IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Arbabi v. McLelland,*
2024 BCSC 810

Date: 20240527
Docket: S236788
Registry: Vancouver

Between:

Naomi Arbabi

Plaintiff

And

Colleen McLelland

Defendant

Before: Registrar Gaily

Reasons for Decision

Plaintiff, Appearing in Person:	N. Arbabi
Counsel for the Defendant:	G.T. Palm D.A. Hunter
Place and Date of Hearing:	Vancouver, B.C. April 23, 2024
Further written submissions by thse Plaintiff received:	April 30, 2024
Place and Date of Judgment:	Vancouver, B.C. May 27, 2024

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Introduction

[1] This is an assessment of the special costs awarded to the defendant, Colleen McLelland, pursuant to the order of Associate Judge Hughes. In her reasons for judgment, which are indexed at 2024 BCSC 91 (the "Reasons"), Associate Judge Hughes granted Ms. McLelland's application to strike Ms. Arbabi's notice of civil claim (the "Claim") and dismissed Ms. Arbabi's action against Ms. McLelland, awarding Ms. McLelland special costs, payable by Ms. Arbabi. The order was pronounced on January 19, 2024 and entered on February 26, 2024 (the "Order").

[2] Ms. McLelland represented herself on the application before Associate Judge Hughes. After the Reasons were released, on a *pro bono* basis, counsel assisted Ms. McLelland draft and enter the Order, and pursue the assessment and certification of her special costs. In the bill of special costs (the "Bill of Special Costs") attached to the appointment filed on March 15, 2024 (the "Appointment"), Ms. McLelland seeks $21,206.84 as her special costs. At the assessment, Ms. McLelland's counsel submitted a further bill of costs, claiming an additional $8,303.50 in special costs for the period from March 18 through April 22, 2024 (the "Additional Bill of Special Costs").

[3] As detailed below, I have assessed the special costs claimed by Ms. McLelland and allow them at $29,510.34.

Background

[4] The parties are familiar with the background facts, as well as the Claim, and the "Notice of requirement of court" and "Rules of Court" documents, which Ms. Arbabi had appended to the Claim (see the Reasons at paras. 3-12, and 13-15, and Appendix A and B). I will not review the background of the proceedings in this decision.

[5] As noted at the beginning of the Reasons, both Ms. McLelland and Ms. Arbabi represented themselves at the application before Associate Judge Hughes; however, Ms. Arbabi was at the time a practicing member of the Law Society of

British Columbia (the "LSBC") (para. 2) (she resigned her membership after the Reasons were released).

[6] Ms. McLelland applied to strike the Claim pursuant to Rule 9-5(1) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*SCCR*], on the following bases: Ms. Arbabi had no standing to bring the Claim; the Claim should have been brought in the Civil Resolution Tribunal; and the Claim was "in the nature of an organized pseudo-legal commercial argument ("OPCA"), which claims have been found to be frivolous and vexatious by a number of courts" (Reasons, para. 18).

[7] In concluding that the Claim was an abuse of process, and dismissing her action against Ms. McLelland, Associate Judge Hughes found that the Claim fell within several of the grounds set out in Rule 9-5(1), in particular:

> a) The plaintiff's claim does not set out a reasonable legal basis for the claim brought in this court;
>
> b) It is frivolous and vexatious insofar as it denies the authority of the Court. Such a denial is intrinsically frivolous and vexatious: *Meads* [*v. Meads*, 2012 ABQB 571] at para. 556; and
>
> c) It is an abuse of process insofar as the plaintiff has filed her initiating document as an attempt not to litigate legitimately in this Court, but instead to utilize this Court's infrastructure for the purposes of her fictional court: *Parhar v. British Columbia (Attorney General)*, 2021 BCSC 700 at para. 33(d).
>
> (Reasons, para. 32)

[8] Rule 9-5(1) provides that the court may order the costs of the application to strike be paid as special costs. Associate Judge Hughes determined that an award of special costs was appropriate in the circumstances, stating:

> [35] Given that the plaintiff is a member of the Law Society of BC, she has an enhanced obligation to uphold the rule of law. The introduction to the Law Society's *Code of Professional Conduct for British Columbia* provides that "a special ethical responsibility comes with membership in the legal profession". Indeed, the oath taken by all lawyers called to the bar in BC includes a term that the lawyer "will not promote suits upon frivolous pretences."
>
> [36] I find that an award of special costs is appropriate. The defendant shall receive special costs of this proceeding payable by Ms. Arbabi.

[9] As Registrar, my jurisdiction is limited to assessing costs on the basis set out in the Order, which in this case is as special costs (see *567 Hornby Apartment Ltd. v. Le Soleil Restaurant Inc*., 2020 BCCA 69, para. 143 [*567 Hornby*] [leave to appeal refused, 2020 CanLII 71307 (SCC)]).

[10] The evidence in the hearing record to support Ms. McLelland's special costs included the affidavit Ms. McLelland made on March 14, 2024, which was filed on March 15, 2024 ("McLelland Affidavit #3"), and the 2nd affidavit of Greg Palm, the counsel assisting Ms. McLelland, made on March 14, 2024, and filed on March 15, 2024 ("Palm Affidavit #2"). Mr. Palm spoke to the special costs claimed by Ms. McLelland during the period when she represented herself, and his colleague, David Hunter, spoke to the special costs claimed for the work Mr. Palm performed since the Reasons were released.

[11] Ms. Arbabi read into the record her 5th affidavit, which she made and filed on April 22, 2024, the day before the assessment ("Arbabi Affidavit #5").

[12] Mr. Palm exhibited the Additional Bill of Costs to his 4th affidavit, which was made and filed on April 23, 2024 (the day of the hearing) ("Palm Affidavit #4"). At the hearing, I reiterated that I am bound by the Court of Appeal's determination that when special costs "of a proceeding" have been ordered (as they have in this case), the award of special costs includes the cost of any subsequent proceedings to assess costs, unless the court orders otherwise (*567 Hornby*, para. 141).

[13] Because Ms. Arbabi had not been served with Palm Affidavit #4 before the hearing, I granted her leave to file further written submissions, addressing Palm Affidavit #4 and the Additional Bill of Costs, which she was directed to submit to me through Scheduling by April 30, 2024. I also granted Mr. Palm leave to file further written submissions responding to Ms. Arbabi's submissions, if necessary, by May 3.

[14] Ms. Arbabi provided her three-page submissions on April 30, 2024 (the "Arbabi Submissions") and that same day, Mr. Palm advised that he would not be making further submissions in response to the Arbabi Submissions.

The Purported Settlement

[15] At the commencement of the hearing, the parties asked me to resolve the issue of whether an agreement on the amount of Ms. McLelland's special costs for which Ms. Arbabi was liable had been reached prior to the hearing (in other words, had they settled the special costs).

[16] Ms. Arbabi maintains that she agreed to pay Ms. McLelland $14,214.67 and as a result, Ms. McLelland could not claim a different (higher) amount at the assessment. Ms. McLelland admits she had offered to settle her special costs for $14,214.67 before the assessment, but says that the parties did not reach a binding settlement.

[17] At the assessment, I advised the parties that based on the evidence before me, I found they did not reach an agreement on the amount of Ms. McLelland's special costs and I proceeded with the assessment hearing. The following details my determination of this issue.

[18] Rule 14-1 of the *SCCR* governs costs in civil proceedings. Rule 14-1(27) sets out that, on the conclusion of an assessment of costs "or if the party has consented to the amount", a registrar must certify the amount of costs awarded by endorsing the original bill "or by issuing a certificate of costs in Form 64", and the party assessing costs must file the certificate.

[19] The evidence in the record[1] establishes that after the Order was entered, Mr. Palm wrote to Ms. Arbabi and offered to settle Ms. McLelland's special costs for $14,214.67. Mr. Palm advised Ms. Arbabi that if Ms. Arbabi agreed to pay Ms. McLelland this amount, she was to sign the certificate of costs Mr. Palm enclosed with his correspondence, and return it to Mr. Palm by March 8, 2024. The certificate

[1] Correspondence between the parties regarding the possible settlement of Ms. McLelland's special costs is exhibited to Ms. Arbabi's 4th affidavit, which she made and filed on April 17, 2024 ("Arbabi Affidavit #4"), and to Mr. Palm's 3rd affidavit, which he made April 18 and filed on April 19, 2024 ("Palm Affidavit #3"), as well as to Arbabi Affidavit #5.

of costs Mr. Palm provided to Ms. Arbabi was in Form 64, the form referred to in Rule 14-1(27) (the "Palm Form 64").

[20] In response to Mr. Palm's correspondence, Ms. Arbabi wrote to Ms. McLelland (and later to Mr. Palm), providing a "notice" indicating that she agreed to pay Ms. McLelland $14,214.67 as her special costs, and that she promised to pay this amount by "no later than March 8, 2064". There is no dispute that Ms. Arbabi did not sign the Palm Form 64 and return it to Mr. Palm by March 8, 2024. Mr. Palm extended the deadline for Ms. Arbabi to accept the proposed settlement, but each time he did, he indicated that to accept the offer, Ms. Arbabi was to sign the Palm Form 64, and return it to him by the indicated date.

[21] In further correspondence, Ms. Arbabi provided a bank draft payable to Ms. McLelland for $5,000.00, reiterating her promise that she would pay the balance in installments, and it would be paid in full by March 8, 2064. Ms. Arbabi also provided Mr. Palm with a signed certificate of costs, which she had modified from the Form 64 in the *SCCR* (the "Arbabi Form 64"). On Arbabi Form 64, after the words "Consented to" and above her signature, Ms. Arbabi has handwritten the phrase: "All rights reserved, none waived". The Arbabi Form 64 also includes the phrase, "The following variation is made pursuant to Rule 22-3(1)" before the following typewritten paragraph:

> NOTICE: The purpose of this certificate is to settle the amount the Plaintiff, Naomi Arbabi, shall pay the Defendant, Colleen McLelland pursuant to the order dated February 26, 2024. This certificate may not be used in any way and or by anyone to cause harm to Naomi Arbabi or anyone else.
> (Underlining in original.)

[22] Mr. Palm advised Ms. Arbabi that Ms. McLelland did not accept the terms of her counter-offer, in particular, that Ms. McLelland did not accept payment of her special costs in installments over a 40-year period and she would not execute the Arbabi Form 64, and that he was proceeding with the assessment of Ms. McLelland's special costs.

[23] Ms. Arbabi maintains that she did not "counter-offer", that she agreed to the amount of special costs of $14,214.67, and that she is not legally required to sign the Palm Form 64 or legally required to agree to pay $14,214.67 by a certain date in order to effect the agreement. She submits that she found "zero legal authority that requires i, to sign a certificate of cost in order to consent to the amount of special costs" and that she found "zero legal authority that indicates the [Order] …. does include a provision that it is payable forthwith and or immediately" (Arbabi Affidavit #5, paras. 7 and 9).

[24] Rule 14-1(13) addresses when costs are payable:

> Rule 14-1(13) *When costs payable* – If an entitlement to costs arises during a proceeding, whether as a result of an order or otherwise, those costs are payable on the conclusion of the proceeding unless the court otherwise orders.

[25] Associate Judge Hughes did not order that Ms. Arbabi could pay the special costs owing to Ms. McLelland by a future date of Ms. Arbabi's choosing.

[26] It is a basic principle of contract law that for a contract to be binding, both parties must agree on its terms and conditions. A settlement agreement is a contract. It was a condition of Mr. Palm's settlement offer that if Ms. Arbabi agreed with the proposed amount of $14,214.67, she was to return the executed Palm Form 64 to him by March 8, 2024 (and the subsequent extended dates). By refusing to sign the Palm Form 64, and by maintaining that she would pay $14,214.67 "no later than March 8, 2064", Ms. Arbabi did not agree to the terms and conditions of the settlement offer Mr. Palm made. As a result, there is no binding agreement that the special costs owing to Ms. McLelland are set at $14,214.67.

Discussion

Applicable Principles

[27] Pursuant to Rule 14-1(3), on an assessment of special costs, the registrar must allow fees that were properly or reasonably necessary to the conduct of the proceeding, having regard to the following factors:

a. The complexity of the proceeding and the difficulty/novelty of the issues involved;

b. The skill, specialized knowledge and responsibility required of the lawyer;

c. The amount involved in the proceeding;

d. The time reasonably spent in conducting the proceeding;

e. Conduct that tended to shorten or unnecessarily lengthen the proceeding;

f. The importance of the proceeding to the party whose bill is being assessed, and the result obtained;

g. The benefit to the party whose bill is being assessed of the services rendered by the lawyer; and

h. Rule 1-3 (*i.e.* proportionality) and any case plan order.

[28] Rule 14-1(5) directs that when assessing costs under R. 14-1(3), a registrar must determine which disbursements have been necessarily or properly incurred in the conduct of the proceeding and allow a reasonable amount for those disbursements.

[29] Rule 14-1(3) contemplates that the party who is awarded their special costs is represented by counsel (R. 14-1(3)(b) and (g) expressly refer to “the lawyer”) and the jurisprudence frequently analogizes special costs to actual legal fees (see, for example, *Gichuru v. Smith*, 2014 BCCA 414, at para. 122 [*Gichuru*]).

[30] However, since 1995, B.C. courts have recognized that special costs may be awarded to a self-represented litigant, as set out in *Skidmore v. Blackmore*, 1995 CanLII 1537 (BC CA) [*Skidmore*].

[31] In *Neural Capital GP, LLC v. 1156062 B.C. Ltd*., 2022 BCSC 1800, at para. 75 [*Neural Capital*], Justice Fitzpatrick commented that the “jurisprudence on the question of methodology for the assessment of special costs for a self-represented litigant is not well developed” in this province, adding that given the rise in the number of self-represented litigants in our courts, “this is no doubt an area ripe for

further consideration." (See also the comments of Justice Sharma in *K.L.M. v. L.K.M.*, 2023 BCSC 1414, [*K.L.M*.] at para. 41.) However, neither *Neural Capital* nor *K.L.M.* involved an assessment of the special costs awarded to a self-represented litigant.

[32] In his submissions, Mr. Palm referred to *City Club Development (Middlegate) Corporation v. Cutts*, 1996 CanLII 8486 (BC SC) [*City Club*] (a decision of Master Doolan, sitting as registrar), and to *McKnight v. Hutchison*, 2014 BCCA 472 [*McKnight*], a decision of Court of Appeal Registrar Outerbridge. (These cases were also discussed by the justices in both *Neural Capital* (paras. 76-83) and *K.L.M*. (paras. 39 and 42) as examples of where a self-represented litigant's special costs have been assessed).

[33] In both *City Club* and *McKnight*, the presiders rejected the "lost opportunity" approach followed in other provinces (in particular, Ontario), which is that the special costs can be based on what the claiming party could have earned had their time not been spent on the litigation: *City Club*, para. 19; *McKnight*, para. 42-43.

[34] In both *Neural Capital*, at para. 80, and *K.L.M.*, at para. 41, the justices noted that the "lost opportunity" approach has been rejected in B.C., both citing *Harrison v. British Columbia (Information and Privacy Commissioner)*, 2008 BCSC 979 [rev'd on other grounds, 2009 BCCA 203], in which District Registrar Bouck (as she then was) reviewed the "lost opportunity" approach and noted that since *Skidmore*, "neither the lost opportunity principle nor the suggested imposition of guidelines on the assessment officer's approach have gained favour in BC" (para. 18).

[35] In *City Club*, based on the narrative set out in the bill prepared by the self-represented litigant, Ms. Cutts (carrying on business as City Club Interiors), her time estimates, and her evidence at the assessment, Master Doolan found that Ms. Cutts spent 40 hours on the proceeding for which she had been awarded special costs (she was the respondent on an appeal from a Small Claims Court action) (para. 17). He then determined that the "reasonably competent solicitor" approach when assessing special costs claimed by a self-represented litigant was "unworkable" and

that the only reasonable approach is to "make the award on a *quantum meruit* basis" (para. 22). He assessed Ms. Cutts' special costs at $3,500.00 (para. 23). However, as Sharma J. noted in *K.L.M.*, "it is not entirely clear how that approach led to the $3,500 special costs award" (para. 42).

[36] In *McKnight*, released 18 years after *City Club*, the Court of Appeal had ordered the respondent, a lawyer who had represented himself during portions of the appeal, to recover his costs "on the basis of 75% of special costs". Registrar Outerbridge considered whether it was appropriate to apply the strict *quantum meruit* approach adopted by Master Doolan in *City Club*, and concluded that he must still consider the factors under the applicable Rules:

> [47] The *quantum meruit* approach was traditionally used where no tariff was available for the assessment of costs (*Paradis v. Bossé* (1892), 1892 CanLII 66 (SCC), 21 S.C.R. 419) and, as is the case with a self-represented lay litigant, where there is no general custom and practice on which to rely to assess the work done (see e.g., *Wright v. Wright* (1994), 1994 CanLII 1841 (BC SC), 93 B.C.L.R. (2d) 358 at paras. 20 - 21). In this Court, for a registrar, an assessment of special costs has come to be guided by the factors in Rule 61(2). As this Court recently clarified, an assessment, whether by a justice or registrar, must also be guided by evidence to permit an objective assessment of a reasonable fee (*Gichuru* at para. 156).
>
> [48] As such, I do not favour a strict application of the *quantum meruit* approach with no regard to the bills presented by the respondent in this assessment or the factors under Rule 61(2). While Rules 61(2)(b) and (g) may be inapplicable to a lay litigant, they can apply to the work of a self-represented lawyer. Given the mandatory language of Rule 61(2), I must apply these factors when possible and I do so when assessing the respondent's bills.

[37] In *McKnight*, Registrar Outerbridge reviewed each of the circumstances set out in what is now Rule 71(3) of the *Court of Appeal Rules*, B.C. Reg. 120/2022 [then Rule 61(2) of the *Court of Appeal Rules*, B.C. Reg. 297/2001], which are analogous to the factors set out in *SCCR* R. 14-1(3) (but do not include reference to proportionality or a case plan). He reiterated that the overarching question is 'always whether a fee claimed is objectively proper or reasonably necessary" (para. 49).

[38] Decisions of the Court of Appeal Registrar are not binding on the Registrar of the Supreme Court, but they provide helpful guidance and I have adopted the same

approach Registrar Outerbridge took in *McKnight* when assessing the special costs claimed by Ms. McLelland.

Analysis

[39] On an assessment of special costs, I must consider the factors set out in R. 14-1(3) in the context of this case, both as they apply to the period when Ms. McLelland represented herself, and to the period when she was assisted by counsel.

The complexity of the proceeding and the difficulty/novelty of the issues involved

[40] The Claim was one of trespass, resulting from the installation of a divider on the rooftop deck at the condominium building where both parties lived, which Ms. Arbabi alleged blocked her views. Because the divider was installed on limited common property at the direction of the strata corporation, the Claim raised strata property law issues, as well questions of standing and the proper forum. While these are not complex or difficult issues of law for a lawyer to address, I find that they are complex issues for a self-represented litigant who is not familiar with strata property law or civil procedure, such as Ms. McLelland, requiring her to spend time researching and familiarizing herself with the law to respond to the Claim (as she attested in the McLelland Affidavit #3, at paras. 3-5, and 8).

[41] Further, I find that the Claim was made more complex than it should have been by the fact that, as Associate Judge Hughes expressly found, it bore many of the indicia of OPCA actions, recognized in *Meads* (Reasons, paras. 30-31).

The skill, specialized knowledge and responsibility required of the lawyer

[42] As has been recognized in the authorities, this factor is not applicable when assessing the special costs awarded to a self-represented litigant when they are representing themselves.

[43] As noted above, the Court has recognized for many years that special costs can be awarded to self-represented litigants, but there are very few authorities

setting out the process by which these special costs are to be assessed to guide self-represented litigants, or counsel for that matter.

[44] I find that the circumstances of this case required specialized knowledge of costs assessments and the authorities addressing the assessment of special costs awarded to self-represented litigants, particularly where the special costs have been ordered against an OPCA litigant.

[45] Mr. Palm was called to the bar in 2001 and practices as a litigator. He is skilled and has specialized knowledge of costs, attesting that his practice focuses on remuneration of lawyers, as well as disputes about costs, and he has written several articles and presented on these topics (Palm Affidavit #2, paras. 2-5, Ex. A).

The amount involved in the proceeding

[46] At the assessment, Ms. Arbabi disputed that the amount involved exceeded $34,200, and could have climbed over $100,000, as Mr. Palm submitted. In the Claim, which Ms. Arbabi filed on October 5, 2023, Ms. Arbabi sought “compensation” of $30,000 for “the 30 days as of the date of this notice since the trespass started”, plus “$1,000 per every additional day until trespass has been remedied in court”, as well as an “administrative cost for the notices of $4,200 as of the date of this notice plus court fees and other expenses” (McLelland Affidavit #3, Ex. A, p. 3).

[47] With respect to her special costs, Ms. McLelland seeks approximately $30,000 (as set out in the Bill of Special Costs plus the Additional Bill of Costs).

[48] While the amount involved in this proceeding may not be large when compared to other cases proceeding through the Court, I acknowledge it is significant to Ms. McLelland.

The time reasonably spent in conducting the proceeding

[49] I find McLelland Affidavit #3 to be comprehensive and detailed and very useful in these assessment proceedings. In her affidavit, Ms. McLelland attested that she spent 40.8 hours on this case before Mr. Palm’s involvement, which she detailed

in Schedule A of the Bill of Costs (McLelland Affidavit #3, para. 26). She attested to the steps she took once she was served with the Claim through to her contact with Mr. Palm, estimating the time she spent on the various tasks she performed. I will not describe each of the tasks and her time estimate in detail, but summarize it.

[50] In addition to researching law on strata property issues and OPCA litigants (for a total of 3.3 hours), Ms. McLelland attested that she spent approximately 1.4 hours to prepare her response to the Claim and 4.4 hours to prepare her application to strike the Claim, as well as her affidavit in support. Ms. McLelland attested that she spent 1.2 hours reviewing Ms. Arbabi's response to her application, together with Ms. Arbabi's first and second affidavits, and drafting a short second affidavit (responding to allegations in Ms. Arbabi's affidavits denying that she had been properly served with Ms. McLelland's application materials).

[51] On the occasions she came to the courthouse to file materials, Ms. McLelland attested that she spent time observing chambers to prepare herself for the application before Associate Judge Hughes (a total of 9.5 hours, which included her travel time and the time at the Registry). Ms. McLelland attested that the day before the hearing before Associate Judge Hughes, she spent two hours reviewing materials and preparing for the application hearing. She attested that her application was the last matter heard on the chambers list on November 29, 2023, and she waited at the courthouse all day to be heard, estimating that she spent 9.2 hours on the proceeding that day, which includes her travel time.

[52] Ms. McLelland attested that she included her travel time from Surrey, where she is currently residing, to Vancouver when she filed materials and when she attended for the hearing before Associate Judge Hughes. Because she has mobility issues, Ms. McLelland's travel time involved driving from Surrey to her apartment in Vancouver, where she has free parking, then taking a taxi to the Vancouver courthouse (McLelland Affidavit #3, para. 12).

[53] Mr. Palm attested to the activities that he undertook from the time he started assisting Ms. McLelland on February 5, 2024, to the filing of the Appointment (March

15, 2024), which are detailed in Schedule B to the Bill of Special Costs (Palm Affidavit #2, paras. 8-27).

[54] Mr. Palm and two of his legal assistants recorded a total of 20.2 hours as detailed in Schedule B. During this period, Mr. Palm drafted the Order, which Ms. Arbabi refused to sign because she "did not see the benefits" in doing so, as she set out in an email to him of February 20, 2024 (Palm Affidavit #2, para. 14, Ex. C, p. 53). Mr. Palm then filed a requisition with an accompanying affidavit, enabling the Order to be entered without Ms. Arbabi's endorsement. Once the Order was entered, Mr. Palm filed a certificate of judgment, which was then registered on Ms. Arbabi's property, based on his concern that Ms. Arbabi would not pay the special costs in a timely fashion. As detailed above, during this time, Mr. Palm also engaged with Ms. Arbabi attempting to settle Ms. McLelland's special costs before the Appointment was filed.

[55] The Additional Bill of Special Costs is exhibited to Palm Affidavit #4, showing that Mr. Palm, Mr. Hunter and their assistants spent 13.8 hours assisting Ms. McLelland from March 18, 2024 through April 22, 2024. During this time, Mr. Palm was continuing to attempt to settle the special costs with Ms. Arbabi, as well as preparing for the assessment, which involved preparing his affidavit and the hearing record.

[56] Based on the evidence before me, in the circumstances of this proceeding, I find the hours recorded on the Bill of Special Costs detailed in the attached Schedules, and in the Additional Bill of Costs, were reasonably spent in conducting this proceeding.

[57] In particular, I find the hours recorded by Ms. McLelland when she represented herself to be reasonable in the circumstances presented by responding to a litigant such as Ms. Arbabi.

Conduct that tended to shorten or unnecessarily lengthen the proceeding

[58] Ms. McLelland succeeded on the application before Associate Judge Hughes, who dismissed Ms. Arbabi's action, thereby reducing the time the parties spent on court proceedings. However, because of the manner in which Ms. Arbabi drafted the Claim, as well as her response to Ms. McLelland's application, and supporting affidavits, Ms. McLelland was required to spend more time researching and learning civil procedure to deal with the OPCA litigation than she otherwise would have.

[59] At the assessment, Ms. Arbabi said that she took responsibility for the Claim, although she denied that she is an OPCA litigant. The Arbabi Submissions did not address the Additional Bill of Special Costs, as I had directed, but I find that they continue to bear the indicia of OPCA litigation and I do not reproduce them.

[60] I find that Ms. Arbabi's conduct after the Reasons were released unnecessarily lengthened the assessment proceedings, in particular, her refusal to sign the draft Order and her position with respect to the settlement offer made by Mr. Palm detailed above (which is repeated to some extent in the Arbabi Submissions).

The importance of the proceeding to the party whose bill is being assessed, and the result obtained

[61] I find that it was important to Ms. McLelland to have the Claim against her struck and the action dismissed, not least because Ms. Arbabi was seeking "compensation" from her of upwards of $35,000. Ms. McLelland, representing herself, was entirely successful. Associate Judge Hughes found the Claim to be an abuse of process, dismissed Ms. Arbabi's action and ordered her to pay Ms. McLelland her special costs of the proceeding.

The benefit to the party whose bill is being assessed of the services rendered by the lawyer

[62] As has been recognized in the authorities, this factor is not applicable when assessing the special costs awarded to a self-represented litigant when they are representing themselves.

[63] If Ms. McLelland had continued to represent herself after the release of the Reasons, given Ms. Arbabi's position with respect to settling the Order (which she saw no benefit in signing) and securing payment of the special costs she is liable to pay Ms. McLelland (which she insists she will pay over the next 40 years), I have no doubt that she would have spent much more time and incurred further expenses to conclude the assessment process and be paid her special costs.

[64] Since the release of the Reasons, Mr. Palm has ensured that the Order has been entered and a judgment registered against Ms. Arbabi's property, securing payment of the special costs. Mr. Palm and his staff were able to secure a date for the assessment of Ms. McLelland's special costs in less than four months from the release of the Reasons.

[65] I find that Ms. McLelland benefited greatly from Mr. Palm's assistance in ensuring that the Order was entered and the assessment of her special costs proceeded in a timely fashion.

Rule 1-3 (i.e. proportionality) and any case plan order

[66] There was no case plan order in this proceeding. Rule 1-3 sets out the objects of the *SCCR*, which is to "secure the just, speedy and inexpensive determination of every proceeding on its merits", which includes, so far as is practicable, conducting the proceeding in ways that are proportionate to the amount involved in the proceeding, the importance of the issues in dispute and the complexity of the proceeding.

[67] At the hearing, Ms. Arbabi submitted that as a result of these proceedings, she has lost her livelihood. Ms. Arbabi has stated that she ("i") "acknowledge the obligation pursuant to the said order that i, shall pay to the Defendant her special costs of the proceeding, and intend to do so to the best of the ability of i, without causing i, or those in the care of i, harm" (Arbabi Affidavit #5, para. 10).

[68] In *Prescott Strategic Investments Limited Partnership v. Flair Airlines Ltd.*, 2022 BCCA 443, at para. 27, Justice Griffin (for the Court) reiterated that "special

costs are typically only awarded where the conduct of a litigant within the proceeding is reprehensible and deserves censure and rebuke."

[69] I find that in the circumstances of this proceeding, given the basis on which Associate Judge Hughes awarded special costs to Ms. McLelland (namely, because Ms. Arbabi was, at that time she filed the Claim and defended Ms. McLelland's application to strike it, a member of the legal profession), the amount sought as special costs in this proceeding are proportionate to the amount in the Claim, the importance of the issues in dispute, and, in particular, the complexity of the proceeding.

The Fees Claimed as Special Costs

The Legal Fees

[70] Mr. Palm assisted Ms. McLelland on a *pro bono* basis. The authorities recognize that it would be contrary to the interests of justice to ask Ms. McLelland's *pro bono* counsel to bear the financial burden associated with the pursuit of her claim, and have held that special costs include the reasonable value of *pro bono* services provided to the party awarded special costs (see, for example, *Tanious v. The Empire Life Insurance Company*, 2019 BCCA 329, and *PHS Community Services Society v. Canada (Attorney General)*, 2008 BCSC 1453, para. 29).

[71] Mr. Palm's hourly rate is $650, which is commensurate with a lawyer of his level of call, and his time makes up the bulk of the special costs claimed during the period he assisted Ms. McLelland (28.9 hours on both Bills of Special Costs). Mr. Hunter's hourly rate is $575.00 and he recorded 1.1 hours on the Additional Bill of Special Costs. The legal assistants who helped with Ms. McLelland's matter bill at hourly rates of $200 and $160; Ms. Huestis, whose hourly rate is $160 recorded 2.6 hours, and Ms. Roxas, whose hourly rate is $200, recorded 0.4 hours.

[72] Based on the R. 14-1(3) factors discussed above, I find the fees claimed by Ms. McLelland for the *pro bono* services offered to her by Mr. Palm (his colleague

and legal assistants) to be proper and necessary to the conduct of the proceeding, and reasonable in the circumstances.

Ms. McLelland's Fees

[73] As I set out above, I adopt the same approach that Registrar Outerbridge followed in *McKnight* in assessing the fees Ms. McLelland has claimed as her special costs.

[74] On the Bill of Special Costs, Ms. McLelland has claimed $200 per hour for the time she spent on these proceedings when she was representing herself. Mr. Palm submitted that a useful cross-check on the reasonableness of the amount Ms. McLelland claims as her special costs while representing herself is to compare the rate she seeks ($200 per hour) to the "not-at-all unusual modern-day hourly rate of $400" for legal counsel. The authorities hold that as Registrar, I may draw on my own experience in assessing costs and lawyer's bills in determining the reasonableness of fees claimed. In my experience, I find the hourly rate of $200 for the work that Ms. McLelland performed, as detailed above, to be reasonable.

[75] When I consider the circumstances of this case, as well as the relevant R. 14-1(3) factors detailed above, I find the fees claimed by Ms. McLelland at a rate of $200 per hour to be proper for the conduct of the proceedings through to the release of the Reasons and a reasonable amount for the time she spent responding to the Claim as a self-represented litigant.

Disbursements

[76] The disbursements Ms. McLelland claims are set out on the Bill of Special Costs. She claims $616.90 in non-taxable disbursements, and $819.94 in taxable disbursements (including applicable taxes). The non-taxable disbursements include court filing fees, land title office filing fees, as well as parking and copying at the courthouse, and Ms. McLelland's taxi fare and mileage. The taxable disbursements include the fees charged by the notary public who swore Ms. McLelland's affidavits, her printing, scanning and copying costs, as well as binders, and the fees charged

by the process server Ms. McLelland retained after Ms. Arbabi attested she had not been properly served with Ms. McLelland's application materials.

[77] Ms. McLelland attested to the disbursements she claimed (as I set out above) and exhibited receipts for all of them, except her mileage, which she calculated by multiplying the mileage recovery rate allowed by Canada Revenue Agency ($0.54 per kilometre) by 260, which is the distance she calculated for her trips to and from Surrey to Vancouver, and to Mr. Palm's office (McLelland Affidavit #3, paras. 27-28, Exhibits K, L, M, N, O, P, Q and R).

[78] There are no disbursements claimed on the Additional Bill of Special Costs.

[79] Based on the evidence before me, I find that the disbursements claimed by Ms. McLelland (both taxable and non-taxable) were necessarily and properly incurred for the conduct of the proceedings, and I find that the amounts claimed are reasonable in the circumstances.

Disposition

[80] I find that in the circumstances of this case, having regard to the factors set out in R. 14-1(3) detailed above, the amounts claimed by Ms. McLelland as her special costs in the Bill of Special Costs and the Additional Bill of Costs were properly and reasonably necessary to the conduct of these proceedings, which includes both the application before Associate Judge Hughes and the assessment.

[81] Accordingly, I allow Ms. McLelland her special costs at $29,510.34 (which includes fees, disbursements and applicable taxes).

[82] Because I have assessed the special costs, neither party's signature is required on the Form 64 certificate of costs.

[83] Ms. McLelland is directed to file in the Vancouver registry a certificate of costs in Form 64 for my signature showing that the amount of special costs allowed after assessment is $29,510.34 on the date of this decision.

“Registrar Gaily”