complexity of a given proceeding (at para. 6):

- (a) The length of the trial;
- (b) the complexity of the issues involved;
- (c) the number and complexity of pre-trial applications;
- (d) whether or not the action was hard fought with little or nothing being conceded along the way;
- (e) the number and length of Examinations for Discovery;
- (f) the number and complexity of Experts' Reports; and
- (g) the extent of the effort required in the collection and proof of facts.

[52] These factors are neither determinative nor exhaustive: *Monument Mining Limited v. Balendran Chong & Bodi*, 2013 BCSC 179 at para. 6. As always, the court must consider each case on the totality of its own facts.

B. Positions of the Parties

[53] The defendants submit that the following facts militate in favour of awarding the defendants costs at Scale C:

- (a) the trial of these matters required 20 days;
- (b) the parties made extensive written submissions in the form of concluding submissions, reply submissions and sur-reply submissions;
- (c) the plaintiffs relied on three experts, two of whom were required to give evidence at trial, and the defendants relied on an expert of their own;
- (d) the expert reports of both the plaintiffs' and the defendants' Certified Fraud Examiner, were based on a large volume of complex financial data which required more analysis, investigation and time to consider and consolidate into expert reports than ordinarily required of an expert;
- (e) 14 witnesses, including experts, gave evidence during the trial;
- (f) both the plaintiffs and the defendants had two counsel throughout the trial, indicating the matter was of more than ordinary complexity; [I note that there was one counsel for the plaintiffs and one counsel on a watching brief for a creditor]
- (g) five persons were examined for discovery in this matter over seven days;

- (h) document disclosure in this case was voluminous: the parties disclosed thousands of pages of documents, with the plaintiffs listing 687 individual documents and the defendants listing 5,091 documents;
- (i) the legal issues were complex, including claims of fiduciary breach in multiple scenarios, consideration of the Business Corporation Act, S.B.C. 2002, c. 57 and its conflict of interest provisions, fraud and fraud-like claims and an array of theories on the quantum of damages which were the subject of expert opinion;
- (j) the collection and proof of facts was of more than ordinary difficulty; and
- (k) the action was hard fought and was of great importance to the parties involved.

[54] The plaintiffs submit that:

- 85. At paragraph 78 of these Submissions I suggested that the Defendant's ought to recover Costs at Scale B, "at best". In my submission the conduct of the Defendants from the commencement of the proceeding to the trial contributed significantly to the length and complexity of the proceedings. To refer to a rule of Equity, the Defendants have not come to court with clean hands.
- 86. The approach Tom Savage took in the RCC and RRCB was to deny virtually everything, including that he owed a fiduciary duty to SDSI. Significantly, he failed to plead the existence of an agreement between he and Mr. Roussy that acknowledged he was acting in a conflict of interest, but that Mr. Roussy had approved.
- 87. Had Tom Savage acknowledged a fiduciary duty owed to SDSI in the first instance, and asserted his conflict of interest activities had been disclosed and approved of by Mr. Roussy the course of the proceedings could and probably would have been entirely different. The focus of litigation would have been on whether there was full disclosure, including exactly what that disclosure was, and whether there was evidence Mr. Roussy authorized the conflict activities. By denying he owed a fiduciary duty to SDSI, and denying he acted in conflict of interest circumstances, and by failing to assert he indeed made full disclosure and obtained approval from Mr. Roussy as required by the Business Corporations Act. Tom Savage created much more difficult, time consuming and expensive litigation than would have been the case.
- 88. With the issues framed by the close of pleadings the first obligation of the Defendants was to make full disclosure of relevant documents. As described earlier in these Submissions the Defendants ignored their obligations under the Rules, forcing an Application. Once faced with the filed Application the Defendants consented to an Order. They then breached the Order by failing to abide by time limitations and further breached the Order by failing to disclose all the documents they consented to disclose. What they did disclose contained significant redacting of material information. They forced another disclosure Application, and then opposed the Application, including the production of clean copies.

89. The court ordered Tom Savage to swear an affidavit of completeness, which he did. That process is intended to provide a party with a sworn assurance that all efforts to disclose have been made and disclosure completed. It is common ground the affidavit was either intentionally false or made with extreme carelessness, because disclosure of several thousand pages dribbled out over the 18 months following the swearing of the affidavit. As stated earlier, significant disclosure occurred 13 days before the trial commenced.
90. Tom Savage and Trevor Savage gave questionable if not false evidence at Discovery. In many respects their evidence at trial differed from Discovery.

C. Analysis

- [55] That the trial of these actions was complex is not the only relevant factor in determining the appropriate level of costs to be awarded to the defendants. In this case, the actions of the defendants throughout the litigation contributed significantly to the complexity. This must be taken into account in determining the scale of costs.
- [56] The Mort factors must first be considered. The trial consisted of fifteen days of evidence and three days of submissions, as well as written submissions following the oral argument. This was a longer than ordinary trial.
- [57] The issues were complex, involving two actions and a number of complex issues including breach of fiduciary duty, and the conflict of interest provisions of the Business Corporation Act. The documentary evidence initially submitted was voluminous. I note, however, that of the documents submitted to the court at the outset, many were not referred to in the trial and the documents marked as exhibits were significantly reduced although still numerous. The evidence of the parties' expert Certified Fraud Examiners encompassed and summarised much of the documentary evidence, both assisting the court and requiring consideration of the substance of the documents. I accept that the evidence of those witnesses was complex.
- [58] This was a hard-fought trial. The individual parties had been business partners and as such the litigation had some of the indicia of the toxic breakdown of a marriage. In addition, the strong belief of Mr. Roussy that he had been the victim of Mr. Savage's wrongdoings contributed to the intensity of the proceedings. I would be remiss if I did not add that throughout the proceedings, all counsel were measured and professional and of great assistance to the court.
- [59] The Examinations for Discovery were lengthy, but not exceedingly so. The most complex factor was the effort required in the collection of the facts. This difficulty in this area lies primarily at the feet of the defendants due to their delay in providing timely and complete disclosure of documents. As set out in the plaintiff's submissions on costs, it required additional steps, court attendances and attention of their counsel to obtain what should have been produced when required.

- [60] With regard to the importance of the case, it was of utmost importance to the parties but cannot be described as a case of wide-ranging import legally or factually.
- [61] This case was made unnecessarily complicated by the delayed and incomplete disclosure of the defendants and by the unsuccessful positions taken by Mr. Savage in the pleadings and at discovery. For example, Mr. Savage later admitted that he had a fiduciary duty to SDSI, contrary to the pleadings, and that TCS was active throughout the SDSI years, contrary to his discovery evidence. Having contributed significantly to making the case more difficult, it is not in my opinion appropriate to award costs at a higher scale.
- [62] In this respect, this matter closely resembles the facts of Monument Mining. In that case, Goepel J. (as he then was) awarded the costs of a complex and protracted proceeding on Scale B to account for the role the successful party had played in making the proceedings more difficult:
- [21] This was not an easy case. It was hard fought throughout. Certain factors suggest that it was of more than ordinary difficulty. That said, this proceeding was made more difficult by the unsuccessful positions for which the defendants advocated. Having made the case more difficult, it is not, in my opinion, appropriate to reward the defendants by awarding costs at a higher scale.
- [63] For similar reasons, and after balancing the various considerations, I find that it is appropriate to award the defendants costs on Scale B.

V. Uplift in Costs

A. Law

- [64] Short of an award of special costs, the court may grant an increase of 1.5 times the unit costs that would otherwise be applicable where the usual award, as a result of unusual circumstances, would be "grossly inadequate" or "unjust". The court's authority to make such an award is found in ss. 2(5)-(6) of Appendix B of the SCCR which states:
- (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).
- (6) For the purposes of subsection (5) of this section, an award of costs is not grossly inadequate or unjust merely because there is a difference between the actual legal expenses of a party and the costs to which that party would be entitled under the scale of costs fixed under subsection (1) or (4).

[65] What constitutes "unusual circumstances" is "a fact-based inquiry driven by the nature of the litigation and the conduct of the parties": *Bajwa v. Veterinary Medical Assn. (British Columbia)*, 2008 BCSC 905 at para. 73. In *380876 British Columbia Ltd. v. Ron Perrick Law Corp.*, 2009 BCSC 1209, Justice Allan set out several factors to guide this analysis (at para. 37):

- (a) misconduct by the unsuccessful party in the litigation;
- (b) the serious nature of the allegations;
- (c) the complexity or difficulty of the issues in the litigation; and
- (d) the importance of the litigation to the parties or to the development of the law.

[66] Notably, these factors overlap with some of the factors applicable to an award of special costs. Unlike special costs, however, the purpose of increased costs is not to punish, but to indemnify: *National Hockey League v. Pepsi-Cola Canada Ltd.*, (1995), 2 B.C.L.R. (3d) 13 (C.A.) at para. 32. An award of increased costs serves to compensate one party for unnecessary expense caused by another's misconduct, regardless of whether its conduct can be characterized as "reprehensible". As such, a judge's decision not to order special costs does not preclude an order for an uplift in unit values: *Walker v. John Doe*, 2014 BCSC 294 at paras. 63-64. As explained in *National Hockey League* (at para. 33):

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.

B. Positions of the Parties

[67] In addition to arguing that costs on Scale C are appropriate, the defendants also submit that an uplift in unit values is warranted under s. 2(5) of Appendix B. They assert that the "unusual circumstances" of this case -- namely, the plaintiffs' baseless allegations of fraud and fraud-like conduct -- merit increased costs, whatever the appropriate scale.

[68] The defendants submit that the uplift in unit values will address the gross inadequacy of ordinary costs which arises from the plaintiffs' conduct. Their draft Bill of Costs at Scale C amounts to \$129,202.72, including fees and disbursements. The actual legal fees and disbursements incurred by the defendants in defending both actions through to the conclusion of trial and Reasons are \$649,937.12 for fees, inclusive of taxes, and \$94,769.57 for disbursements, inclusive of taxes and expert fees. The defendants' party-and-party costs, even at Scale C, equate to approximately 17% of their actual legal fees.

[69] The plaintiffs submit that increased costs ought not to be awarded, and that the court should consider awarding the defendants any of their costs. They say:

91. It turned out a material witness at the trial was Mr. Bublitz. The Defendant's breached the directive to deliver a "will say" statement. It was their duty to do so. If Mr. Roussy had any advance notice of the bombshell evidence Mr. Bublitz delivered he would have been afforded an opportunity to examine Mr. Bublitz pursuant to Rule 7-5. That examination may have led to a postponement of the trial, but if not counsel for Mr. Roussy would have had an opportunity to mount a more focused and fullsome cross examination of Mr. Bublitz.
92. In my respectful Submission the conduct of the Defendants throughout the proceedings is deserving of rebuke. They should have made prompt and full disclosure, not sworn to facts that were demonstrably untrue, not disclosed a load of documents at the last minute and not called a witness with bombshell evidence. The court's displeasure can be expressed by denying the Defendants any Costs at all despite their success in the proceedings. I repeat here the excerpt provided earlier from the Reasons of Mr. Justice Lowry in 307527 BC Ltd, an Appeal from a Judgment of Mr. Justice Groberman:
- [3] The judge held that no case in fraud had been made out. He awarded damages in various amounts totalling about \$11,500 against Mr. Rawji's partners and their companies severally, \$6,666.67 of which was awarded against Mr. Langley personally. The judge dismissed the claim against Ms. Langley: 2003 BCSC 1027. With respect to costs, he said:
- [273] The plaintiff has largely failed in its claim - a claim involving allegations of fraud. This would ordinarily result in an award of costs (possibly special costs) against it. For their parts, the defendants have been remiss in their duties to disclose documents, and have, at times, failed to take seriously their obligations in respect of examination for discoveries. This might also affect an award.
- [5] The judge considered that the conduct of the defendants - the Langleys in particular - had unnecessarily prolonged the trial. His reason for denying costs to Mr. Langley related to his conduct in failing to give adequate discovery of documents, his inadequate documentation of matters during the course of the construction of the project, and his lack of credibility. Mr. Langley's conduct both before and during the litigation was said to require sanction. The judge expressed his concern about Ms. Langley's failure to make timely disclosure of documents but was nonetheless satisfied that she should be awarded some costs. He awarded her costs reflective of what he saw as her minor role in the trial where only three days were taken addressing issues of direct concern to her.

C. Analysis

- [70] I have dismissed the claim for special costs and determined that Scale B, rather than Scale C, is the appropriate level of costs. In determining whether to award an uplift in costs, many of the same facts are relevant. The question, however, is whether the usual award under Scale B would be grossly inadequate in these unusual circumstances. I find that it would be grossly inadequate, and that an uplift is appropriate in these unusual circumstances.

- [71] As I have discussed above, and as is set out in detail in the plaintiff's submissions, the conduct of the defendants contributed significantly to the difficulties in the course of the litigation and therefore to their costs incurred. However, the plaintiffs brought actions with allegations of fraud and fraud-like behaviour over many years that required the defendants to mount a full and many-faceted defence. Notwithstanding the comments above regarding the responsibility of the defendants for contributing to the length and complexity of the proceedings, at the end of the trial it was the plaintiffs who brought serious claims that were not made out.
- [72] As stated in 380876 at para. 37, the nature of the allegations, complexity of the issues, and importance to the defendants given the serious nature of the allegations are three factors to be considered. Misconduct is also a factor. While far from reprehensible, the plaintiffs' dogged pursuit of these allegations also complicated the proceedings and took the dispute with the defendants from a business matter to a prolonged legal and evidentiary morass.
- [73] Therefore, in order to indemnify the defendants in these unusual circumstances, they are entitled to an uplift of 1.5 times the value that would otherwise apply to a unit in Scale B.

VI. Offer to Settle

A. Law

- [74] Pursuant to Rule 9-1(5), in a proceeding where an offer to settle has been made, the court may, among other things, award double costs of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle.
- [75] The purpose of this rule is to encourage the prompt settlement of the issues between the parties, ideally prior to trial. As explained by the Court of Appeal in *Hartshorne v. Hartshorne*, 2011 BCCA 29:
- [25] An award of double costs is a punitive measure against a litigant for that party's failure, in all of the circumstances, to have accepted an offer to settle that should have been accepted. Litigants are to be reminded that costs rules are in place "to encourage the early settlement of disputes by rewarding the party who makes a reasonable settlement offer and penalizing the party who declines to accept such an offer".
- [76] Rule 9-1(6) sets out the following factors in determining whether to award double costs for a party's failure to accept a settlement offer:
- (a) whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or served or on any later date;
 - (b) the relationship between the terms of settlement offered and the final judgment of the court;
 - (c) the relative financial circumstances of the parties;

(d) any other factor the court considers appropriate.

[77] Whether the offer is one that ought reasonably to have been accepted is assessed under the circumstances existing when it was open for acceptance. In making this determination, the court may consider such factors as "the timing of the offer, whether it had some relationship to the claim (as opposed to simply being a "nuisance offer"), whether it could be easily evaluated, and whether some rationale for the offer was provided": Hartshorne at para. 27. The focus of this analysis is on whether it was unreasonable to have refused the offer, as opposed to whether the offer was a reasonable one in itself: Cottrill v. Utopia Day Spas and Salons Ltd., 2019 BCCA 26 at para. 30. In other words, "the consideration is not whether the offer was a reasonable offer. It is whether it was unreasonable for the plaintiff to refuse it": Kobetitch v. Belski, 2018 BCSC 2247 at para. 24.

[78] Nevertheless, "the fact that it may be reasonable for a party to refuse an offer does not necessarily immunize that party from the consequences of a reasonable offer to settle": Cottrill at para. 31. As I wrote in Tham v. Bronco Industries Inc., 2018 BCSC 240:

[17] It is to be remembered that while an award of double costs is said to be punitive, double costs are also intended to reward the party who puts forward a reasonable offer of settlement. The fact that it may have been reasonable from the defendant's perspective to go to trial is not determinative. The Court must also consider this matter from the perspective of the plaintiffs. They are not required to compromise their claim beyond their own objective assessment of the case in order to obtain the benefit of an offer to settle: Domtar Inc. v. Univar Canada Ltd., 2012 BCSC 510 at para. 45.

[79] In other words, while an offer to settle should reflect a "genuine compromise" and provide a "real incentive to settle", "the need to compromise will vary according to the strength of a party's case, considered objectively": Domtar Inc. v. Univar Canada Ltd., 2012 BCSC 510 at para. 45.

B. Facts

[80] On January 22, 2019, the defendants served a formal offer to settle (the "Offer") on the plaintiffs in respect of both the Roussy Action and the Bankruptcy Action. The Offer was for \$600,000, to be derived from Jenor's one-half equity interest in the Chilliwack Property.

[81] The Offer proposed a settlement of the Roussy Action and the Bankruptcy Action, and specifically included the matter of settling a judgment (the "Judgment") registered against title to the Savage Home. The Judgment is referenced in the Notice of Civil Claim filed in the Roussy Action and is for \$507,232.94. The plaintiffs acknowledge in the Notice of Civil Claim that the Judgment is a joint and several obligation of both Mr. Roussy and Tom Savage. Therefore, without reducing the recoverable amount of the Judgment from Mr. Savage based on the actual amount paid by SHL for the Judgment, his one-half share of the Judgment is \$253,616.47 (\$507,232.94 / 2).

- [82] The plaintiffs withdrew their claim against Tom Savage for the Judgment at the beginning of trial.
- [83] In the Reasons for Judgment, the only award made in favour of any of the plaintiffs in either action was that Jenor was liable to pay to 466 the amount of \$22,355.06 on account of one-half of the net rent collected by Jenor for the Enterprise Way property in 2013 and 2014. With Tom Savage's half-share of the Judgment (\$253,616.47) included with the \$22,355.06 (total, \$275,971.53), the amount of the Offer more than doubles this amount.

C. Positions of the Parties

- [84] The defendants submit that, in the circumstances, double costs from the date of the Offer should be awarded in their favour.
- [85] It is submitted by the defendants that the findings of fact at trial make clear that Mr. Roussy was aware of SDSI's financial circumstances and had access to substantially all of SDSI's financial information. Further, Mr. Roussy was shown to have known that SDSI was not making timely payments to its suppliers from its inception and to have known that SDSI's financial statements did not reflect a several hundred-thousand-dollar liability to one of his own companies, SHL. Despite this, Mr. Roussy proceeded to trial pursuing various causes of action and theories against Tom and the Savage Family based on their alleged dishonest management of SDSI. A reasonable person with access to the same level of information as Mr. Roussy ought reasonably to have accepted the Offer.
- [86] Further, the defendants say that they did not waiver from their denial that any fraud or fiduciary breach had been committed on their part. Despite this, they made an offer to settle agreeing to provide consideration of \$600,000 to the plaintiffs to resolve the actions. In a case where the defendants deny all allegations of wrongdoing, and the case alleged against them is for fraud and fiduciary breach, the allegations should be considered in determining whether and to what extent those defendants ought to be required to compromise their claim beyond their own assessment of their innocence in order to obtain the benefit of a formal offer under Rule 9-1. Further, that the Offer exceeded the result obtained by the plaintiffs at trial militates in favour of granting an award of double costs.
- [87] Finally, the defendants argue that where a court makes findings in respect of a plaintiff's lack of credibility, the court may consider the lack of credibility as a separate factor under Rule 9-1(6)(d), citing *Garib v. Archibald*, 2016 BCSC 1082 at para. 33.
- [88] The plaintiffs submit that the Offer was not a simple cash offer, but involved the transfer of an equity interest in the Chilliwack property whose cash value was unknown. In fact, the equity of the owners was a matter of dispute. Further, the Offer sought a release for Tom Savage from exposure to a Judgment in a separate proceeding.

[89] Mr. Roussy submits that he had confidence in the merits of his claim, and confidence in the opinion of Ms. Sidhu whose normalized earnings analysis indicated TCS had generated approximately \$3,000,000 in net revenues by virtue of its use of SDSI facilities, materials and personnel. The \$600,000 offer represented just 20% of what Mr. Roussy reasonably considered to be the value of the claim.

[90] The Offer arrived seven days prior to commencement of the trial.

D. Analysis

[91] It is not disputed that the defendants served an Offer to Settle on the plaintiffs seven days before the trial commenced. The Offer exceeded the final judgment as set out in the Reasons. The relative financial circumstances of the parties are not a relevant consideration in this matter.

[92] Thus the issue in the determination of the defendants' claim for double costs from the date of the Offer is whether the offer was one that ought reasonably to have been accepted. I find that it was not.

[93] The Offer was not a cash offer. The Offer proposed \$600,000 to be derived from Jenor's one-half equity interest in certain property. However, the amount to be recovered from that property interest was not easily evaluated, and was a matter of dispute. Although Offers are often made a short time prior to trial, the complexity of this Offer contributes to the finding that it was not an Offer that should reasonably have been accepted in the short time frame.

[94] I do not consider Mr. Roussy's credibility to be a relevant consideration here. Although I found that his intense disappointment and frustration with the failure of the business at times clouded his recollection of events and interfered with his intention to tell the truth, I did not find, and do not find, that he intentionally misled the court or otherwise engaged in fundamentally dishonest conduct.

[95] The question is whether it was unreasonable for the plaintiffs to have refused the Offer: see Cottrill at para. 30. In all of the circumstances of the history of this litigation, referred to above, the nature of the Offer, the time frame in which it was served, and the evidence of the plaintiffs' expert accounting witness, I find it was not unreasonable for the plaintiffs to refuse the Offer.

[96] The defendants' claim for double costs from the date of the Offer is therefore dismissed.

VII. Summary

[97] The following costs orders are therefore made:

1. The defendants' claim for special costs is dismissed.
2. The defendants' claim for costs at Scale C is dismissed. The defendants are awarded costs at Scale B.

3. The defendants' claim for costs at the uplift of 1.5 is granted.
 4. The defendants' claim for double costs from the date of the Offer to Settle is dismissed.
- [98] The defendants are therefore entitled to their costs at Scale B with an uplift of 1.5 times. One set of costs is awarded for the two actions, with the exception of any additions for tariff items required because of the second action.

"The Honourable Madam Justice Watchuk"

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