

CANADA / JUDGMENT

Wilson v. Switlo

2016 BCSC 130

COURT

Supreme Court of British Columbia

DECIDED

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2016 BCSC 130 Wilson v. Switlo

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Wilson v. Switlo,

2016 BCSC 130

Date: 20160128

Docket: 15896

Registry: Terrace

Between:

Steve Wilson, Margaret Grant, Jonah (Keith) Nyce, also known as

Joey Nyce, Ellis Ross, Kevin Stewart, Rod Bolton, Ken Hall,

Alex Grant Sr., Godfrey Grant Jr., Henry Amos Sr. and

Kitimaat Village Council

Plaintiffs

And

Janice Georgina Alice Eleanor Switlo, John Wilson Sr., Allan Williams Sr.,

Morris Amos, Sandra Robinson, Wendy Bolton, Harvey Grant Sr.,

John Doe, Jane Doe, Richard roe, Jane Roe, and

Jennifer Grant Howard, also known as Jennifer Grant

Defendants

Before: The Honourable Mr. Justice Punnett

Reasons for Judgment

re Costs

Counsel for the Plaintiffs:

R.D. McConchie

Counsel for the Defendants Sandra Robinson and Wendy Bolton:

D.W. Burnett, Q.C.

(by telephone)

Defendants Janice Georgina Alice Eleanor Switlo, Allan Williams Sr. and Morris Amos:

In Person

No one else appearing

Written responses of Allan Williams Sr. and Morris Amos received October 1, 2015

Place and Date of Hearing:

Terrace, B.C.

September 1, 2015

Place and Date of Judgment:

Terrace, B.C.

January 28, 2016

- [1] The plaintiffs seek special costs against three of the unsuccessful defendants, regular costs against one of the defendants and oppose any costs being awarded in favour of the successful defendants or, in the alternative, that the unsuccessful defendants bear the successful defendants' costs. The costs sought relate to the trial judgment reported at *Wilson v. Switlo*, 2011 BCSC 1287, aff'd *Wilson v. Williams*, 2013 BCCA 471, which gave the parties liberty to speak to costs if they could not come to an agreement.

Application of Morris Amos and Allan Williams Sr. to Adjourn Costs Application

- [2] Plaintiffs' counsel attended in Terrace, British Columbia from Vancouver, BC having received no response from the defendants other than Sandra Robinson and Wendy Bolton who were represented by Mr. Daniel W. Burnett, Q.C. Janice Switlo attended in person. Morris Amos and Allan Williams Sr. appeared and sought an adjournment. As they have in the past they simply showed up with no material and no valid explanation for failing to respond seeking an adjournment in order to consult counsel despite having had ample time

to do so. The application to adjourn was opposed by the plaintiffs and by Janice Switlo, the latter indicating she could not afford to travel to Terrace again to make submissions. Had Morris Amos and Allan Williams Sr. contacted plaintiffs' counsel upon delivery of the application and sought an adjournment to consult with counsel Mr. Roger D. McConchie indicated he would have agreed and reset the matter. Instead, as they have in the past, Morris Amos and Allan Williams Sr. did not have the courtesy to contact plaintiffs' counsel instead having him travel to Terrace at considerable expense and then seek an adjournment thereby wasting the plaintiffs' and Janice Switlo's time and money as well as potentially the Court's. The adjournment was refused. Morris Amos and Allan Williams Sr. were granted 30 days in which to consult counsel and provide written submissions on costs given the plaintiffs' submissions were in written form hence counsel would be able to respond notwithstanding not having attended the hearing.

- [3] In any event there is no evidence that either Morris Amos or Allan Williams Sr. did consult counsel. They simply filed responses on October 1, 2015. They did not file written submissions.

Background

- [4] At trial the defendants Janice Switlo, Allan Williams Sr., Morris Amos and Jennifer Howard were found to have defamed the plaintiffs. The defamatory publications arose from efforts of the defendants to challenge the conduct of the Kitimaat Village Council (the Band Council for the Haisla First Nation) and its band councillors. In particular the defendants objected to the position taken by the Band Council before the British Columbia Utilities Commission (the "BCUC") to support regulatory approval of an energy contract whereby Rio Tinto Alcan agreed to provide energy to BC Hydro.
- [5] The majority of the defamatory publications arose in documents filed in the regulatory proceeding. They were part of the efforts of the defendants to stop the Band Council from taking certain actions. The defendants as a group intervened in the BCUC process. At trial I found:
- [46] In the early fall of 2007, the opposition to the KVC [Kitimaat Village Council] coalesced into an organized group. The leader of the group was the defendant Morris Amos. It was his idea to intervene in the BCUC hearings. The evidence of the late John Wilson Sr. on discovery explained that "the B.C. Utilities Commission was the only way we figured we would somehow stop -- stop them. Q. Stop who? A. The Council". Allan Williams Sr. confirmed that it was Morris Amos' idea to write to the BCUC.
- [6] Various defamatory documents were found to allege fraud, deceit, trickery, illegal conduct, treason, conflict of interest, bribery, dishonesty, breach of trust and corruption on the part of the plaintiffs and to impute criminal conduct to them. Publication of the defamatory documents continued after the litigation commenced.

- [7] At trial the plaintiffs were found to be credible as were the defendants Sandra Robinson and Wendy Bolton along with Jennifer Howard. The defendants Morris Amos and Alan Williams Sr. were not found to be credible. The defendant Janice Switlo withdrew her statement of defence and counter-claim in 2008. Default judgment was taken against her on March 31, 2009 with damages and costs to be assessed. She did not appear at trial hence no findings were made respecting her credibility.
- [8] I found that Allan Williams Sr., Morris Amos and Janice Switlo were guilty of malice. At para. 488 I held that they "were actuated by the improper and indirect purpose of challenging and undermining the authority of the elected band council this was the dominant purpose with respect to all of the impugned publications."
- [9] In addition to the defamatory and unproven allegations the plaintiffs note the failure of the defendants to comply with their discovery obligations under the Rules of Court as a result of which the plaintiffs were compelled to bring a series of motions to obtain orders requiring document disclosure and attendance on examinations for discovery. The relevant orders were:
- a) On September 2, 2008 the defendants noted were ordered to deliver their lists of documents to the plaintiffs by October 3, 2008. Costs of that application were awarded to the plaintiffs in the cause.
 - b) On October 29, 2008 the plaintiffs applied for orders requiring the defendants attend on examinations for discovery after having refused to do so.
 - c) On November 3, 2008 plaintiffs' counsel travelled from Vancouver to Terrace to conduct examinations for discovery from November 3-7, 2008. After the defendant John Wilson Sr. failed to appear for his examination for discovery on November 3, 2008 counsel returned to Vancouver.
 - d) On November 17, 2008 the Court ordered that the statement of defence and counter-claim of the defendants (except Allan Williams Sr.) be struck out and those defendants were ordered to pay damages and costs to be assessed. The order provided it would become final against each of those defendants unless they brought an application to set aside the orders for judgement by November 28, 2008. The plaintiffs were awarded costs of this application in the cause.
 - e) On December 1, 2008 the defendants, with the exception of Allan Williams Sr., were granted an extension of time to apply to set aside the orders which they filed on January 5, 2009.
 - f) On January 29, 2009 the defendants Morris Amos, John Wilson, Sr., Sandra Robinson and Wendy Bolton, were ordered to attend their respective examinations for discovery on certain dates.
 - g) On February 9, 2008 the judgement striking the defence and counter-claims was set-aside with costs to the plaintiffs in the cause.

- h) On February 23, 2009 the defendant Allan Williams Sr. was ordered to attend a discovery at his own expense in Vancouver.
 - i) Also on March 31, 2009 the defendants Wendy Bolton, Sandra Robinson, Morris Amos and Janice Switlo were ordered to deliver to the plaintiffs within 10 days a supplementary list of documents, the defendant Harvey Grant Sr. was to attend an examination for discovery and the defendants Wendy Bolton, Sandra Robinson and Morris Amos were to produce within 10 days for inspection and copying by the plaintiffs all documents requested of them by counsel for the plaintiffs at their examinations for discovery in their possession and control including all video and sound recordings and all electronic records and as well that the defendants Wendy Bolton, Sandra Robinson and Morris Amos were to attend a continuation of their examinations for discovery and to bring to those examinations all documents in their possession or control including the documents ordered to be produced.
 - j) On April 30, 2009 the defendant Sandra Robinson attended on her discovery but did not bring a relevant video recording nor her electronic emails.
 - k) The defendants Sandra Robinson and Morris Amos failed to produce copies of any electronic records or video recording or to deliver the supplementary list of documents as required by the March 31, 2009 order.
- [10] These actions of the defendants were deliberate. The defendant Morris Amos was overheard stating that the "defamation defendants were going to stall until June when the new Kitimaat Village Council could be elected and then the defendants wouldn't have to pay a penny for any damages". I found that the actions of the defendants were designed to stall or hinder the litigation, an effort that continued up to the first day of trial when Morris Amos walked out of the courtroom only to return the next day.

Issues

- [11] Are the plaintiffs entitled to special costs against the unsuccessful defendants Morris Amos, Allan Williams Sr. and Janice Switlo?
- [12] Are the successful defendants Sandra Robinson and Wendy Bolton entitled to their costs? If so are the plaintiffs responsible for such costs or should the unsuccessful defendants Janice Switlo, Allan Williams Sr. and Morris Amos bear responsibility for them on the basis of what is commonly called either a Sanderson order or alternatively a Bullock order?

Position of the Plaintiffs

- [13] The plaintiffs are seeking special costs against Janice Switlo, Allan Williams Sr., and Morris Amos. They are not seeking special costs against Jennifer Howard. With respect to Sandra Robinson and Wendy Bolton the plaintiffs seek an order that they pay their own costs, or in the alternative, that a Bullock or Sanderson order respecting their costs be made.

- [14] The argument of the plaintiffs in favour of special costs is based on the pre-trial conduct of the defendants Janice Switlo, Allan Williams Sr. and Morris Amos in failing to provide discovery of documents and in failing to attend on discovery along with their maintenance of allegations of fraud and the like throughout the trial.
- [15] With respect to the successful defendants Sandra Robinson and Wendy Bolton the plaintiffs seek to deny those defendants their costs because of their failure to make timely and thorough production of relevant documents.
- [16] The plaintiffs also seek their costs of the dismissed counter-claims of Allan Williams Sr., Morris Amos, Sandra Robinson, Wendy Bolton, Harvey Grant Sr. and Janice Switlo.

Position of the Defendants Morris Amos, Allan Williams Sr. and Janice Switlo

- [17] Janice Switlo, Morris Amos and Allan Williams Sr. appeared at the hearing on costs but only Janice Switlo chose to make oral submissions. As a result of the denial of their application for an adjournment Morris Amos and Allan Williams Sr. relied on their written responses filed October 1, 2015. They did not file written submissions.
- [18] The defendant Morris Amos submits that he complied with all discovery and documents disclosure or, in the alternative that he "complied with all discovery and document disclosure obligations according to indigenous culture." (Emphasis added.)
- [19] He then states:
- [1] The respondent produced the required documents in the time frame the respondent felt was appropriate to his cultural belief systems and under the direction of his hereditary leadership.

2 At all times the respondent maintained his integrity by standing up for and defending the honour of those who asked him to assist them with their responsibility under custom law.

3

4 In no manner can the terms: reprehensible, dishonest, discreditable, unmeritorious, unwarranted, callous or reckless be applied to the conduct of respondent Morris Amos.

5 The respondent Morris Amos denies any and all claims his conduct was anything more than the defense of the traditional culture of the hereditary laws and manners of the Haisla Nation.

6 Even when the Court did not recognize the authority or the status of the internal laws of the Haisla Nation Hereditary culture, the respondent Morris Amos conduct did not interfere with the processes of the British Columbia Supreme Court.

7 The respondent Morris Amos complied with all directions of the court when properly informed of the obligations.

[Emphasis added.]

[20] The defendant Allan Williams Sr. repeats the assertions of Morris Amos in paras. 4, 5 and 7 above. He also submits that a number of the pre-trial orders obtained by the plaintiffs did not relate to him.

[21] Janice Switlo submitted that special costs should not be awarded against her because:

- a) She withdrew and discontinued her counter-claim in 2008 and had no involvement in the subsequent conduct of the defendants;
- b) She was concerned that band funds were being used by the plaintiffs to fund the litigation and did not want her involvement and counter-claim to extend the trial and hence increase costs to the Band albeit she did not know if the Band was funding the litigation on behalf of the plaintiffs or not.
- c) Her involvement was in the BC Utilities Commission hearing and she was simply attempting to assist the defendants in that matter given her background as a lawyer. She had asked that the Band not involve her in this litigation as she was only assisting them in the Utilities Commission hearing. She stated that she tries to assist First Nations and that she has done so for other Bands in the past. She submits that given that was her intention special costs should not be awarded against her.

Position of the Defendants Sandra Robinson and Wendy Bolton

[22] The defendants Sandra Robinson and Wendy Bolton submit that as the claims against them were dismissed in their entirety and as the counter-claim occupied an insignificant amount of time, they are entitled to their costs of the entire proceeding from the plaintiffs. In addition they submit it is would be unjust and unfair to put them to the expense or risk of collecting their costs by ordering that the unsuccessful defendants pay them.

Law and Analysis

[23] Special costs can be awarded under Rule 14-1(1)(b)(i) of the Supreme Court Civil Rules or as part of the Court's inherent jurisdiction to control abuse of process and contempt of court (*MacLeod v. Harrington (Guardian)* (1995), 14 B.C.L.R. (3d) 201 at paras. 216-218 (C.A.)).

[24] Special costs should not be awarded unless there is some form of reprehensible conduct, either in the circumstances giving rise to the cause of action or during the proceedings. They are a form of chastisement for misbehaviour in the conduct of the litigation often described as scandalous or outrageous (*Macleod*, at para. 220 citing *Lambert J.A. in Stiles v. British Columbia (Workers' Compensation Board)* (1989), 38 B.C.L.R. (2d) 307 (C.A.)). Conduct that is neither scandalous or outrageous but deserving of reproof or rebuke may still be described as reprehensible. As stated in *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 at para. 17 (C.A.), the "standard for the awarding of special costs" is encompassed by the word "reprehensible".

[25] The principles to be applied were summarized by Gropper J. in *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352 at para. 73 as follows:

[73]

- a) the court must exercise restraint in awarding specials [sic] 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 *Mayer v. Osborne Contract Ltd.*, 2011 BCSC 914, Mr. Justice Walker noted at para. 11(d) special costs can be justified "where a party made the resolution of an issue far more difficult than it should have been".

[27] Restraint is to be exercised when awarding special costs. They have been described as limited to "exceptional circumstances" *A.B.Z v. A.L.F.A.*, 2015 BCSC 34.

[28] Madam Justice Gropper recently held in *Friedlander v. Claman*, 2015 BCSC 482 that the application of special costs should be limited to "exceptional circumstances" and stated:

[24] I went on to say at para. 38 of *Westsea* that despite Lambert J.A.'s effort to clearly articulate the threshold for awarding special costs in *Garcia*, it can be difficult to apply this standard because the concept of "reprehensibility" captures a wide range of misconduct, special costs awards are determined on a case by case basis, and it is sometimes challenging to pinpoint the outer limits of what is reprehensible. What is key to the analysis is the exceptional element or "something more". I agree that the application of special costs should be limited to exceptional circumstances. The Supreme Court of Canada very recently affirmed this "exceptional" circumstances threshold at para. 137 of *Carter v. Canada (Attorney General)*, 2015 SCC 5, when clarifying the test for special costs in cases involving public interest litigants.

- [29] Simply making unsuccessful claims of fraud or dishonesty do not in and of themselves justify an award of special costs. There must be an element of improper behaviour. Mr. Justice Joyce, in *Hung v. Gardiner et al.*, 2003 BCSC 285, also in the context of a defamation action said this:
- [16] In order to justify an award of special costs, it is not sufficient simply to establish that the plaintiff's allegations of bad faith and malice were not proven. It is necessary to show that the plaintiff acted improperly in making or maintaining the allegations in this proceeding or otherwise acted improperly in the manner in which she conducted the litigation before special costs will be awarded. It must be shown, not just that the allegation was wrong, but that it was obviously unfounded, reckless or made out of malice. The matter must be considered from the point of view of the plaintiff at the time she made or maintained the allegations (see *Native Citizens Fisheries et al. v. James Walkus*, [2002] B.C.J. No. 1617 (July 10, 2002) 2002 BCSC 1030).
- [30] However, even where special costs are warranted they may not be awarded where punitive damages are ordered. In *Home Equity et al. v. Crow et al.*, 2005 BCSC 743, Mr. Justice Davies said this at paras. 42-43:
- [42]
- (5) There is authority for the proposition that conduct giving rise to the cause of action that continues through the litigation may lead to awards of both punitive damages and special costs. (See, for example, *Golden Capital Securities v. Holmes* (2003), 22 B.C.L.R. (4th) 171, 2003 BCSC 1265 at [paragraph] 171; *International Forest Products v. Riggs*, [1997] B.C.J. No. 745 (S.C.) (QL); and, *I.C.B.C. v. Eurosport Auto Co. Ltd.* (2004), 18 C.C.L.I. (4th) 120, 2004 BCSC 1598). However, such cases are generally concerned with reprehensible conduct in the litigation process involving deceit or other duplicitous behaviour that has as its goal the prevention of fact finding or otherwise disrupting the trial process for ulterior purposes.
- (6) There are other authorities that stand for the proposition that:

Where there is misconduct in the litigation, the trial judge chooses one means only to punish the losing party: either special costs or punitive damages but not both.

See for example, *McPhillips v. B.C. Ferry Corp* (1993), 16 C.P.C. (3d) 284 at 289 (B.C.S.C.)

- [43] I do not consider that the aggressive and unrelenting conduct of the unsuccessful defendants (except Kohne) in advancing their positions (particularly that of Crow and Pettit against whom punitive damages were awarded), ill-conceived though it was, was undertaken for any ulterior purpose of preventing fact finding.

Discussion of Special Costs Claim Against Morris Amos, Allan Williams Sr. and Janice Switlo

- [31] In the early states of the litigation the defendants failed to comply with their discovery obligations under the Rules of Court. The plaintiffs brought a series of motions for orders for the defendants to disclose documents and attend examinations for discovery.
- [32] A total of eight orders were made for production of documents after the defendants refused to produce them on discovery. As a result various default judgment orders were taken and followed by applications to set aside certain of those default orders.
- [33] Plaintiffs' counsel travelled to Terrace from Vancouver on each occasion. He also attended on discoveries in Terrace where the defendants either failed to appear or did appear but without relevant documents.
- [34] It is clear that the defendants generally sought to frustrate the pre-trial procedures either by failing to comply with the rules for disclosure and discovery or by failing to comply with orders of the Court.
- [35] In my view the conduct of the defendants Morris Amos, Allan Williams Sr. and Janice Switlo was reprehensible. They improperly used the BCUC process to attempt to interfere with the elected Band Council and its councillors and they sought to hinder the progress of the litigation by frustrating the discovery process. It also became evident that the numerous and improper allegations of alleged fraud, deceit, trickery, illegal conduct, treason, conflict of interest, bribery, dishonesty, breach of trust and corruption were unfounded and made out of malice.
- [36] While punitive damages were awarded against Morris Amos in my view his reprehensible conduct giving rise to the litigation and its continuation throughout the litigation support an award of both punitive damages and special costs. His efforts to prevent fact-finding and to disrupt the litigation process are deserving of rebuke.
- [37] I conclude that the plaintiffs are entitled to special costs against Morris Amos, Allan Williams Sr. and Janice Switlo. However, while special costs are awarded against Morris Amos and Allan Williams Sr. throughout, the order for special costs against Janice Switlo shall apply only up to the date of the default judgment against her with Scale B costs thereafter. As a result Morris Amos, Allan Williams Sr. and Janice Switlo shall be jointly and severally liable for special costs to the date of the default judgment against Janice Switlo and thereafter Morris Amos and Allan Williams Sr. shall be jointly and severally liable for the balance of the special costs with Janice Switlo severally liable for costs at Scale B, all to be assessed.
- [38] With respect to the defendant Jennifer Howard she did not appear to oppose the plaintiffs request for costs. The plaintiffs are entitled to their costs at Scale B given they were successful in their claims against her.

Denial of Costs to Successful Defendants

[39] The plaintiffs submit that the Court should deny the successful defendants their costs due to the fact that the defendant's document production was neither timely nor complete. They rely on *LeClair v. Mibrella Inc.*, 2011 BCSC 533, where Mr. Justice Voith noted at paras. 10-11:

[10] The following legal principles are relevant:

- i) Costs represent an important instrument by which courts can either promote or, conversely, sanction given conduct. Rule 14-1(9) provides one means of achieving this overarching object. The broad role served by cost awards is captured in the following statements:
 - a) In *Houweling Nurseries Ltd. v. Fisons Western Corporation* (1988), 49 D.L.R. (4th) 205 at 226, 37 B.C.L.R. (2d) 2 (C.A.) at 25, leave to appeal ref'd, [1988] S.C.C.A. No. 200, [1988] 1 S.C.R. ix, McLachlin J.A., as she then was for the courts, said:

Parties, in calculating the risks of proceeding with a particular action or defence, should be able to forecast with some degree of precision what penalty they face should they be unsuccessful.

- b) In *Karpodinis v. Kantas*, 2006 BCCA 400 at para. 4, Hall J.A., for the court, said:

Cost considerations are meant to guide counsel and litigants in the choices and strategies they pursue in litigation. ...

- c) In *Skidmore v. Blackmore* (1995), 122 D.L.R. (4th) [330], 2 B.C.L.R. (3d) 201 (C.A.), Cumming J.A., speaking for a five member panel of the court, said:

[28] the view that costs are awarded solely to indemnify the successful litigant for legal fees and disbursements incurred is now outdated. A review of Rule 37, which deals with offers to settle, reveals that in certain circumstances a party may be entitled to costs, or double costs, or to no costs at all. One of the purposes of the costs provisions in Rule 37 is to encourage conduct that reduces the duration and expense of litigation, and to discourage conduct that has the opposite effect. Thus, although it is true that costs are awarded to indemnify the successful litigant for legal fees and disbursements incurred, it is also true that costs are awarded to encourage or to deter certain types of conduct.

[Emphasis added.]

- d) Recently, in *Catalyst Paper Corporation v. Companhia de Navegação Norsul*, 2009 BCCA 16, Hall J.A., in the context of addressing Rule 57(9), said:

[15] In the recent case of *Bedwell v. McGill*, 2008 BCCA 526, a case dealing with a particular aspect of costs not relevant to this appeal, Newbury J.A., for the court, at para. 33, noted the purpose of former R. 37(24) as being "aimed at encouraging litigants to settle wherever possible, thus freeing up judicial resources for other cases."

[16] 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.

ii) The onus is on the person who seeks to displace the usual rule that costs follow the event: *Grassi v. WIC Radio Ltd.*, 2001 BCCA 376 at para. 24.

iii) Though Rule 14-1(9) conveys a discretion to the court, that discretion is to be exercised in a "principled way": *Rossmo v. Vancouver Police Board*, 2003 BCCA 677 at para. 59; or on "sound principle": *Brown v. Lowe*, 2002 BCCA 7 at para. 147.

iv) The exercise of discretion must be connected to the conduct (or misconduct) of a party in the litigation: *Lawrence v. Lawrence*, 2001 BCCA 386 at paras. 31-32; *Smith v. City of New Westminster*, 2004 BCSC 1304 at para. 9.

v) The conduct in question can arise either at trial or at some earlier stage in the proceeding. For example, conduct that has been held to justify a denial of costs includes giving false evidence on discovery: *Brown* at para. 149-150. It also includes a failure to make timely and thorough production of relevant documents; *Forsyth v. Pender Harbour Golf Club Society*, 2006 BCSC 1108 at para. 72.

vi) Costs are not to be used to sanction a party whose evidence was exaggerated or who gave evidence in error: *Brown* at para. 149. Where the appropriate dividing line lies was explained in each of *Roberts v. Wilson* (1997), 10 C.P.C. (4th) 188 (B.C.S.C.) at para. 25; *Cardwell v. Perthen*, 2007 BCSC 366 at para. 13; *Noyes v. Stoffregen*, [1995] B.C.J. No. 73 at paras. 79-80.

vii) Where a court concludes that a party has intentionally or deliberately sought to mislead the court that party will normally be deprived of its costs: *Medeiros v. Vuong*, 2001 BCSC 326 at para. 12.

[11] I would add the following additional comments. First, Rule 14-1(9) is not intended to provide an unsuccessful party with an opportunity to parse through the litigation conduct of the opposing party searching for behaviour that might be criticized. I do not say that the discretion which is conferred in Rule 14-1(9) is limited to exceptional cases. The Rule is not, however, intended to address imperfect or less than optimal conduct. It is generally not intended to address questionable judgment. Instead it provides the court with an objective means of communicating its censure in relation to conduct that manifestly warrants rebuke.

[40] They also refer to *Forsyth v. Pender Harbour Gold Club Society*, 2006 BCSC 1108 at para. 72:

- [72] Plaintiff's counsel faces a very difficult task as the trial date approaches in any litigation. He or she must advise their client about the economics of proceeding to trial, thereby incurring significant costs and exposing the client to an additional award of costs in the event they are unsuccessful. Almost all litigation can be settled short of trial even it is settled by abandonment of the plaintiff's claim with or without payment of court costs. Failure by a party to disclose relevant facts in a timely way frustrates this process. A defendant who does so should not be rewarded with costs, even though the plaintiff is unsuccessful at trial.
- [41] While the defendants Sandra Robinson and Wendy Bolton were sympathetic to the view of the other defendants they were not found to have made the defamatory allegations. I am not satisfied that their conduct "manifestly warrants rebuke".

Sanderson or Bullock Order

- [42] As noted earlier the plaintiffs seek an order that the costs of the defendants Sandra Robinson and Wendy Bolton be paid directly to them by the unsuccessful defendants by way of a Sanderson order. Rule 14-1(18) grants the Court the discretion to order that the costs of one defendant be paid by another defendant.
- [43] In *Davidson v. Tahtsa Timber Ltd.*, 2010 BCCA 528, Kirkpatrick J.A. reviewed Sanderson and Bullock orders as follows:
- [50] In *Fraser, Horn & Griffin, The Conduct of Civil Litigation in British Columbia*, 2nd ed. Looseleaf (Markham: LexisNexis, 2007), the authors explain at para. 38.19:

Rule 14-1(18) [formerly Rule 57(18)] provides that the court may order that a successful plaintiff pay the costs of a successful defendant and recover such costs as a disbursement against an unsuccessful defendant. Such order is commonly known as a Bullock order. The Rule also provides that the court may, as an alternative, order that the unsuccessful defendant pay the costs of the successful defendant directly. Such order is commonly known as a Sanderson order. A court may make such order where there is more than one defendant in an action and also where actions have been consolidated for trial or ordered to be tried at the same time.

Where all parties are solvent, it does not matter much which form of order is made. The advantage of a Sanderson order in such a case is confined to avoiding circuitousness.

If the unsuccessful defendant is insolvent, then the Bullock form of order imposes a hardship upon the plaintiff who may recover nothing from the unsuccessful defendant and yet has to pay the successful defendant. A Sanderson form of order, on the other hand, imposes the hardship upon the successful defendant. Where the successful defendant is blameless, the courts have generally refused to make a Sanderson order. [Footnotes omitted.]

- [44] In *Robertson v. North Island College Technical and Vocational Institute et al.* (1981), 119 D.L.R. (3d) 17 at 23-24, (1980), 26 B.C.L.R. 225 (C.A.), McFarlane J.A. stated.

The Sanderson and Bullock cases show that the rule is a rule relating to the exercise of the trial Judge's discretion on a matter of costs. It is no different from any other matter of costs. It is inappropriate that the discretion should be whittled away by drawing fine points of comparison between one case and another, and creating a set of legal principles that in the end prevent trial Judges from exercising the discretion that they are intended to have over matters of costs.

There is a threshold question. It is expressed by Vaughan Williams L.J. in *Besterman v. British Motor Cab Company Ltd.* [1914] 3 K.B. 181 at p. 186, a decision of the English Court of Appeal, at page 186, in this way:

Under these circumstances, was it a reasonable thing for the plaintiff in his action against a man who ultimately turns out to be in fact the wrong-doer to join the other defendant in order that the matter might be thoroughly threshed out?

This statement of the threshold question has been widely followed. In this jurisdiction, see for example, *Beach v. Pearce* [1936] 3 W.W.R. 174, 51 B.C.R. 59, a decision of Robertson J.; *Helenius v. Price, Mann et al.* (1967) 60 W.W.R. 569, a decision of Macdonald J.; and *Taylor et al v. The Queen in right of British Columbia et al.; Ankenman et al., Third Parties* (unreported, 7 February 1979, Vancouver Registry No. C763014), a decision of Meredith J.

In my opinion the test enunciated by Lord Goddard, in delivering the judgment of the English Court of Appeal, in *Mulready v. J.H. & W Bell Ltd. et al.*, [1953] 2 All E.R. 215, is merely a statement in negative form of the threshold question enunciated by Vaughan Williams L.J. Lord Goddard's statement, at page 219 [as summarized in the headnote] is in these words:

A "Bullock" order, requiring a defendant against whom judgment in an action has been obtained to pay the costs of a second defendant (against whom the action has been dismissed) direct to that defendant, is not an appropriate order where the plaintiff has alleged independent causes of action against the two defendants and the two breaches of duty alleged are in no way connected.

Once the threshold question is answered affirmatively then the discretion of the trial judge arises. Of course, he may exercise it either way. It is a true discretion. Whether he grants a Bullock order, or not, must depend on his assessment of the circumstances of the case. In my opinion it is inappropriate to trammel that discretion by endeavouring to extract principles from those cases where the discretion was exercised and from those cases where it was refused. The threshold question must be answered affirmatively; the discretion must be exercised judicially; and that is all.

[45] More recently, Abrioux J. in *Maras v. Seemore Entertainment Ltd.*, 2014 BCSC 1842, said this respecting Sanderson orders:

[53] The principles that apply to a Sanderson order include:

- the plaintiff bears the onus of justifying a departure from the usual rule that costs follow the event: 0915406 B.C. Ltd. v. 0834618 B.C. Ltd., 2013 BCSC 1529 at para. 15;

- the test is whether it was reasonable for the plaintiff to sue the successful defendant together with the unsuccessful defendant. There must be something that the unsuccessful defendant did to warrant being made to reimburse the plaintiff for the successful defendant's costs: *Grassi v. WIC Radio Ltd.* Once the threshold question is answered affirmatively then the granting of a Sanderson order becomes an exercise of judicial discretion in determining what is just and fair in the circumstances: *Robertson v. North Island College Technical and Vocational Institute and Wing*, [1981] 26 B.C.L.R. 225 at 228 (C.A.); *Brown v. Lowe*, 2002 BCCA 7 at paras. 129-130;
- a Sanderson order can be granted when there is a close legal relationship between a successful and unsuccessful defendant but it is not required that there be some unusual circumstances; *Brown v. Lowe* at paras. 131-132;
- when exercising its discretion, the court may consider whether it was appropriate for a plaintiff to maintain his or her action against the successful defendant when it becomes apparent during the course of litigation that the claims against that party have no reasonable prospect of success: *Lee (Guardian of) v. Richmond Hospital Society*, 2002 BCSC 862 at para. 58, rev'd on other grounds 2005 BCCA 107;
- .

[46] I accept that it was reasonable and necessary for the plaintiffs to name the two successful defendants. They were clearly sympathetic to and involved with the defendants in opposition to the actions of the plaintiffs. I cannot say it was inappropriate to not seek to have the proceedings against them dismissed or discontinued. The factual circumstances involving the successful defendants were not clear and the legal issues supporting the plaintiffs' claims against them were not clearly unfounded.

[47] I am satisfied that the appropriate order is a Sanderson order. The successful defendants were not blameless. In my view it is not appropriate that the plaintiffs bear the costs of the successful defendants nor seek to recover them from the unsuccessful defendants by way of a Bullock order.

[48] As a result the plaintiffs are entitled their costs against the unsuccessful defendants Morris Amos, Allan Williams Sr. and Janice Switlo as special costs on the terms noted earlier. The costs of the successful defendants Sandra Robinson and Wendy Bolton at Scale B shall be paid directly by the unsuccessful defendants by way of a Sanderson order. The plaintiffs are entitled to their costs at Scale B against the defendant Jennifer Howard.

[49] The plaintiffs are entitled to their costs of this application at Scale B.

"Punnett J."

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