

CANADA / JUDGMENT

Sull v. Pengelly

2019 BCSC 1565

COURT

Supreme Court of British Columbia

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2019 BCSC 1565 Sull v. Pengelly

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sull v. Pengelly,

2019 BCSC 1565

Date: 20190917

Docket: S131897

Registry: Vancouver

Between:

Tony Halvinder Sull in the name of and on behalf of Bonnie Manjinder Kaur Pengelly, in her capacity as executor of the Estate of Jeet Kaur Sull

Plaintiff

And

Bonnie Manjinder Kaur Pengelly in her personal capacity and in her capacity as executor of the Estate of Jeet Kaur Sull, and David Jaswinder Sull

Defendants

Before: The Honourable Mr. Justice Voith

Reasons for Judgment re Costs and Interest

Counsel for Plaintiff:

Tony M. Chan

Appearing on their own behalf:

Bonnie M.K. Pengelly

David J. Sull

Place and Dates of Hearing:

Vancouver, B.C.

July 19, 2019

Place and Date of Judgment:

Vancouver, B.C.

September 17, 2019

Table of Contents

1. OVERVIEW.. 3
2. THE COSTS ISSUE. 5
 - a) Solicitor-and-Own-Client Costs. 5
 - i) Jurisdiction. 5
 - ii) Analysis. 7
 - b) Special Costs. 8
 - i) Jurisdiction. 8
 - ii) Analysis. 8
 - c) Double Costs. 14
 - i) Jurisdiction. 14
 - ii) The Factual Background. 15
 - iii) Analysis. 16
1. Should the First Offer Have Reasonably been Accepted by Mrs. Pengelly. 16
2. The Relationship between the First Offer and the Judgment in the Reasons. 17
3. The Relative Financial Circumstances of the Parties. 17
4. Additional Factors. 18
3. INTEREST CALCULATIONS. 19
 - a) Pre-Judgment Interest 19

b) Post-Judgment Interest 20

4. COSTS OF THIS APPLICATION. 20

1. OVERVIEW

- [1] The Plaintiff, Mr. Sull, seeks the costs of the trial that took place between the parties, and in which he was successful, on one of various alternative bases. He also seeks awards of both compound pre-judgment and post-judgment interest against the Defendant Mrs. Pengelly.
- [2] The Plaintiff had named his brother, David Sull ("David"), in the action but he discontinued that aspect of his claim before the conclusion of the trial.
- [3] The Plaintiff's claim against Mrs. Pengelly was advanced under various causes of action and in respect of various forms of wrongdoing. The essence of the claim, however, was that Mrs. Pengelly had, using a power of attorney that had been granted to her by her mother (the "Deceased"), misappropriated a portion of her mother's assets while her mother was still alive and that she further, in her capacity as executrix under the Deceased's will (the "Will"), misappropriated additional assets. In particular she misappropriated the proceeds from the sale of the Deceased's home.
- [4] My Reasons for Judgment, in respect of these various claims, are indexed at 2019 BCSC 575 (the "Reasons"). In the Reasons I concluded:
- [153] Mrs. Pengelly's evidence was that she had no knowledge of what happened to any of these funds other than for perhaps a handful of expenses on her mother's Scotiabank Visa card. This \$325,000 figure can be broken into six discrete categories:
- i. Approximately \$61,000 was withdrawn between August 19, 2008 and October 10, 2009 on the Deceased's G&F line of credit. The first such withdrawal was for \$30,000. Thereafter, there were 31 further withdrawals for amounts between \$100 and \$6,500. It is also relevant that, but for one online bill payment, each of these withdrawals were made by cheque. None of these cheques have been produced by Mrs. Pengelly.
 - ii. The G&F Balance History indicates that on November 4, 2009, seven separate online bill payments, totalling approximately \$60,000, were made. Neither the Deceased nor David ever paid bills online. Defendants' Document 51 indicates that each of those payments was made on account of various outstanding credit card balances. None of these records have been produced by Mrs. Pengelly. It is to be remembered that it was in or about November 4, 2009 that the G&F line of credit and Mortgage increased from \$100,000 to \$225,000.

- iii. Approximately \$92,000 was withdrawn from the G&F line of credit in a one week period in November 2009. The G&F Balance History indicates that on November 4, 2009, November 6, 2009, and November 13, 2009, the amounts of approximately \$12,008.00, \$30,006.00 and \$50,006.00 respectively, for a total of approximately \$92,020.00, were withdrawn from the G&F line of credit. Those three withdrawals are also reflected on the November 1-30, 2009 G&F Statement of Account. The specific documents that relate to these withdrawals have not been produced.
- iv. Between November 5, 2009 and March 8, 2011, when the G&F Mortgage was discharged, fourteen further withdrawals, by way of cheque, in amounts between \$100 and \$1,000, were made from the G&F line of credit. These withdrawals add up to \$8,450. None of these cheques have been produced by Mrs. Pengelly.
- v. At some unknown time, \$75,000 was withdrawn under the Westminster Mortgage. That \$75,000 reflects the approximate difference between the \$225,000 amount that had been secured by the G&F Mortgage before it was discharged on March 8, 2011, and the new \$300,000 Westminster Mortgage. I have said that none of the documents that relate to the application for the Westminster Mortgage or to the disbursement of funds under that mortgage have been produced by Mrs. Pengelly.
- vi. I have dealt with the approximately \$19,000 that was outstanding on the Deceased's Scotiabank Visa card at the time of her death, with the nature of some of the expenditures that made up that outstanding amount and with when the bulk of that debt was incurred.
- [154] I am satisfied that Mrs. Pengelly is responsible for the misappropriation of the amounts in each of the first five of these categories of loss. These five categories of loss total \$305,000. This conclusion is based on her status as a fiduciary under the POA, her failure to account and to provide any explanation of any sort for what happened with these funds and financial transactions, her lack of candor before the Court during this trial, her significant failure to produce relevant records, and her clear involvement in significant aspects of the Deceased's financial affairs in the years after the Deceased became physically disabled.
- [155] I also do not consider that any useful purpose would be served by sending the matter to the Registrar for an accounting. The Deceased passed away more than seven years ago. Nothing in Mrs. Pengelly's conduct suggests that an accounting would provide the Registrar with any better or more precise information than I presently have. Furthermore, the amounts involved do not, on balance, warrant having the Plaintiff expend the further funds and suffer the further delay that would arise from a further hearing before the Registrar.
- ...
- [158] The Will required, subject to certain specific exceptions, that the Estate of the Deceased be distributed equally between her three children. I have, for the reasons I have described, not accepted that the Property was gifted to Mrs. Pengelly or that the proceeds from its sale were to be distributed otherwise than in accordance with the terms of the Will. Thus, the \$279,921.00 that remained, after proper expenses from the sale of the Property were

deducted, plus the \$305,000.00 that Mrs. Pengelly misappropriated, and that should have been available on an equal distribution of the Estate between the Plaintiff, Mrs. Pengelly and David, totals \$584,921.00. One third of this \$584,921.00 figure, that being the Plaintiff's entitlement under the Will, is \$194,974.00. The Plaintiff, however, owed his mother, or her Estate, \$10,000.00. One third of this amount would have come to him if the Deceased's Estate was properly distributed. Two thirds of the amount, or \$6,667.00, would have gone to Mrs. Pengelly and David. The resulting calculation indicates that the balance owed to the Plaintiff is \$188,307.00.

[159] Accordingly, the Defendant, Mrs. Pengelly, is to pay \$188,307.00 to the Plaintiff. The Plaintiff also seeks compound interest on this award. Such an order is available under the Court's inherent jurisdiction, is consistent with the order made in Brown at paras. 119-122, and is, I am satisfied, appropriate in the circumstances of this case.

[5] Though Mrs. Pengelly had retained different counsel at earlier stages of the action she was self-represented at trial. This application was adjourned once so that Mrs. Pengelly could retain counsel. She did not do so and she was, accordingly, self-represented on this application as well.

[6] Mrs. Pengelly made virtually no submissions in relation to the various remedies or alternative orders that the Plaintiff sought. Her limited submissions were directed to an affidavit she filed which addressed her family's financial circumstances.

2. THE COSTS ISSUE

[7] The Plaintiff seeks either solicitor-and-own-client costs, or special costs, or double costs (from one of two alternative dates) or costs at Scale B. The jurisdiction for and object of each of these potential cost orders is different.

a) Solicitor-and-Own-Client Costs

i) Jurisdiction

[8] In addressing this issue I am not addressing the body of case law that enables an executor to recover their reasonable costs, including litigation costs, incurred in their capacity as the executor of an estate, from that estate. Instead I am addressing the ability of litigants to recover their litigation costs, on a full indemnity basis, from an opposing party. Full indemnity costs, known as solicitor-and-own-client costs, are distinct from solicitor-and-client costs (now called special costs). Whether this Court has the jurisdiction to make an award of solicitor-and-own-client costs, or full indemnity costs, in such circumstances has changed over time.

[9] In *Stiles v. B.C. (W.C.B.)* (1989), 38 B.C.L.R. (2d) 307 (C.A.), Justice Lambert commented on the inherent jurisdiction of a Supreme Court judge to make cost awards and, at 310, said:

The power of a Supreme Court judge to award costs stems from s. 3 of the Supreme Court Act which confirms that the judges of the Supreme Court have the inherent powers of a judge of a superior court of record. The power to award costs is governed by the laws in force in England before 1858 and by the enactments, including the Rules of Court, affecting costs made in British Columbia since 1858. Generally, the decisions on costs, including both whether to award costs, and, if awarded, how to calculate them, are decisions governed by a wide measure of discretion. See *Oasis Hotel Ltd. v. Zurich Ins. Co.*, 28 B.C.L.R. 230, [1981] 5 W.W.R. 24, 21 C.P.C. 260, [1982] I.L.R. 1-1459, 124 D.L.R. (3d) 455 (C.A.). The discretion must be exercised judicially, i.e., not arbitrarily or capriciously.

[10] The Court of Appeal in *Oasis Hotel Ltd. v. Zurich Insurance Co.*, [1981] B.C.J. No. 690 (C.A.), took a broad view of a judge's discretion to award costs. *Oasis Hotel* was cited subsequently by the Court of Appeal for the proposition that there is no jurisdictional bar preventing a judge from exercising their discretion to award costs: *Vorvis v. ICBC* (1984), 53 B.C.L.R. 63 (C.A.) at 71. In *Glazewski v. Easterbrook*, 2012 BCSC 1699 at para. 21, this was said to include solicitor-and-own-client costs.

[11] More recently, however, the Court of Appeal has said that the Supreme Court Civil Rules, B.C. Reg. 168/2009 ("SCCR") govern the law of costs, that there are only two categories of costs, and that a judge cannot impose cost sanctions, such as solicitor-and-own-client costs, that are not authorized by the SCCR: *Gichuru v. Smith*, 2014 BCCA 414 at para. 84; *West Van Holdings Ltd. v. Economical Mutual Insurance Company*, 2019 BCCA 110 at para. 95; *Kyle Estate v. Kyle*, 2017 BCCA 329 at para. 44.

[12] Since solicitor-and-own-client costs are not available under the SCCR, special costs are the appropriate vehicle for parties seeking indemnity. The main purpose of special costs is to deter misconduct: *West Van Holdings* at para. 108. Nevertheless, in *Kyle Estate*, and in other judgments, the Court of Appeal has commented that special costs "are in the nature of indemnification": see paras. 45-46. In this way and in light of *West Van Holdings*, special costs awards may be used as a vehicle for providing partial indemnity to a party in the proper circumstances.

ii) Analysis

[13] Apart from any questions of jurisdiction, I do not, in any event, consider that an award of solicitor-and-own-client costs would be appropriate.

[14] In *Lane, Re* (1984), 58 B.C.L.R. 261 (C.A.), Seaton J.A. addressed the issue of solicitor-and-own-client costs and, at 263, said:

My view is that if there is power to award solicitor-and-own-client costs it is a power that should not be exercised, or should only be exercised in the most extraordinary circumstances.

- [15] Other cases had similarly observed that solicitor-and-own-client costs awards were only to be awarded in "extreme situations" such as circumstances where the conduct of a party constitutes an abuse of the court process (ICBC v. Hoang, 2002 BCSC 1162 at para. 75) or where such conduct can be described as "contempt or fraud" perpetrated against the court (Glazewski at para. 21; Goss (Guardian of) v. Woodward, (1991) 4 B.C.A.C. 115 at paras. 18-19; Vorvis at 79).
- [16] In Vorvis, all three judges agreed that solicitor-and-own-client costs were not appropriate on the facts of that case. Mr. Justice Anderson, who dissented in part but not on this point, said at 79:

It appears to me that the learned trial judge awarded costs on a "solicitor and own client basis" to condemn the conduct of the defendant for its callous and harsh treatment of the plaintiff in the course of his employment. While the trial judge was entitled to award a higher scale of costs based on the improper conduct of the litigation by the defendant, he could not compel the defendant to fully indemnify the plaintiff in respect of legal fees payable by him as a substitute for punitive damages. The only alleged misconduct of the defendant in the conduct of the litigation was that it insisted in pursuing the groundless allegation that the appellant was incompetent up to and throughout the trial. Such misconduct may have provided grounds for awarding costs on a solicitor-and-client basis but did not justify awarding costs on a "solicitor and own client" basis. While there may be cases where the conduct of the litigation has been so contemptuous or fraudulent that an award of costs on a "solicitor and own client" basis would be justified, this case does not fall into that category. [Emphasis added.]

- [17] There is nothing in the circumstances of this case that meets the standard that had been developed in these authorities. Specifically, Mrs. Pengelly's conduct did not constitute a "contempt or fraud" perpetrated against the court", or "an abuse of the court's process". Nor was her conduct in the nature of a "most extraordinary circumstance". Accordingly there is no basis for such a cost award.

b) Special Costs

i) Jurisdiction

- [18] Rule 14-1(1)(b) of the SCCR codified the inherent jurisdiction of a Supreme Court judge to make an award of special costs: MacLeod v. Harrington (Public Trustee of), [1995] B.C.J. No. 2717 (C.A.) at paras. 215-218.

ii) Analysis

- [19] The Court of Appeal in Smithies Holdings Inc. v. RCV Holdings Ltd., 2017 BCCA 177, provided the following succinct summary that describes both when an award of special costs may be appropriate and the purpose that is served by such awards:

- [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 SCR 3 at 134-138. Special costs are not compensatory; they are punitive: *Grewal v. Sandhu*, 2012 BCCA 26 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 (C.A.) at para. 23. There are circumstances where special costs may be ordered where there has been no wrongdoing: *Gichuru v. Smith*, 2014 BCCA 414 at para. 90. These reasons are not concerned with such types of cases.
- [57] The leading authority on special costs is this Court's decision in *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 (C.A.). There, Mr. Justice Lambert, writing for the Court, set out that the threshold for special cost awards is "reprehensible conduct". He noted the continuum of circumstances in which special costs could be awarded, ranging from "milder forms of misconduct deserving of reproof or rebuke" to "scandalous or outrageous conduct":
- [17] Having regard to the terminology adopted by Madam Justice McLachlin in *Young v. Young*, to the terminology adopted by Mr. Justice Cumming in *Fullerton v. Matsqui*, and to the application of the standard of "reprehensible conduct" by Chief Justice Esson in *Leung v. Leung* in awarding special costs in circumstances where he had explicitly found that the conduct in question was neither scandalous nor outrageous, but could only be categorized as one of the "milder forms of misconduct" which could simply be said to be "deserving of reproof or rebuke", it is my opinion that the single standard for the awarding of special costs is that the conduct in question properly be categorized as "reprehensible". As Chief Justice Esson said in *Leung v. Leung*, the word reprehensible is a word of wide meaning. It encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke. Accordingly, the standard represented by the word reprehensible, taken in that sense, must represent a general and all encompassing expression of the applicable standard for the award of special costs.
- [20] Furthermore, the "reprehensible conduct" that is considered by the Court, for the purposes of awarding special costs, must be conduct that occurs during the course of the litigation process: *Smithies* at paras. 3 and 128. Mr. Justice Goepel explained:
- [131] As has been set out in many authorities reviewed here, pre-litigation conduct that gives rise to a cause of action will already be the subject of a damage award flowing from the objectionable conduct. Where a party's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency, an award of punitive damages may also follow. *Whiten* provides a principled structured framework for such awards.
- [132] Special costs are an inherently unsatisfactory mechanism to punish pre-litigation conduct. Special costs are intended to punish reprehensible conduct which as per *Garcia* includes scandalous or outrageous conduct as well as milder forms of misconduct deserving of reproof or rebuke. The case law has considered a range of pre-litigation conduct, including breach of contract, negligence, breach of fiduciary duty, fraud, misappropriation, deceit,

sexual assault, failure to follow a constitutionally mandated process and murder. All such conduct could be said to be deserving of rebuke. Indeed, as noted in Kongrecki, almost every unsuccessful litigant is deserving of reproof or rebuke.

[133] Attempting to draw the line on a principled basis as to what pre-litigation conduct should be sanctioned by special costs and which should not is, as amply demonstrated by the case law, a near impossible task. It is also an unnecessary task as the law already provides appropriate relief and remedies for such conduct. In my respectful opinion, special costs should only be awarded to punish reprehensible conduct in the litigation.

See also *Grant v. Lowres*, 2018 BCCA 311 at para. 38; *Pellerin v. Dingwall*, 2018 BCCA 110 at paras. 51-52; *Nazerali v. Mitchell*, 2018 BCCA 104 at para. 114.

[21] The Court in *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914, described, at para. 11, various circumstances in which special costs have been or may be ordered:

- (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.

[22] For a summary of the case law that illustrates these various circumstances more fully, see *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352 at paras. 38-87.

[23] Madam Justice Gropper added to this list in *Westsea* and highlighted decisions in which evidence was deliberately falsified and tendered at a proceeding to mislead the court (*Chudy v. Merchant Law Group*, 2009 BCCA 93 at paras. 9-10), where contempt orders were made (*Telus Communications Inc. v. Telecommunications Workers Union*, 2008 BCCA 144 at paras. 30-31), and where there were serious and repeated instances of sharp practice (*Johal v. Dosang* (1998), 48 B.C.L.R. (3d) 236 (C.A.); *Grewal v. Nijjer*, 2011 BCCA 505) as further situations or factors that might justify an award of special costs.

[24] The jurisprudence establishes that it is often a combination of factors, "no single one of which would necessarily have been sufficient in itself", that will support a finding that a party's conduct is reprehensible and deserving of a special costs award: *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 (C.A.) at para. 28.

[25] Finally, Madam Justice Gropper, in *Westsea* at para. 73, developed the following set of guidelines that are relevant to an award of special costs:

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.

[26] In this case, counsel for the Plaintiff argued that it was i) Mrs. Pengelly's breach of the various fiduciary obligations she held as executor under her mother's will and as holder of the power of attorney that she had been granted by her mother, ii) her dishonesty at trial, and iii) her failure to produce relevant documents during the course of the proceedings, that, either individually or in combination, warranted an award of special costs. Counsel's emphasis on these latter two considerations is warranted as I made a series of findings, in the Reasons, in relation to Mrs. Pengelly's truthfulness; see, for example, paras. 54, 73, 75, 77, 87, and 154 of the Reasons. I also addressed Mrs. Pengelly's failure to disclose relevant documents and described that failure as "egregious"; see paras. 71, 95, and 98 of the Reasons. Accordingly, it is these two considerations, and the case law that is relevant to them, that I have focused on.

- [27] The first consideration, Mrs. Pengelly's dishonesty in overseeing her mother's affairs and her breach of her various fiduciary duties, is directly addressed by the Court of Appeal's decision in *Kyle Estate*. In that case the trial judge had made an award of special costs on the basis of certain pre-litigation conduct as well as on account of the fact that the court was dealing with an executor who had acted dishonestly and in breach of his fiduciary obligations which, in turn, had given rise to the litigation.
- [28] Madam Justice Saunders, for the Court, determined, however, that it was inappropriate to consider the defendant's pre-litigation conduct and that the other "reprehensible conduct" was the "very subject of the litigation and was a triable issue"; at paras. 45, 48 and 49.
- [29] So too, in this case, the Plaintiff seeks to rely on the nature and seriousness of the claims that were advanced against Mrs. Pengelly as a basis for an award for special costs. The fact that the Plaintiff advanced a claim for breach of fiduciary obligation, or any other reason that pertains to the nature of the causes of action or claims at issue at trial, is a matter that is properly addressed in the result of the litigation. It can also, in appropriate circumstances, be addressed with an award of punitive damages. Such damages are aimed at punishing a litigant for their pre-litigation conduct: *Smithies* at para. 131. Conversely, special costs are intended to punish a litigant for their conduct during the litigation itself. Accordingly I do not consider that this aspect of the Plaintiff's submissions can properly ground or contribute to the analysis of the special costs award he seeks.
- [30] Dishonest testimony alone is insufficient to warrant an award of special costs; something more egregious in the impugned conduct at issue is required. This would include, for example, multiple instances of deliberate lying designed to mislead the Court, forgery of documents, or the deliberate concoction of evidence to support a party's position: *Mayer* at paras. 12-15. In *Grewal v. Sandhu*, 2012 BCCA 26, the Court addressed a party's lack of candour and commented that lack of candour and efforts to conceal evidence were an insufficient basis, on their own, to make an award of special costs. If such an award could be made based on the acceptance or rejection of testimony, "instead of being an extraordinary measure, special costs could be imposed whenever credibility was in issue": paras. 103-107.
- [31] Whether the non-disclosure of relevant documents can meet the threshold required to make an award of special costs has been the subject of some debate. In *Leung v. Leung* (1993), 77 B.C.L.R. (2d) 314 (S.C.), Chief Justice Esson concluded that Mr. Leung's conduct was not reprehensible: at para. 6. In arriving at this conclusion he observed that there had been no material non-disclosure or misrepresentation in the case: at para. 3. This might suggest that material non-disclosure can constitute reprehensible conduct, particularly if it makes the resolution of an issue more difficult and/or more expensive and/or causes delay in the resolution of the matter.
- [32] In *Fullerton v. Matsqui* (District), [1992] B.C.J. No. 2969 (C.A.), the Court of Appeal considered "'deliberate non-disclosure' in the face of repeated public inquiries" to be at least one appropriate factor in an award of special costs: para. 12. In *Solex Developments Co. v.*

Taylor (District) (1998), 60 B.C.L.R. (3d) 53 (C.A.), Madam Justice Southin also considered "material non-disclosure" to be a factor justifying an order of special costs: paras. 27-28. In Westsea, and in addressing whether a party's conduct warranted an award of special costs, Gropper J. considered delay, non-attendance at an examination for discovery, and deficient document production. She said, at para. 82: "These issues do not necessarily give rise to the inference of obstructive conduct. Significantly, none of these alleged procedural deficiencies resulted in 'material non-disclosure'."

- [33] These various authorities suggest that non-disclosure of material documents, without more, may not be sufficient to ground an award of special costs. This conclusion is, of course, largely dependent on the circumstances of each case. Material non-disclosure, on its own, may warrant special costs particularly if the material non-disclosure is egregious, gives rise to delay, and is "obstructive" in its purpose and result. In other less extreme cases, non-disclosure will be only one of several factors that, together, justify an award of special costs.
- [34] The guidance from the various authorities I have referred to gives rise to the following conclusions:
- i. Westsea establishes that a court "must exercise restraint" in awarding special costs and that the party seeking such costs "must demonstrate exceptional circumstances": para. 73;
 - ii. Unfortunately a dishonest witness is not an extraordinary or exceptional circumstance. Though Mrs. Pengelly was not forthright I do not consider that her behaviour, or the extent of such behaviour, supports a special costs award;
 - iii. The stronger basis for the cost award that the Plaintiff seeks is Mrs. Pengelly's failure to produce relevant documents. That failure was egregious. Mrs. Pengelly was, however, self-represented both for a period of time prior to trial and at the trial itself. Though I considered that Mrs. Pengelly's status as a self-represented litigant did not excuse her from her obligation to produce relevant documents (Reasons at paras. 95-98) I consider that that status is relevant to whether her conduct warrants the Court's further rebuke and a cost award that is intended to be punitive.
- [35] Based on the foregoing considerations I do not consider that an award of special costs would be appropriate in the circumstances of this case.
- c) Double Costs
 - i) Jurisdiction
- [36] The jurisdiction to make an award of double costs is found in Rule 9-1(5)(b) of the SCCR:
- (5) In a proceeding in which an offer to settle has been made, the court may do one or more of the following:
 - (b) 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;

[37] Rule 9-1(6) prescribes the considerations a court is to consider in weighing the appropriateness of an award of double costs:

Considerations of court

- (6) In making an order under subrule (5), the court may consider the following:
- (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.

ii) The Factual Background

[38] The Plaintiff sent a formal settlement offer to Mrs. Pengelly on January 3, 2017 (the "First Offer"). At that time David was not yet a defendant in the action. The First Offer was a detailed three-page letter that laid out the history of the dispute, the nature of the claims being advanced, and the basis for the settlement offer being made. The amount of the First Offer was \$173,804.13 plus interest. That sum represented one-third of the proceeds of the Deceased's home after adjustments and expenses less a further \$20,000, which represented amounts previously received by the Plaintiff. Mrs. Pengelly never responded to the First Offer.

[39] The Plaintiff sent a second formal settlement offer (the "Second Offer") to both Mrs. Pengelly and David on January 18, 2019. The Second Offer was delivered on the Friday afternoon prior to the start of the trial the following Monday. The Second Offer was a two-page letter which again explained, albeit briefly, the basis for the offer being made. That offer was again based on the sale proceeds of the Deceased's home less the deduction of various specifically described amounts. The settlement proposal was further discounted by approximately \$50,000, to the all inclusive sum of \$130,000, to prompt settlement.

[40] Mrs. Pengelly rejected the Second Offer, within a half hour of its being made, on behalf of both herself and David. Her email concludes with the words "Best of luck on Monday, as you will need it". Mrs. Pengelly never made a settlement proposal or a counter-offer of any kind to the Plaintiff.

[41] Both the First Offer and the Second Offer complied with the formal requirements of Rule 9-1(1)(c).

iii) Analysis

[42] The regime in Rule 9-1 can advance various important objects: see for example *Lakhani v. Elliott*, 2010 BCSC 281 at paras.11-16; *Bailey v. Jang*, 2008 BCSC 1372 at para. 10. Its dominant purpose, however, is to promote reasonable settlements and to attach some consequence to the failure of a party to accept a reasonable settlement: *Level One Construction Ltd. v. Burnham*, 2019 BCSC 548 at para. 14 and *Morris v. Robinson*, 2019 BCSC 1467 at para. 38. This dominant purpose was expressed in *Catalyst Paper Corporation v. Companhia de Navegação Norsul*, 2009 BCCA 16, where the Court, at para. 16, said:

It seems to me that the trend of recent authorities is to the effect that the costs rules should be utilized to have a winnowing function in the litigation process. The costs rules require litigants to make careful assessments of the strength or lack thereof of their cases at commencement and throughout the course of litigation. The rules should discourage the continuance of doubtful cases or defences. This of course imposes burdens on counsel to carefully consider the strengths and weaknesses of particular fact situations. Such considerations should, among other things, encourage reasonable settlements.

1. Should the First Offer Have Reasonably been Accepted by Mrs. Pengelly

[43] The answer to the foregoing question is not to be addressed with the benefit of hindsight: *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 27.

[44] I have focused on the First Offer, rather than the Second Offer, because that offer was extended to Mrs. Pengelly alone and because David's involvement in the Second Offer need not be addressed. Furthermore, the Second Offer was made to two self-represented litigants on the eve of trial. Some of the timing issues that are often considered within the context of Rule 9-1(6)(a), and that might be raised in the context of the Second Offer, are irrelevant to the First Offer. Finally, I am satisfied that it is the First Offer that more appropriately addresses the object of Rule 9-1 and its promotion of reasonable settlements.

[45] I am satisfied that the First Offer should have been accepted by Mrs. Pengelly. She would have been aware of her wrongdoing. She would also have been aware that she had no principled or legitimate basis on which to defend the Plaintiff's claim. This blunt statement reflects the reality of the trial that took place between the parties.

[46] Mrs. Pengelly sought to advance her defence with a single third-party witness and with almost no documents in a case that should be been, to a significant extent, document driven. Her defence relied, in the first instance, on the proposition that the Deceased had gifted her home to Mrs. Pengelly. There was virtually no admissible or reliable evidence that supported this assertion. Conversely, Mrs. Pengelly's claim was refuted by a significant body of evidence: Reasons at paras. 139-145.

[47] The second dominant aspect of Mrs. Pengelly's defence relied on the related and bare assertions that she knew nothing of what had happened to a significant part of her mother's assets and that she had nothing to do with the dissipation of those assets. In this regard it is relevant that the Deceased had, for a number of years, suffered from Parkinson's disease and

that she had, in the last three years of her life, been largely housebound. It is also relevant that over a period of approximately 40 months, prior to when the Deceased passed away, an average of \$8,000 per month was either being spent or taken from the credit cards, bank accounts, lines of credit or other sources that were owned by the Deceased: Reasons at para. 69. I concluded that Mrs. Pengelly's evidence was not honest and that it was inconsistent with the limited objective record before the Court.

2. The Relationship between the First Offer and the Judgment in the Reasons

[48] The First Offer, as of the date it was made inclusive of interest, exceeds the amount I awarded the Plaintiff.

3. The Relative Financial Circumstances of the Parties

[49] There is limited evidence of the Plaintiff's financial circumstances. There was some evidence at trial that when he sought to do some renovations on his home, after his mother's death, he had to borrow money to do so and that he was relying on his interest from the Deceased's estate to repay that loan.

[50] Mrs. Pengelly filed an Affidavit in which she described the equity that she and her husband hold in their home as well as some of the debt that they carry. I expect and accept that an award of double costs will cause her some financial hardship. This is, however, of Mrs. Pengelly's making. Quite apart from her improper conduct in relation to her mother's assets and estate, she could have and should have accepted the First Offer and thereby avoided this application.

[51] Furthermore, I have reviewed the various draft Bill of Costs that counsel for the Plaintiff has proposed. The Bill of Costs from the date of the First Offer, at double costs, is approximately \$12,000 more than that Bill of Costs at Scale B. I do not consider that that amount, in this case, engages Rule 9-1(6)(c) in any meaningful way.

4. Additional Factors

[52] Mrs. Pengelly asserted that I ought to consider that David lives in a laneway home on their property. David has some form of mental disability or impairment that was not identified at trial and that I addressed at paras. 29-34 of the Reasons. I do not consider this persuasive. To the extent Mrs. Pengelly's, and in turn David's circumstances, are affected this arises from the findings and orders I made at trial. Their circumstances are, again, not meaningfully affected by this aspect of the Plaintiff's current application.

[53] I return to where I started. The dominant object that animates Rule 9-1(5)(b) is the promotion of reasonable settlements. Mrs. Pengelly's failure to respond to the First Offer, and her open disdain for the Second Offer, are the very behaviours that Rule 9-1(5)(b) is intended to address. The First Offer represented a reasonable settlement. The factors within Rule 9-1(6), individually and in combination, support the double cost award that the Plaintiff seeks. Accordingly I order that Mrs. Pengelly pay the Plaintiff double costs from the date

after when the First Offer was made and costs, at Scale B, prior to that date.

- [54] In *Gichuru* the Court of Appeal observed that a court should not fix special costs except in exceptional circumstances. That condition has been extended to party-and-party costs and to awards of double costs: see *Reid v. Reid*, 2015 BCSC 889 at paras. 46-48; *Peace River Greenhouses Ltd. v. Taylor (District)*, 2016 BCSC 1455 at paras. 31-38; and *Berthin v. British Columbia (Registrar of Land Titles)*, 2016 BCSC 1522 at paras. 51-53, overturned in part at 2017 BCCA 181 but not on this point. There is nothing exceptional about this case and the Plaintiff should tax his costs in the usual way.

3. INTEREST CALCULATIONS

a) Pre-Judgment Interest

- [55] At para. 159 of the Reasons I ordered that Mrs. Pengelly pay \$188,307, plus compound interest, to the Plaintiff. The Reasons did not, however, specify the appropriate date or dates from which such calculations should be undertaken.
- [56] Compound interest will often be appropriate where such an order would make good the loss that has been caused by a breach of trust: *Brown v. Brown*, 2011 BCSC 649 at para. 119. In *Brown*, the Court ordered interest to be compounded annually from the time the defendant had collapsed all of an estate's investments and he had then distributed that estate.
- [57] In this case, at para. 153 of the Reasons, which I earlier quoted at para. [4] of these Reasons for Judgment, I identified six discrete categories of loss that, in combination, totalled approximately \$325,000 and represented the various amounts that had been either dissipated or misappropriated from the Deceased's assets. These categories of loss did not include the net sale proceeds, of \$279,971.01, from the sale of the Deceased's home.
- [58] I was satisfied that the Plaintiff should, with one exception, receive his one-third share from each of these various categories of loss. That one exception pertained to credit card debt of approximately \$19,000, owed to Scotiabank, that had been outstanding since 2012 and that had never been actively pursued by the bank.
- [59] The Plaintiff, in generating his various compound interest calculations, has relied on the five remaining categories of loss that are identified at para. 153 of the Reasons. Those calculations are conservative in that, for each such category of loss and to the extent losses occurred over a period of time, the Plaintiff has used the last date of the period to begin his calculations. The Plaintiff has similarly used the date of the closing for the sale of his mother's home as the date on which to commence the calculation of pre-judgment compound interest on the net sales proceeds from that sale.
- [60] The sum of these various amounts was then divided by three to reflect the fact that under the Deceased's Will each of the Plaintiff, Mrs. Pengelly and David was, with the exception of a few specified items, to receive a one-third share of their mother's estate.

[61] I am satisfied that each of these various pre-judgment compound interest calculations has been undertaken properly. The amount that arises from these calculations, and that is owed by Mrs. Pengelly to the Plaintiff, is \$15,207.50.

b) Post-Judgment Interest

[62] The Plaintiff is also entitled to post-judgment interest, pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79, from Mrs. Pengelly on the principal amount of \$188,307.

4. COSTS OF THIS APPLICATION

[63] I do not consider that the Plaintiff should receive his costs of this application. Counsel for the Plaintiff advanced a costs application that was, in part, ill-considered and without any basis. Counsel sought an award of solicitor-and-own-client costs in circumstances where it is clear that this Court lacks the jurisdiction to make any such award. Counsel also failed to provide the Court with any of the appellate authorities that establish this point. Still further counsel, in relation to the Plaintiff's claim for special costs, only provided the Court with the trial decision in Kyle Estate. That decision was overturned on appeal in relation to this very issue.

[64] It is always essential that counsel be careful and thorough with respect to the submissions they make to the Court. In this case, because Mrs. Pengelly was self-represented, there was no one who could realistically respond to counsel for the Plaintiff's submissions and highlight the errors that counsel had made. The Court should be able to rely on counsel's authorities without having to note up, or otherwise confirm, the status and ongoing application of those decisions.

"VOITH J."

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