

CANADA / JUDGMENT

SHH Holdings Limited v. Philip

2021 BCSC 1232

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Supreme Court of British Columbia

DECIDED

23 June 2021

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2021 BCSC 1232 SHH Holdings Limited v. Philip

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

SHH Holdings Limited v. Philip,

2021 BCSC 1232

Date: 20210623

Docket: S173277

Registry: Victoria

Between:

SHH Holdings Limited and SHH Management Limited

Plaintiffs

And

Sinclair Philip, Frederique Philip, the Philip Family Trust and Sooke Harbour House Inc.

Defendants

And

SHH Holdings, SHH Management Limited and Timothy Durkin

Defendants by Way of Counterclaim

Before: The Honourable Mr. Justice Basran

Reasons for Judgment

Appearing on his own behalf and appearing as a Representative of SHH Management Limited and SHH Holdings Limited:

Timothy Durkin

Counsel for Defendants:

J. Bloomenthal

Place and Date of Hearing:

Victoria, B.C.

December 14-18, 2020 and March 5, 2021

Place and Date of Judgment:

Victoria, B.C.

June 23, 2021

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Overview

- [1] The defendants seek special costs against Timothy Durkin, Rodger Gregory, and the corporate plaintiffs, jointly and severally, arising from a 56-day trial and several post-trial applications, including this one. They also seek an order that the Court exercise its jurisdiction to assess the quantum of special costs. Mr. Durkin was a defendant by counterclaim and represented the corporate plaintiffs at trial. Mr. Gregory was a witness at trial and purported to represent the corporate plaintiffs.

- [2] In the reasons that follow, I have concluded that Mr. Durkin, Mr. Gregory and the corporate plaintiffs are jointly and severally liable to pay special costs to the defendants, as assessed by the registrar.

Background

- [3] Some of the background relevant to this application for special costs, and a description of the defined terms used in this decision, are set out in the Reasons for Judgment from the trial ("RFJ") indexed as SHH Management Limited v. Philip, 2020 BCSC 1411:
- [2] Over 35 years, Frederique and Sinclair Philip owned, operated and built the Sooke Harbour House Hotel and Restaurant into a world-class destination (the "Hotel"). In 2012, they decided to sell the Hotel and enjoy the fruits of their many years of hard work. Three separate deals to sell the Hotel to two different purchasers failed to complete. By 2014, the Philips were both anxious and eager to find a purchaser for the Hotel. In March 2014, they met Timothy Durkin and Rodger Gregory. They thought they had found honest and reputable business people who would comply with their contractual obligations and pay for the Hotel. Unfortunately for the Philips, Mr. Durkin and Mr. Gregory had neither the means nor the intention of paying them for their valuable asset. Instead, the Philips suffered a six-year odyssey of lies, excuses, threats, intimidation and bullying by both of these individuals. In the end, the Philips' substantial equity in the Hotel was entirely dissipated because of the actions of Mr. Durkin and Mr. Gregory. The Philips' reasonable expectation of a comfortable and well-deserved retirement has been effectively stolen from them because they unknowingly put their future in the hands of these two fundamentally dishonest individuals.
- [3] The plaintiffs in this matter are SHH Management Limited ("Management") and SHH Holdings Limited ("Holdings"). Mr. Durkin controls and directs both companies. The defendants are Mr. and Mrs. Philip, their Family Trust and Sooke Harbour House Inc. ("Inc").
- [4] The parties executed three separate agreements for the purpose of transferring all of the shares of Inc. to Holdings:
- a) a share purchase agreement ("SPA") executed on October 15, 2014, with a closing date of November 14, 2014;
 - b) a settlement agreement ("Settlement") executed on July 13, 2016, with closing dates of July 25, 2016, August 15, 2016 and September 5, 2016; and
 - c) an addendum ("Addendum") executed on November 14, 2016, with closing dates of November 28, 2016 and March 15, 2017.
- [5] Holdings failed to perform any of its obligations in respect of the SPA, Settlement and Addendum. It asserts that it had reasonable explanations for failing to comply with the terms of these agreements. These explanations largely consist of blaming the Philips.

- [6] I have reviewed and interpreted each of the agreements, the obligations described therein and the various allegations surrounding Holdings' failure to close on any of these agreements. I conclude that the defendants in this matter bear no responsibility for Holdings' failure to comply with its obligations under these agreements. Mr. Durkin and Mr. Gregory deceived the Philips into believing that they had both the intention and capacity to purchase the Hotel. They had neither.
- [7] In the reasons that follow, I have concluded that Mr. Durkin has been deceitful and dishonest in virtually all of his dealings with the Philips and in the manner in which he conducted himself during the trial. He deliberately lengthened this matter by repeatedly failing to comply with court orders to disclose all relevant documents and not adequately preparing for the trial.
- [9] The Philips and their Family Trust are entitled to:
- a) \$2,645,229 in compensatory damages for the plaintiffs' breach of the SPA as amended by the Settlement and the Addendum;
 - b) prejudgment interest of 4.75% on this compensatory damage amount from August 15, 2015, to the date of this judgment;
 - c) \$1,359,544 in damages arising from the Injunction Order; and
 - d) costs.

Is Mr. Durkin Liable for Special Costs?

Legal Principles

- [4] The court has inherent jurisdiction to award special costs: *MacLeod v. Harrington (Guardian of)* (1995), 14 B.C.L.R. (3d) 201 (B.C.C.A.) at para. 218.
- [5] The standard for awarding special costs is that the conduct in question must be reprehensible. This includes scandalous and outrageous conduct and other milder forms of misconduct deserving of reproof or rebuke: *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 (B.C.C.A.) at para. 17.
- [6] Special costs are punitive and intended to encompass an element of deterrence aimed at discouraging reprehensible conduct. The focus of the inquiry is on the party's blameworthiness and intent: *International Hi-Tech Industries Inc. v. FANUC Robotics Canada Ltd.*, 2007 BCSC 1724 at para. 6.
- [7] This Court set out the following principles for awarding special costs in *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352 at para. 73:

- [73] I have undertaken a thorough review of the cases involving special costs. Having examined the authorities provided by both sides, it is apparent to me that the courts have been somewhat inconsistent in their determination of what amounts to reprehensible conduct and that those authorities must be reconciled. Based upon my review of the authorities, I have derived the following principles for awarding special costs:
- a) the court must exercise restraint in awarding special costs;
 - b) the party seeking special costs must demonstrate exceptional circumstances to justify a special costs order;
 - c) simply because the legal concept of "reprehensibility" captures different kinds of misconduct does not mean that all forms of misconduct are encompassed by this term;
 - d) reprehensibility will likely be found in circumstances where there is evidence of improper motive, abuse of the court's process, misleading the court and persistent breaches of the rules of professional conduct and the rules of court that prejudice the applicant;
 - e) special costs can be ordered against parties and non-parties alike; and
 - f) the successful litigant is entitled to costs in accordance with the general rule that costs follow the event. Special costs are not awarded to a successful party as a "bonus" or further compensation for that success.
- [8] Special costs are warranted if a person knowingly misleads the court or gives false evidence on matters in question: *Westsea Construction Ltd.* at paras. 65-72; *Chudy v. Merchant Law Group*, 2009 BCCA 93 at paras. 9-10. Evidence is "false" when it is knowingly untrue, not just erroneous: *Brown v. Lowe*, 2002 BCCA 7 at para. 149.
- [9] "There can be no question that a person who attempts to perpetrate a deceit on the court is guilty of reprehensible conduct." *Le Soleil Hospitality Inc. v. Louie*, 2011 BCCA 305 at para. 125, leave to appeal to SCC refused, [2011] S.C.C.A. No. 442.
- [10] In addition to the more serious forms of reprehensible conduct, such as misleading or deceiving the court and giving false evidence under oath, special costs may also be awarded against an individual who:
- a) withheld admissions and denied facts;
 - b) delayed pre-trial procedures;
 - c) fail to attend for examination for discovery;
 - d) conducted themselves in an unreasonable or high-handed manner;
 - e) engaged in obfuscation;
 - f) wasted court time by mischaracterizing the evidence or raising trivial issues;

- g) pursued a meritless claim with reckless disregard to the truth;
- h) made improper allegations of fraud, conspiracy or breach of fiduciary duty;
- i) made the resolution of an issue far more difficult than it should have been;
- j) brought a proceeding for an improper motive;
- k) maintained unfounded allegations of fraud or dishonesty; and
- l) pursued claims frivolously or without foundation.

Westsea Construction Ltd. at paras. 82 and 85; Mayer v. Osborne Contracting Ltd., 2011 BCSC 914 at para. 11.

- [11] The above actions will not always give rise to an inference of obstructive conduct: Westsea Construction Ltd. at para. 82
- [12] A litigant's decision to represent themselves in an action is not a basis for declining to award special costs where that individual's conduct was reprehensible: M.P. v. N.M., 2009 BCSC 40 at para. 30.
- [13] The court's inherent jurisdiction to order special costs for reprehensible conduct extends to non-parties: Le Soleil Hospitality Inc. at para. 125. However, special costs should only be ordered against a non-party for serious misconduct or when the non-party is the "real litigant". Actions by a non-party that justify special costs include: (1) fraudulent conduct; (2) abuse of process; (3) gross misconduct in the instigation and/or conduct of the litigation: Hollander v. Mooney, 2017 BCCA 238 at para. 54, citing to Perez v. Galambos, 2008 BCCA 382 at paras. 17-18 (overturned on different grounds, 2009 SCC 48) and Anchorage Management Services Ltd. v. 465404 B.C. Inc., 1999 BCCA 771 at paras. 21-26. This is not an exhaustive list: International Hi-Tech Industries Inc., at para. 55.
- [14] Orders of costs should not be made against the principals of corporations if the only evidence is that they were directing the operations of the corporation but can be made if there is fraud, misconduct, or abuse of process: Anchorage Management Services Ltd. at paras. 24 and 27.

Positions of the Parties

- [15] Relying extensively on the RFJ, the defendants urge this court to award special costs, jointly and severally, against Mr. Durkin, Mr. Gregory, and the corporate plaintiffs. Specifically in regards to Mr. Durkin, they allege that he failed to comply with court orders, committed perjury, deliberately misled the court, fabricated evidence, withheld admissions and denied facts, maintained unfounded allegations of fraud and criminal conduct, mischaracterized evidence, intentionally delayed and elongated the trial, and abused and intimidated witnesses.

- [16] Mr. Durkin represents himself, Mr. Gregory, and the corporate plaintiffs in this application. He opposes the awarding of special costs because the plaintiffs were self-represented litigants with no legal training and a poor understanding of procedural and evidentiary rules. He asserts that the trial judge failed to provide adequate assistance and demonstrated prejudice towards them. He also suggests that the trial judge unreasonably failed to admit material evidence on procedural grounds.

Analysis

- [17] At the beginning of the trial in January 2020, Mr. Durkin confirmed to the Court that he complied with his legal obligation to disclose all relevant documents pursuant to the orders of Justice Horsman on October 8, 2019, and the trial judge on December 6, 2019. This proved to be inaccurate. Over the course of the 56-day trial, Mr. Durkin sought to rely on and introduce into evidence a broad range of unlisted and undisclosed documents.
- [18] During the trial, Mr. Russell Chambers confirmed that he had received a share subscription agreement and promissory note for his \$450,000 investment in SHH Holdings Limited. Mr. Durkin and Mr. Gregory explicitly denied giving these documents to Mr. Chambers and instead repeatedly asserted that they did an undocumented "handshake" deal with him. In the RFJ, I accepted Mr. Chambers' evidence and concluded that Mr. Durkin and Mr. Gregory deliberately and intentionally mislead the court: see RFJ at paras. 30 and 43.
- [19] I found that Mr. Durkin was fundamentally "deceitful and dishonest in virtually all of his dealings with the Phillips and in the manner in which he conducted himself during the trial" and that he "lied unabashedly throughout [the] trial": RFJ at paras. 7 and 35.
- [20] In initiating this litigation, I concluded that Mr. Durkin deliberately swore a false affidavit in order to obtain an injunction that prevented the Phillips from exercising their rights as the owners of the Sooke Harbour House. The details of my findings are contained in paras. 222 to 243 of the RFJ. I concluded that:
- [244] I conclude that Mr. Durkin knowingly and deliberately swore a false affidavit in order to obtain the injunction. He concocted a narrative in which Holdings was not responsible for its failure to complete the SPA, the Philips could not be trusted to operate the Hotel, and he was effectively and successfully managing it. None of these assertions are true.
- [21] In addition to perpetrating a fraud on the court by swearing a false affidavit, I referred to several other examples of Mr. Durkin's deliberate efforts to mislead the Court:
- [32] In yet another obvious example of a falsehood perpetrated by Mr. Durkin, he testified that a point of sale credit card "Square" device was only used to hold deposits for events and to collect funds from Art Gallery sales. However, Ms. Parker confirmed that for at least one weekend in October 2019, Mr. Durkin expressly ordered her to process all payments received by the Hotel through the Square device and deposit all of those revenues directly into the bank account of Management. Furthermore, Ms. Parker testified that Mr. Durkin

ordered her to mislead the Hotel's front desk staff by directing them to use the Square device because of a purported problem with the Hotel's point-of-sale system. There was no problem with the Hotel's point-of-sale system. Interestingly, this weekend in October 2019 was immediately before the defendants' application to vacate the Injunction Order and remove Mr. Durkin from the Hotel.

- [33] One of Mr. Durkin's excuses for failing to complete his obligations pursuant to the SPA was the litigation commenced by Turn/Two. In direct examination, Mr. Durkin testified that the certificate of pending litigation ("CPL") filed by Turn/Two was registered on July 14, 2016, and it prevented the completion of the share purchase agreement and refinancing on the closing date of July 25, 2016, as contemplated in the Settlement. However, in cross-examination, when presented with title searches for the properties that clearly established that a CPL was not registered until August 30, 2016, Mr. Durkin resiled from his earlier testimony. He later admitted that he never actually knew when the Turn/Two CPL was registered.
- [35] The foregoing examples are only a few of the countless instances in which Mr. Durkin lied or deliberately misled the Court. Many other examples of his mistruths and deception are described in detail throughout these Reasons for Judgment. I have no hesitation in concluding that Mr. Durkin lied unabashedly throughout this trial and in virtually all of his dealings with the defendants.
- [111] Also on October 23, 2014, Mr. Durkin sent an email to Mr. Trelawny stating that "[Holdings] has sold \$260,000 in share capital for delivery in October" and that it was merely an "unforeseen error on [the plaintiffs'] part and only a portion was paid in on October 23." He went on to reassure Mr. Trelawny that Mr. Gregory was "cleaning it up and should get the remaining paid-in by tomorrow." Under cross-examination, when Mr. Durkin was confronted with this email, he indicated that Mr. Chambers was the investor expected to provide \$260,000. Mr. Chambers directly contradicted this assertion. He testified that neither Mr. Durkin nor Mr. Gregory asked him for \$260,000 in October 2014. Mr. Durkin fabricated this narrative.
- [22] I summarized Mr. Durkin's credibility and character based on the whole of the evidence as follows:
- [254] Mr. Durkin seemingly has no understanding of or regard for the truth. Notwithstanding the oath he swore, he did not comply with his obligation to speak truthfully. His view of the truth is whatever will serve his interests in the moment. He is entirely unencumbered by ordinary norms of morality, integrity and decency. He is a garden-variety bully who preys upon those whom he perceives to be weaker than himself and vulnerable to his mistruths and manipulation. Unfortunately for the Philips, they were victims of Mr. Durkin's countless lies and deceptions.
- [23] Mr. Durkin and Mr. Gregory also fabricated evidence in the form of a "hand delivered" letter:

- [134] During Mr. Durkin's examination for discovery on October 23, 2019, he stated that he knew the BDC Provision was "an unfulfillable obligation" from the day he entered into negotiations with the Philips. I take this rare moment of honesty by Mr. Durkin to mean that he had no intention, and no ability, to comply with the provisions of the SPA when he executed it in on behalf of Holdings on October 15, 2015. I have no doubt that if he had been forthright with the Philips regarding his lack of intention or capacity to pay them \$2 million and other valuable consideration for the shares of Inc., they would not have entered into the SPA with Holdings.
- [24] In short, Mr. Durkin and Mr. Gregory fabricated evidence and then provided false testimony about it. I have no difficulty in concluding that their conduct in this regard was reprehensible.
- [25] I am similarly satisfied that Mr. Durkin withheld admissions and unreasonably denied facts. I described Mr. Durkin's conduct as a witness as follows:
- [22] Throughout his cross-examination, Mr. Durkin was evasive, combative, deliberately vague and frequently dishonest. He repeatedly refused to provide direct answers to basic questions and instead resorted to casting baseless aspersions on the Philips. He propagated various unfounded allegations of fraud and criminal conduct against the Philips, and some of their witnesses, without producing any supporting evidence.
- [26] Under cross-examination, Mr. Durkin repeatedly refused to make admissions in the face of conclusive documentary evidence:
- [23] For example, when questioned on the origin of article 2.4(a) of the SPA that required Holdings to pay the BDC interest arrears within five days of October 15, 2014 (the "BDC Provision"), Mr. Durkin categorically denied any involvement whatsoever with proposing, drafting or incorporating the BDC Provision into article 2.4(a) of the SPA. Incredibly, he refused to admit that the BDC Provision was his idea despite clear documentary evidence that established that he proposed the interim payment structure to pay off the interest arrears in the draft share purchase agreement that he produced and presented to the Philips on September 24, 2014. Instead of admitting that he was responsible for the BDC Provision, Mr. Durkin insisted that it was the result of negotiation between the parties and speculated that perhaps Mr. Trelawny, the Philips' solicitor, told him to incorporate the BDC Provision into the SPA. Over 30 questions were required before Mr. Durkin finally admitted that he drafted and proposed this provision.
- [27] Absurdly, he refused to admit that he authored correspondence signed "SHH Management Limited". I described the following example of Mr. Durkin's efforts to mislead the court:
- [24] Another example of Mr. Durkin's evasiveness was his refusal to admit that he authored emails and letters signed, "SHH Management Limited." He had no direct answer for who else may have drafted this correspondence other than vague and unsupported speculation. For example, in respect of a post that Ms. Parker sent to the employees of the Hotel on

August 26, 2017, which accused the Philips of recklessly endangering the safety of the employees, Mr. Durkin testified that it "looks like" Ms. Parker drafted the post notwithstanding the fact that it was signed "Tim - SHH Management Limited." After counsel pointed out that Mr. Durkin's name was signed under the posting, Mr. Durkin backpedaled and testified that perhaps he "may have talked to Ms. Parker on the phone and she may have sent this out to other employees." Ms. Parker testified that Mr. Durkin dictated the contents of this post to her verbatim and directed her to disseminate it to the staff. I accept Ms. Parker's evidence on how this post was created and disseminated.

- [28] These are only a few of many examples of Mr. Durkin's evasiveness and repeated refusal to admit facts. His misconduct during his cross-examination unnecessarily lengthened the trial and forced the defendants to incur additional legal costs.
- [29] Mr. Durkin maintained unfounded allegations of fraud and criminal conduct against the Phillips and Ms. Saunders, a former employee of the Sooke Harbour House:
- [37] Mr. Durkin extensively cross-examined Mrs. Philip and Mr. Philip. He made a series of baseless and unfounded allegations against them, including fraudulent misrepresentation, deceit, incompetence and thuggery. He did not produce any credible documentary evidence to support these specious allegations. Although he frequently indicated that he would be calling other witnesses, or bringing forward documentary evidence that would support his wide-ranging and nefarious allegations against the Philips, he failed to do so.
- [69] Mr. Durkin attacked and vilified Ms. Saunders, her husband and, appallingly, her young son. All of his absurd and spurious allegations were entirely unfounded and designed to malign and discredit someone with far more integrity and honesty than himself. Ms. Saunders demonstrated uncommon strength, grace and dignity in standing up to Mr. Durkin's bullying antics. I completely accept Ms. Saunders' evidence and prefer it to that of Mr. Durkin on all relevant conflicts in their evidence.
- [30] Furthermore, as the legal representative of the plaintiffs and in his capacity as a witness, Mr. Durkin repeatedly accused Ms. Saunders of creating and publishing posters displaying images of him and Mr. Gregory despite Ms. Saunders' adamant denials. Mr. Durkin failed to adduce any evidence whatsoever to substantiate his baseless allegations against her.
- [31] Mr. Durkin repeatedly mischaracterized the evidence in defending his actions. For example, he testified in direct examination that the certificate of pending litigation filed by Turn/Two 643 LLC against the properties owned by Sooke Harbour House Inc. was registered on July 14, 2016, and therefore impeded the completion of the share purchase agreement and refinancing scheduled to close on July 25, 2016, for the Settlement Agreement. However, in cross-examination, Mr. Durkin resiled from this testimony after being confronted with title searches for the properties that show that the certificate of pending litigation was registered on August 30, 2016. He ultimately conceded that he did not actually know when the certificate of pending litigation was registered: see RFJ at para. 33.

- [32] I found that Mr. Durkin has a "propensity to say whatever he thinks will serve his interests regardless of how disconnected these statements may be from the truth.": see RFJ at para. 34.
- [33] I also concluded that Mr. Durkin intentionally delayed and elongated the trial:
- [8] The Court provided Mr. Durkin with detailed guidance on preparing for trial and conducting direct and cross-examinations. He ignored most of this advice. Instead, he deliberately and repeatedly asked a series of leading questions on direct examinations, particularly during his examination of Mr. Gregory. For reasons that are unclear, he failed to provide direct evidence on relevant matters that only he was aware of, and instead chose to elicit this evidence from other witnesses, who relied largely on what he had told them. I conclude that Mr. Durkin attempted to repeatedly delay and elongate the hearing of this matter for reasons that were entirely unrelated to the resolution of the issues in this trial.
- [34] I advised Mr. Durkin to speak to documents that he had created but he declined to do so. Instead, he tried to introduce some of these documents, including financial documents he drafted, through other witnesses who had no direct knowledge of them, such as Ms. Robin Parker.
- [35] The manner in which Mr. Durkin conducted himself during the trial was reprehensible. He belittled, mocked, and sought to intimidate witnesses. I found that "Mr. Durkin made a number of inappropriate comments and gestures during the direct examination of Ms. Saunders. I reprimanded him for this conduct and warned him that if it continued he would face consequences. Mr. Durkin responded by making various allegations of criminal conduct against both Mr. and Mrs. Saunders ": see RFJ at para. 251.
- [36] I also described an example of Mr. Durkin's outrageous conduct in seeking to intimidate Mr. Philip:
- [252] On June 19, 2020, Mr. Durkin allegedly approached Mr. Philip in the bathroom at the courthouse and insisted that he accept service of court documents. Mr. Philip reasonably told Mr. Durkin to give these documents to his counsel, but Mr. Durkin forced the documents on him and allegedly stated, "if you know what is good for you, watch your step" in an intimidating and threatening tone. Counsel for the Philips brought this matter to my attention. I questioned Mr. Durkin about it and he admitted giving the documents to Mr. Philip but completely denied making this statement or threatening him. I note that this took place at a time when Mr. Durkin was conducting his cross-examination of Mr. Philip. I admonished Mr. Durkin in the strongest possible terms not to engage with or in any way attempt to intimidate Mr. Philip or any other witness in this matter. Unfortunately, Mr. Durkin did not heed this warning.
- [253] On July 6, 2020, during the afternoon break, Mr. Durkin allegedly directed an expletive ridden insult to Mr. Philip in the hallway outside the courtroom. I provided Mr. Durkin with an opportunity to address this allegation. At first, he completely denied it and insisted

it "did not happen". When I told him that the Sheriffs had witnessed the exchange and had spoken to me about it, he changed his story. He admitted swearing at Mr. Philip. He also admitted that he lied to me when he told me that the allegation was a fabrication. I have no difficulty in concluding that Mr. Durkin sought to intimidate Mr. Philip and Ms. Saunders.

- [37] I have no difficulty in concluding that Mr. Durkin failed to comply with court orders, lied, deliberately misled the court, fabricated evidence, withheld admissions and denied facts, maintained unfounded allegations of fraud and criminal conduct, mischaracterized evidence, intentionally delayed and elongated the trial, and abused and intimidated witnesses. Any one of these acts may have been sufficient to warrant an order for special costs. Taken together, it is beyond doubt that Mr. Durkin's conduct was more than reprehensible. It was disgraceful, offensive, and despicable. I have no difficulty in concluding that he is liable for special costs.

Is Mr. Gregory Liable for Special Costs?

- [38] Over the past seven years, Mr. Gregory was directly involved in and aware of the scheme carried out by Mr. Durkin, the goal of which was to defraud the Phillips of their ownership interest in the Sooke Harbour House. Mr. Gregory participated in this scheme by making several fraudulent misrepresentations to the Phillips and negotiating a Settlement Agreement that he knew SHH Holdings Limited could not perform. He probably should have been a party to this proceeding. The plaintiffs' first witness was Mr. Gregory and his evidence concluded on February 3, 2020.
- [39] Mr. Gregory was more than merely a witness at the trial. He was a director and self-described representative of the corporate plaintiffs. He was Mr. Durkin's partner, charged with the responsibility of finding investors for their unfortunately successful attempt to deprive the Philips of their ownership interest in the Sooke Harbour House. During the trial, Mr. Gregory declared himself "co-counsel" for the corporate plaintiffs and on one occasion, he attended a pretrial application in his capacity as a representative for the plaintiffs and signed the order arising from it.
- [40] Almost all of Mr. Gregory's testimony at trial supported and echoed Mr. Durkin's false narrative. It became clear during the course of his testimony that much of his evidence was based entirely on what Mr. Durkin told him notwithstanding his insistence that he had first-hand knowledge of the matters on which he testified.
- [41] I found that Mr. Gregory tailored his evidence "to describe a narrative that would be consistent with Mr. Durkin's version of events.": RFJ at para. 45. I also found that Mr. Gregory intentionally misled the court by providing false testimony relating to Mr. Chambers' investment in SHH Holdings Limited, at para. 43.
- [42] One of the most notable examples of Mr. Gregory's misleading testimony involved the allegation that Patrick Trelawny, the Philips' solicitor, made a representation to the plaintiffs in 2014 that the BDC Mortgage could be assumed by SHH Holdings Limited:

- [42] An example of Mr. Gregory's reliance on information from Mr. Durkin is on the issue of the assumability of the BDC Mortgage. In direct examination, Mr. Durkin asked Mr. Gregory whether he recalled "any meeting with the Philips where they represented that the mortgage was assumable." In response, Mr. Gregory testified, "I recall a meeting where it was discussed and my recollection was that it was a prevalent consideration." Mr. Gregory emphatically testified that the assumability of the mortgage "was discussed and it was assumable." However, under cross-examination Mr. Gregory completely resiled from this testimony and confirmed that he did not attend a meeting during which this alleged representation was made. Mr. Gregory entirely abandoned his prior evidence and testified instead that he was only made aware of the alleged representation because Mr. Durkin told him that Mr. Trelawny had sent him an email shortly after they executed the SPA that contained the alleged representation that the mortgage was assumable. This purported email was not produced. On further inquiry, Mr. Gregory confirmed that he never saw this alleged email and that he simply trusted Mr. Durkin implicitly. It was beyond clear that Mr. Gregory had no direct knowledge of the alleged representation and was simply reiterating Mr. Durkin's position on this issue.
- [122] As described earlier in these reasons, Mr. Gregory's evidence on this issue shifted significantly and was maddeningly inconsistent. At first, he said he was present at a meeting where this alleged representation took place. He also suggested that the Philips made the BDC Representation rather than Mr. Trelawny. In cross-examination, he admitted that he was not present at the alleged meeting with Mr. Trelawny and instead was relying on information provided to him by Mr. Durkin. He also testified that Mr. Durkin told him that the BDC Representation was in an email but admitted that he had not seen this purported email. He later testified that it was an oral representation. In any event, the evidence is clear that Mr. Gregory has no direct knowledge of the BDC Representation.
- [43] On the subject of the BDC Representation, I held at para. 74: "I have no hesitation in concluding that Mr. Durkin and Mr. Gregory concocted this false narrative to suit their own interests." I also found, at para. 127, "Mr. Durkin and Mr. Gregory fabricated the BDC Representation in 2016 as an excuse for Holdings' failure to complete the share purchase agreement."
- [44] Mr. Gregory's deliberate propagation of this false narrative during his testimony establishes that he lied to the Court.
- [45] Mr. Gregory categorically denied participating in the negotiation of the Settlement Agreement despite conclusive evidence demonstrating that he was the primary person involved in these negotiations: RFJ at paras. 44 and 151.
- [46] Mr. Gregory participated in the fabrication of evidence involving the aforementioned "hand delivered" letter. During his examination for discovery, Mr. Gregory expressly denied seeing or signing the hand-delivered letter and commented, "that's a real poor job of my signature". However, during his cross-examination at trial, he testified that the signature on the letter

appeared to be his genuine signature. When confronted with his prior inconsistent statement from the examination for discovery, Mr. Gregory resiled from his earlier testimony and denied having signed the "hand delivered" letter but conceded that he was "vaguely aware of the text." He then testified during cross-examination that he "never hand-delivered anything to the Phillips" and had "no knowledge of the letter" and that the origins of this letter were "a mystery" to him.

- [47] I am satisfied that Mr. Gregory's evidence relating to the fabricated hand delivered letter was dishonest and intended to deceive the Court. He lied and deliberately misled the Court throughout his testimony.
- [48] Before Mr. Durkin commenced his response submissions on behalf of Mr. Gregory for this application, he advised the Court that Mr. Gregory suffered a stroke sometime between March 13, 2020, and June 8, 2020. The trial adjourned during this period due to the COVID-19 pandemic.
- [49] Mr. Durkin speculated that some type of neurological or cognitive disorder that culminated in a stroke might have affected Mr. Gregory's conduct during the trial. Mr. Durkin sought, and received, a two and a half month adjournment of this application to produce expert medical evidence regarding the possibility that Mr. Gregory may have suffered from some sort of health problem that explains his conduct and behaviour during the trial.
- [50] I also sought confirmation from Mr. Gregory that he wanted Mr. Durkin to represent him on this application, given their potentially conflicting interests. I ordered that Mr. Gregory confirm in writing that he wanted Mr. Durkin to represent him on this application. Mr. Gregory provided this written confirmation.
- [51] Neither Mr. Gregory nor Mr. Durkin produced an expert report that complied with the Supreme Court Civil Rules, B.C. Reg. 168/2009 [Rules]. Instead, they relied on a six-sentence letter written by a locum physician, Dr. David Clinton-Baker: "I have reviewed the medical records of the above (Mr. Gregory) especially with respect to the medical imaging of the brain. On 17 February 2020, he had a CT of the brain performed because of lapses in speech ability. This CT was compared with one performed on 20 December 2011. In that interval there was an increase in white matter atrophy. This can be manifest by lapses in cognitive function and this can include memory lapses".
- [52] Despite the ample time provided by the extended adjournment, neither Mr. Durkin nor Mr. Gregory complied with the substance, let alone the formalities, of obtaining an expert report. On December 18, 2020, the day Mr. Durkin sought the adjournment of this application, I advised him that any purported expert report had to comply with the Rules. I conducted two Judicial Management conferences on January 27, 2021, and February 26, 2021, to monitor his progress in obtaining the expert report. Nevertheless, Mr. Durkin merely produced an unsworn letter that draws no specific conclusions, contains few details, and little context. Mr. Durkin did not provide any information regarding Dr. Clinton-Baker's qualifications or experience. There is no indication that Dr. Clinton-Baker examined Mr.

Gregory and this physician was not produced for cross-examination. This letter contains nothing more than speculation about the possible impact of an increase in "white matter atrophy". I attach no evidentiary weight to it.

- [53] I am satisfied that Mr. Gregory deliberately engaged in reprehensible behaviour that rises to the level of gross misconduct and an abuse of process. He fabricated evidence and deliberately and repeatedly lied during his testimony. He and Mr. Durkin worked in concert in depriving the Philips of their ownership of Sooke Harbour House. Specifically, Mr. Gregory grossly misrepresented their financial ability to pay the Philips for the Sooke Harbour House Inc. At no time did the corporate plaintiffs have the purchase price promised to the Philips. They did not intend to pay for this valuable asset.
- [54] Mr. Gregory is entirely responsible for his own conduct. I reject the unsupported assertion that his alleged pre-stroke medical condition influenced his behaviour during the trial. There is no credible medical or other evidence that suggests that Mr. Gregory was not responsible for his behaviour.
- [55] Mr. Gregory's conduct during the trial, as a witness and frequent spectator, was consistent. He was angry, bombastic, irreverent, and disrespectful. Most importantly, he testified dishonestly. He lied unabashedly to the Court.
- [56] Mr. Gregory was not merely a witness at trial. From 2014, when they first met the Philips, to the conclusion of the trial in July 2020, he and Mr. Durkin worked closely on a scheme intended to defraud the Philips of their rightful ownership of the Sooke Harbour House. Mr. Gregory knowingly gave false evidence and intended to mislead the Court on the central issues in the underlying litigation. He fabricated evidence and testified untruthfully. I am satisfied that he engaged in fraudulent, reprehensible, and outrageous conduct that deserves rebuke. Mr. Gregory is therefore jointly and severally liable for special costs with Mr. Durkin and the corporate plaintiffs.

Should the Trial Judge Assess the Special Costs?

Legal Principles

- [57] A judge may assess costs: Rule 14-1(15).
- [58] A trial judge has inherent jurisdiction to assess special costs. However, this jurisdiction must be exercised sparingly: *Buchan v. Moss Management Inc.*, 2010 BCCA 393 at paras. 12-13 and 29-30; *Westsea Construction Ltd.* at para. 26.
- [59] "The court officer best placed to determine if the fees billed by a lawyer are objectively reasonable is usually the registrar. The registrar's extensive knowledge and experience assessing legal bills is seldom matched by that of a trial judge.": *Gichuru v. Smith*, 2014 BCCA 414 at para. 106, leave to appeal to SCC refused, [2014] S.C.C.A. No. 547.

- [60] " In cases of great length and complexity, where a judge is particularly familiar with the matter, it may be appropriate to exercise his or her inherent jurisdiction to assess special costs summarily." Buchanan at para. 31.
- [61] In assessing special costs, a registrar must only allow those fees that were proper or reasonably necessary to conduct the proceeding and must consider a non-exhaustive list of factors: Rule 14-1(3)(a) and (b).
- [62] A judge assessing special costs must also consider the non-exhaustive list of factors in Rule 14-1(3)(b): Gichuru at para. 102.
- [63] The party liable for special costs must have an opportunity to test the reasonableness of the fees underlying the award. The rationale is that costs are meant to be an indemnity for legal fees, rather than a windfall: Gichuru at para. 103.
- [64] "In order to determine if a legal fee is reasonably objective, it is often necessary to know the particulars of what the lawyer did to accrue it. [I]t is difficult to conceive that a proper examination of a party's incurred legal costs can take place without disclosure of the other side's file and an examination of the other side's lawyers in respect of the file and the matters arising therefrom." Gichuru para. 104.
- [65] " the party facing a costs order must have a meaningful opportunity to challenge the reasonableness of the fees allegedly incurred by the other party; this opportunity is denied where there is insufficient evidence as to the scope and nature of the actual legal fees. Assessing special costs on a summary basis absent sufficient evidence the objective reasonableness of those fees is an error of principle, contrary to both natural justice and to the Rules." Gichuru para. 111
- [66] "A simple presentation of the client's bill to the trial judge together with counsel's submission would not usually allow a party to challenge the reasonableness of the legal costs nor would it allow for an objective determination of the reasonableness of those costs." Gichuru para. 114.
- [67] A party is entitled to a sufficient description of the nature of the services provided so that another lawyer can advise a client on the reasonableness of the charge made: Rule 14-1(31).
- [68] "A party seeking an assessment of special costs must tender evidence of the legal fees incurred and a sufficient description of the nature of the services and of the matter involved to afford any lawyer sufficient information to advise a client on the reasonableness of the charge made." Gichuru at para 119.

Positions of the Parties

- [69] The defendants assert that I should assess the special costs summarily given the length of the trial, the complexities of the litigation, and my knowledge and familiarity with this matter. They seek 100 percent of the legal fees, expenses, and disbursements reflected in the invoices for legal services rendered by their counsel and those amounts incurred by the Philips after the date of those invoices. Alternatively, they ask that I fix an amount of costs and disbursements that is fair to the defendants in light of the circumstances of this case.
- [70] Mr. Durkin generally opposes a determination on costs "until the appeals in this matter have been exhausted." Having ordered special costs against him, Mr. Gregory, and the corporate plaintiffs, I presume that they are opposed to an assessment of these costs by me.

Analysis

- [71] An affidavit sworn by a paralegal at the defendants' law firm attaches a 38-page legal bill, for the period from December 31, 2018 to July 7, 2020, totalling \$972,654 in fees, expenses, disbursements, and taxes. It also includes a subsequent legal bill of \$42,741 for the period from July 7, 2020 to September 27, 2020. In my view, this information is insufficient to determine the reasonableness of the legal fees underlying the special costs award.
- [72] Mr. Durkin and Mr. Gregory are entitled to the particulars of the asserted legal fees. This probably requires disclosure of the Philips' file and possibly an examination of their counsel regarding their file and related matters. This is necessary to enable the plaintiffs to challenge the reasonableness of the fees allegedly incurred by the Philips.
- [73] I have the authority to assess the special costs award and I am sympathetic to the defendants' request that I do so to avoid further court proceedings, additional time, and expense. I am certainly familiar with the details of this protracted matter. However, I cannot summarily assess the special costs award based solely on the presentation of the Philips' final legal bills because they do not include sufficient background and detail to enable an objective determination of the reasonableness of these expenses. In my view, the registrar is best placed to assess these costs based on the presentation of all of the relevant details required to make this determination.

Conclusion

- [74] The defendants are entitled to special costs. The evidence clearly establishes that Mr. Durkin and Mr. Gregory were the directing minds of the corporate plaintiffs. Mr. Durkin, Mr. Gregory, and the corporate plaintiffs are therefore jointly and severally liable for special costs, to be assessed by the registrar.

"Basran, J"

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