COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Vassilaki v. Vassilakakis,* 2024 BCCA 15

Date: 20240116
Docket: CA49191

Between:

John Vassilaki and Florio William Vassilakakis

Appellants
(Petitioners)

And

Florio Michael Vassilakakis, George Ioannis Vassilakakis, Nicholas Vassilakakis, JPN Holdings Ltd. and Vassilaki & Sons Investments Ltd.

Respondents
(Respondents)

Before: The Honourable Mr. Justice Harris
The Honourable Mr. Justice Willcock
The Honourable Mr. Justice Hunter

On appeal from: An order of the Supreme Court of British Columbia, dated June 6, 2023 (*Vassilaki v. Vassilakakis*, 2023 BCSC 960, Penticton Docket S48326).

Counsel for the Appellants:	G. Douvelos
Counsel for the Respondents, Florio Michael Vassilakakis, George Ioannis Vassilakakis, Nicholas Vassilakakis:	J.D. Shields
Counsel for the Respondents, JPN Holdings Ltd. and Vassilaki & Sons Investments Ltd.	J.A. Dawson
Place and Date of Hearing:	Vancouver, British Columbia December 11, 2023
Place and Date of Judgment:	Vancouver, British Columbia January 16, 2024

Written Reasons by:
The Honourable Mr. Justice Hunter

Concurred in by:
The Honourable Mr. Justice Harris
The Honourable Mr. Justice Willcock

Summary:

The appellants appeal the dismissal of their application for oppression remedies under the Business Corporations Act. The chambers judge held that the appellants had not led sufficient evidence to establish the reasonable expectations they asserted. The application was dismissed with special costs on the basis that the appellants had proceeded with reckless indifference as to the evidence needed to establish their claim. Held: appeal allowed in part. The chambers judge did not err in concluding that the appellants had not met their onus to lead sufficient evidence to establish that their reasonable expectations had been violated. However the circumstances did not support the order for special costs.

Reasons for Judgment of the Honourable Mr. Justice Hunter:

[1] This appeal concerns a petition brought by the appellants seeking shareholder oppression remedies under s. 227 of the *Business Corporations Act,* S.B.C. 2002, c. 57 [*BCA*]. The chambers judge dismissed the petition on the ground that the appellants failed to adduce evidence to establish a reasonable expectation that was breached by the respondents' conduct. The chambers judge also awarded special costs to the respondents because, in her view, the appellants displayed reckless indifference by proceeding with a claim they should have realized was manifestly deficient.

[2] The appellants say that their evidence was uncontroverted and satisfied their burden under s. 227 and that the chambers judge committed a palpable and overriding error of fact in concluding otherwise. The appellants further submit that the chambers judge committed an error of law by misapplying the legal test for awarding special costs.

Background

[3] The personal parties are all related. Consistent with the parties' submissions and the reasons of the chambers judge, I will refer to them by their first names. I mean no disrespect in doing so.

[4] The appellants are John Vassilaki ("John") and his son Florio William Vassilakakis ("William"). The personal respondents are Nicholas Vassilakakis

("Nicholas") and his sons Florio Michael Vassilakakis ("Michael") and George Ioannis Vassilakakis ("George"). John and Nicholas are brothers and William, Michael and George are cousins.

[5] The personal parties are shareholders in the two corporate respondents, JPN Holdings Ltd. and Vassilaki & Sons Investments Ltd. (the "Corporations"). John and William collectively own 44% of the issued common and non-voting common shares of Vassilaki & Sons Investments Ltd. and 44% of the issued Class A and Class B common shares of JPN Holdings Ltd. The personal respondents hold the remaining shares.

[6] The issued shares of the Corporations are as follows:

Vassilaki & Sons Investments Ltd.		
Shareholder Name	**Class of Share**	**Number of Shares from Central Securities Register**
John Vassilaki	Class A Common Class B Non-Voting Common	48 48
Nicholas Vassilakakis	Class A Common Class B Non-Voting Common	48 48
Florio William Vassilakakis	Class A Common Class B Non-Voting Common	16 16
Florio Michael Vassilakakis	Class A Common Class B Non-Voting Common	16 16
George Vassilakakis	Class A Common Class B Non-Voting Common	16 16

JPN Holdings Ltd.		
Shareholder Name	**Class of Share**	**Number of Shares from Central Securities Register**
John Vassilaki	Class A Common Class B Non-Voting Common	300 300
Nicholas Vassilakakis	Class A Common Class B Non-Voting Common	300 300
Florio William Vassilakakis	Class A Common Class B Non-Voting Common	100 100
Florio Michael Vassilakakis	Class A Common Class B Non-Voting Common	100 100
George Vassilakakis	Class A Common Class B Non-Voting Common	100 100

[7] Prior to January 23, 2023, John, Nicholas, William, Michael and George were directors of the Corporations.

[8] On January 23, 2023, a shareholder's meeting was held (the "Meeting"). During the Meeting, a vote was held electing Nicholas, George and Michael as directors of the Corporations, to the exclusion of John and William.

[9] On February 14, 2023, the appellants filed a petition alleging shareholder oppression and seeking remedies under s. 227 of the *BCA* (the "Petition"). The Petition sought the following relief:

> 1. The Respondents, Nicholas Vassilakakis and Florio Michael Vassilakakis, actions be declared oppressive as against the Petitioners.
> 2. The Respondents, not be allowed to remove any funds from the financial institutions which hold monies for the Respondents, JPN Holdings Ltd. and Vassilaki & Sons Investments Ltd.
> 3. That the Petitioner, Florio William Vassilakakis, be appointed a director of the Respondents, JPN Holdings Ltd. and Vassilaki & Sons Investments Ltd., in place of the Respondent, Nicholas Vassilakakis.
> 4. Costs.

> 5. Such further and alternative relief as this Honourable Court Deems just.

[10] The Petition was supported by a single affidavit consisting of three paragraphs, sworn by John ("John's Affidavit"). It provides:

> 1. I am the Petitioner in this matter and as such have personal knowledge of the facts and information deposed of herein save and except where I state such facts to be on information and belief and where so stated I verily believe those facts to be true.
> 2. I have read the Petition that is to be filed at the same time as this Affidavit and under the same style of proceeding, and particularly, the facts set out in Part 2 of the Petition.
> 3. The matters in paragraphs 1 to 13 of the facts set out in Part 2 of the Petition are true.

[11] The "matters" set out in Part 2 of the Petition at paras. 1–7, adopted as true by John's Affidavit, describe the basic facts concerning the parties, the directors of the Corporations, the issued shares of the Corporations and the January 2023 Meeting. The remaining factual bases for the Petition are provided at paras. 8–13 as follows:

> 8. At the SH Meeting the Petitioner, John Vassilaki, informed the shareholders that the Petitioner, Florio William Vassilakakis, should be appointed a director of the Companies together with Florio Michael Vassilakakis, who would replace his father Respondent, Nicholas Vasslilakakis [*sic*], and that Florio William Vassilakakis be appointed in place of the Petitioner, John Vassilaki.
> 9. That would be consistent with the agreement between the Petitioner, John Vassilaki and the Respondent, Nicholas Vasslilakakis [*sic*], when they were appointed as directors so that each of two brothers and their families could be involved in the decision-making of the Companies.
> 10. The Petitioner, John Vassilaki, informed the shareholders of the Companies at the SH meeting that reason for appointing the Petitioner, John Vassilaki, and the Respondent, Nicholas Vasslilakakis [*sic*], as directors was so that one side of the family could not take oppressive action against minority shareholders.
> 11. Despite being informed of this legitimate expectation that each of the family members have a director appointed for the Companies, the Respondents voted to appoint themselves as directors of the Companies to the exclusion of the Respondent, Florio William Vassilakakis.

12. No audited financial statements were presented to the shareholders before the SH meeting, as was required by legislation.

13. The Respondents, by their action or conduct, have threatened to remove funds from the bank that holds funds for JPN Holdings Ltd. and Vassilaki & Sons Investments Ltd., which through their actions intend to deplete the Companies funds for the Respondents Nicholas Vassilakaki [*sic*] and Florio Michael Vassilakakis' own personal gain or for which they will gain a financial interest or benefit from.

Chambers Judgment

[12] In reasons indexed at 2023 BCSC 960 [*RFJ*] the chambers judge dismissed the claims for relief in the Petition and ordered special costs against the appellants.

[13] At the outset of her reasons, the chambers judge commented on the brevity of the materials provided. She identified three flaws in the evidentiary basis for the Petition:

a) Portions of the petition which are affirmed/sworn to be true by John are not admissible on the basis that they are conclusory statements without the underlying factual foundation;

b) Despite what para. 1 of John's Affidavit says, the petition is primarily seeking final and not interim relief. Statements based on information and belief are thus presumptively inadmissible under R. 22 2(13) of the Rules; and

c) Most significantly, there are demonstrative gaps in the evidence needed to establish the factual foundation for the relief sought from this Court in the petition.

RFJ at para. 23.

[14] With regard to the "demonstrative gaps" in the evidence, the chambers judge made the following findings:

1. There is no evidence before me as to what statute or statutes the Corporations are incorporated under …;

2. There are no minutes of the meeting as are required to be kept pursuant to s. 179 of the *BCA* …;

3. John's Affidavit fails to attach the existing articles of incorporation for the Corporations which establish the basic corporate governance procedures for the Corporations;

4. John's Affidavit does not contain any evidence as to whether William was actually nominated for election as a director of the Corporations

> at the Meeting. There is also no evidence of his eligibility to act as a director under s. 124 of the *BCA* …;
>
> 5. John's Affidavit does not contain any information as to the historical directorship of the Corporations …;
>
> 6. The Court also has no evidence as to what authority the Meeting was called upon …;
>
> 7. John's Affidavit does not provide any information as to what the Corporations' operations are…it is virtually impossible to assess what a shareholder's reasonable expectations are without even basic facts as to the operations of the Corporations; and
>
> 8. Finally, there are no particulars whatsoever as to an "agreement" between John and Nicholas that each of the two brothers and their families could be involved in the decision making of the Corporations apart from the fact that it was apparently made when John and Nicholas were appointed as directors. However, I do not even know when that was. Further the language "could be involved" and "decision making" are ambiguous.
>
> *RFJ* at para. 24.

[15] The chambers judge began by reviewing the principles emerging from the leading Supreme Court of Canada decision *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69 [*BCE*]. She referred to Justice Brundrett's discussion of *BCE* in *Dalpadado v. North Bend Land Society,* 2018 BCSC 835 at paras. 99–102, 105–106 and excerpted the following summary of principles from *Cote v. Milltown Marina & Boatyard Ltd.,* 2015 BSCC 2033 at para. 66:

> • The court has a "broad, equitable jurisdiction to enforce not just what is legal but what is fair". Courts considering claims for oppression "should look at business realities, not merely narrow legalities" (para. 58);
>
> . . .
>
> • The petitioner "must identify the expectations that he or she claims have been violated by the conduct at issue and establish that the expectations were reasonably held" (para. 70);
>
> • The existence of a reasonable expectation is to be determined objectively, based on the circumstances. The actual or subjective expectations of the petitioner are not determinative (para. 62); [and]
>
> • Factors that may be relevant to determining whether a reasonable expectation exists include: general commercial practice; the nature of the corporation; the relationship between the parties; past practice; steps party claiming relief could have taken to protect itself;

> representations and agreements; and the fair resolution of conflicting interests between corporate stakeholders (paras. 72–81).
>
> *RFJ* at para. 37.

[16] The chambers judge also referenced this Court's decision in *Hui v. Hoa,* 2015 BCCA 128 concerning the application of shareholder oppression remedies in the context of a family business: *RFJ* at para. 39, citing *Hui* at paras. 38, 40.

[17] The parties agreed that the burden fell on the appellants to establish a reasonable expectation that was breached by the respondents' conduct, and that through an objective standard, the breach constituted oppressive or unfairly prejudicial conduct: *RFJ* at para. 50, citing *BCE* at para. 165.

[18] The chambers judge found that the appellants had not presented sufficient evidence to establish, under the first part of the *BCE* inquiry, a reasonable expectation that William would be elected as a director at the Meeting: *RFJ* at para. 54. The chambers judge stated:

> [55] Essentially all that I know is that the Corporations are closely-held family companies and that up to the date of the Meeting there were five directors. I do not know what their operations are so as to assess "general commercial practice". I do not have the articles of the Corporations. I have no evidence as the historical directorship of the Corporations to assess past practice. I have no minutes of the Meeting to confirm what John says was discussed. I do not even know the authority upon which the Meeting was being held. I simply have the conclusory statement which John adopts from para. 9 the petition…
>
> [56] As described by counsel for the personal respondents at the hearing of the petition, this may have been a "wish list" but the proof falls short of it being a reasonable expectation, even with recognition of the family dynamics of closely-held family corporations. This does also dovetail to the point referred to above by N. Smith J. in *Cote*, that a basic shareholders agreement could have alleviated at least this portion of the dispute between the two sides of the family.
>
> [57] Having concluded that the claim for relief pursuant to the Oppression Remedy fails on step 1 of the *BCE* analysis, consideration of step 2 of the *BCE* analysis is rendered unnecessary. I will note, however, that the failings in the evidentiary record similarly preclude this Court from finding that the petitioners have satisfied the burden of proving that the change in directorship at the meeting establishes that the reasonable expectation (which I have found was not proven) was violated by conduct falling within the definition of "oppressive" or "unfairly prejudicial" as defined above in the caselaw.

[19] Having found that the appellants failed to satisfy their burden, the chambers judge dismissed all claims for relief in the Petition: *RFJ* at para. 58.

On Appeal

[20] There are two issues on appeal:

1. Did the chambers judge err by finding that the appellants had not satisfied their burden of proof under s. 227 of the *BCA*?

2. Did the chambers judge err by awarding special costs?

Standard of Review

[21] Questions of law are reviewable on a standard of correctness. These include issues concerning the interpretation of the *BCA*. A standard of palpable and overriding error applies to findings of fact and findings of mixed fact and law where a legal principle is not readily extractible: *Housen v. Nikolaisen,* 2002 SCC 33 at paras. 8–12, 36.

[22] In *Khela v. Phoenix Homes Limited,* 2015 BCCA 202, this Court set out the standard of review that applies to a judge's decision whether to grant an oppression remedy under s. 227:

> [37] Whether to grant an oppression remedy under s. 227 is a discretionary decision, and is afforded significant deference on appellate review. This Court may not interfere with the order of the chambers judge dismissing the Khelas' claims unless he acted on a wrong principle, wrongly exercised his discretion by not giving sufficient weight to relevant considerations, or made a decision that results in an injustice: *Goldbelt Mines Inc. (N.P.L.) v. New Beginnings Resources Inc.* (1985), 59 B.C.L.R. 82 at para. 21 (C.A.).
>
> [38] Further, whether conduct amounts to oppression is a question of mixed fact and law. In the absence of an extricable legal error, such a finding is reviewable on the standard of palpable and overriding error: *Stahlke v. Stanfield*, 2010 BCCA 603 at paras. 21, 25; *1216808 Alberta Ltd. (Prairie Bailiff Services) v. Devtex Ltd.*, 2014 ABCA 386 at para. 24.

[23] The chambers judge's finding that the appellants failed to establish a reasonable expectation is a finding of mixed fact and law that should not be overturned absent palpable and overriding error.

Analysis

[24] In my respectful view, the issues raised by the appellants in this appeal are fully answered by the test for shareholder oppression as set out by the Court in *BCE*:

> [95] As discussed above (at para. 68), in assessing a claim for oppression a court must answer two questions: (1) Does the evidence support the reasonable expectation the claimant asserts? and (2) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?
>
> [Emphasis added.]

[25] The chambers judge understood the test that applied and her reasons contain a careful discussion of the relevant principles. She concluded that the evidence was insufficient to establish the existence of a reasonable expectation and that the court would have been similarly precluded from determining whether the reasonable expectation, if established, had been violated by conduct which was "oppressive" or "unfairly prejudicial": *RFJ* at para. 57.

[26] The appellants submit that the only admissible evidence was provided by John's Affidavit, and to find against the appellants, the chambers judge had to find contradictory evidence. The appellants are effectively rearguing the same issue that was before the chambers judge without pointing to any error in the chambers judge's reasoning or any evidence capable of supporting a different outcome.

[27] The chambers judge correctly held that John's Affidavit could not be tendered for its conclusory statements concerning the reasonableness or legitimacy of John's expectations. As Madam Justice Newbury explained in *1043325 Ontario Ltd. v. CSA Building Sciences Westerns Ltd.,* 2016 BCCA 258 [*1043325*], for the purposes of the shareholder oppression remedy, the "actual expectations" of a shareholder are not conclusive. Rather, the shareholder oppression analysis concerns itself with

"reasonable expectations", which are those "arising out of the web of statutory provisions, articles or bylaws, contractual terms, familial and personal relationships and other contextual factors": *1043325* at paras. 55–56.

[28] In *Callahan v. Callahan*, 2022 BCCA 387, Justice Newbury for the Court provided further guidance to explain the precondition for a s. 227 remedy. The expectations of a person seeking relief under s. 227 must be *reasonable in the corporate context in which they arise*: para. 39, emphasis in original. The concept of reasonable expectations is objective and contextual: para, 39, citing *BCE* at para. 62.

[29] To assess the reasonableness of a shareholder's expectations, it is essential to examine the corporate rights of the parties as stakeholders in the corporation, not as members in a family: *Hui* at para. 38. This requires evidence. At a minimum the corporate documents must be filed so that the corporate rights of the parties can be fully understood.

[30] None of the contextual factors necessary to establish a reasonable expectation were before the chambers judge. The appellants did not lead evidence concerning relevant statutory law, the articles or bylaws of the Corporations, the basic information underlying the alleged "agreement", nor the familial and personal relationships of the parties.

[31] Taking the appellants' evidence to the fullest extent of its probative value, the only thing proven is that John expected William or possibly himself to be elected as a director of the Corporations, on the basis of an alleged agreement with Nicholas. The existence of the agreement and the reasonableness of any expectation flowing from it were wholly undeveloped. The fact that John communicated his expectation at the Meeting did not render it reasonable. In arguing otherwise, the appellants simply ignore the objective aspects of the *BCE* test.

[32] I can see no error in the chambers judge's conclusion that the minimal evidence filed did not establish that the appellants' expectations were reasonable on the *BCE* standard.

Special Costs of the Application

[33] An award of special costs is a discretionary award demanding deference. It should only be set aside on appeal if the judge made an error of law or principle, or a palpable and overriding error of fact, or was clearly wrong: *Malik v. Eagle Mountain Farms (A Partnership)*, 2021 BCCA 379 at para. 26.

The Chambers Judgment

[34] On the chambers application, the respondents sought special costs pursuant to R. 14-1(1) of the *Supreme Court Civil Rules* on the primary basis that the Petition raised an unsubstantiated allegation of misconduct, and on the secondary basis that the Petition was manifestly doomed to fail.

[35] The chambers judge found that the Petition only alluded to a concern about funds being removed from bank accounts belonging to the Corporations rather than raising the more specific allegation that funds had actually been removed: *RFJ* at para. 65. In the chambers judge's view, this was "essentially a throw away allegation which was perhaps imprudently included in the petition but which does not in and of itself meet the standard of reprehensible conduct.": *RFJ* at para. 65.

[36] However, the chambers judge concluded that a special costs award was appropriate because the appellants had displayed "reckless indifference" by not seeing early on that their claim was manifestly deficient: *RFJ* at para. 68. She found that the appellants were aware, in March 2023, that the respondents had elected not to tender any evidence in response to the Petition and it should have been apparent to the appellants that the Petition had no chance of success unless further evidence was tendered: *RFJ* at para. 67.

[37] The judge was aware that further evidence might well be available on the question of reasonable expectations and made the following comments:

> [66] … This is challenging because it may be that there was further evidence available to be led which would have allowed this Court to engage in a more fulsome analysis of the stage 1 reasonable expectations analysis in BCE. Whether the reasonable expectation could have been proven on that evidence remains unclear, but there surely was other evidence that could have assisted the Court in its analysis as identified above.

[38] She found, however, that "it ought to have been clear to the petitioners that the petition had no chance of success unless further evidence was tendered" and concluded that this was "a situation where a party has displayed 'reckless indifference' by not seeing early on that its claim was manifestly deficient", meriting an award of special costs against the appellants: paras. 67–69.

[39] On appeal, the appellants argue that the decision to proceed with the basic information contained in the petition was reasonable in light of the lack of contrary evidence filed by the respondents. The appellants further submit that if that tactical decision was not correct, costs should be awarded against the appellants, but special costs are not warranted for a decision to rely on the only evidence filed in the proceeding, even if that decision turns out to be unwise.

Analysis

[40] Special costs may be awarded when a party has engaged in reprehensible conduct during the course of the litigation: *Garcia v. Crestbrook Forest Industries Ltd.,* (1994), 9 B.C.L.R. (3d) 242 (C.A.).

[41] One form of conduct that has typically attracted an order for special costs is an unfounded allegation of serious misconduct such as fraud or perjury: *Mayer v. Mayer Estate*, 2020 BCCA 282 at paras. 39–44.

[42] The chambers judge held that the allegations in the Petition relating to the respondents did not meet the standard of reprehensible conduct, a conclusion with which I agree.

[43] The issue on appeal is whether it was open to the judge to award special costs on the basis that by pursuing a claim they should have known was "manifestly deficient", the appellants displayed reckless indifference to such a degree that special costs were warranted. The judge expressed her conclusion in this way:

> [68] I find, described by Mr. Justice J. Williams as cited above, this is to be a situation where a party has displayed "reckless indifference" by not seeing early on that its claim was manifestly deficient.

[44] The "manifestly deficient" principle relied on by the chambers judge is based on a statement by Justice Williams in *Webber v. Singh*, 2005 BCSC 224 [*Webber BCSC*] that "special costs may be ordered where a party has displayed 'reckless indifference' by not seeing early on that its claim was manifestly deficient". The authority for this statement in *Webber BCSC* is stated to be *Concord Industrial Services Ltd. v. 371773 B.C. Ltd.,* 2002 BCSC 900.

[45] However, the special costs order in *Webber BCSC* was set aside on appeal: *sub. nom. Webber v. Dulai Roofing Ltd*., 2006 BCCA 501 [*Webber BCCA*]. In *Webber BCCA*, Justice Lowry explained the basis for the reversal in these terms:

> [18] Certainly, the mere fact that Dulai took a position that proved to be legally ill-founded and that it sought to challenge Jhajj's rather unique 1/100 registered interest as being his true beneficial interest was in no way conduct that was reprehensible and deserving of rebuke. The three authorities on which the judge relied in particular speak to the situation where litigants are careless or indifferent with respect to the facts on which they have advanced unmeritorious positions with serious repercussions. The considerations in this case are not the same where, with the benefit of legal advice, Dulai simply took a position that proved not to be sound. There is nothing in its conduct justifying an award of special costs against it.
>
> [Emphasis added.]

[46] In *Merit Consultants International Ltd. v. Chandler,* 2014 BCCA 121, this Court set aside a special costs order made by reference to the principle in *Concord Industrial Services* that was relied upon by the chambers judge in the case at bar. Justice Newbury made the following comments:

> [44] There is a fine line between the bringing of an action that has little chance of success but which the plaintiff *bona fide* believes in, and the assertion of hopeless arguments recklessly or spuriously. I am mindful of the

comments of Cumming J.A. in *Young v. Young* (1990) 50 B.C.L.R. (2d) 1 (C.A.), rev'd on other grounds [1993] 4 S.C.R. 3:

> Solicitors who think that they may be mulcted in costs for advancing points which they honestly believe to be fairly arguable may not act fearlessly and in the best traditions of an independent profession. If solicitors are limited in what they think they can say or do on behalf of their clients, then the rights of those clients are also necessarily limited. The potential for a chilling effect, especially if solicitors may be exposed to orders that they pay costs as between solicitor and client, the repercussions on solicitors' positions and consequently upon that of their clients, if adverse costs awards are made, underscore the need for judges to exercise caution in the making of such orders. [At 63–4.]

[47] The statement in *Webber BCSC* that "special costs may be ordered where a party has displayed 'reckless indifference' by not seeing early on that its claim was manifestly deficient" has not been endorsed by this Court, and I would not do so now. As a principle, it comes too close to penalising a party simply for bringing a claim with no merit, which has never been a basis alone for awarding special costs.

[48] In my view, something more is required than a meritless case that the plaintiff ought to have recognized was deficient. In *Webber BCCA*, this Court recognized that "carelessness or indifference with respect to the facts on which they have advanced unmeritorious positions with serious repercussions" could be characterized as reprehensible conduct, but not, with the benefit of legal advice, taking a position that proved not to be sound. In *Malik*, this Court endorsed the appropriateness of an award of special costs "where a party pursues a meritless claim and is reckless with regard to the truth": *Malik* at para. 31, emphasis added.

[49] Justice Saunders explained the need for an "extra element" to support a special costs award against a party whose claim has failed on the merits in *Berthin v. British Columbia (Registrar of Land Titles),* 2017 BCCA 181:

> [53] In rare circumstances an entirely meritless claim may attract special costs as observed in *McLean v. Gonzales-Calvo*, 2007 BCSC 648, but those circumstances invariably have an extra element, for example, a case that was utterly without hope so as to amount to misconduct or an abuse of process. In circumstances of an extant appeal which, if successful, would support the litigant, and where the result may seem clear in hindsight but was not so clear as to attract extra costs from this court, I consider special costs as a sanction

> for lack of merit generally are to be eschewed for their potential to chill members of the community from solving disputes in the forum designed for that very purpose. This is an access to justice and openness of the court processes issue.

[50] The difficulty in the case at bar, as the chambers judge recognized, is that it is not possible to determine whether the claim is meritless on the material filed. The appellants made a tactical decision to lead very little evidence, evidently assuming that the respondents would respond and a factual inquiry would ensue.

[51] Instead, the respondents made their own tactical decision to lead no evidence and challenge the application on the onus of proof, which was a successful strategy. That entitles them to costs of the application, but in my opinion does not establish reprehensible conduct on behalf of the appellants supporting a special costs order.

[52] The chambers judge characterized the pleadings as “manifestly deficient”, which is a fair characterization, but she also recognized that the merit of the claim could not be adequately assessed on the evidence filed. There is no suggestion that the appellants were reckless as to the truth of their allegations.

[53] This is not a case where a party has pursued a claim that has turned out to be meritless and was reckless with regard to the truth. This is a case where the appellants filed deficient pleadings based on a theory of their evidentiary burden that was incorrect. While the respondents can fairly say that they warned the appellants of the deficiencies in their pleadings, this is not a case of reprehensible conduct so much as a deficient litigation strategy.

[54] In those circumstances, in my respectful opinion it was not open to the judge to award special costs. I would allow the appeal on the special costs issue and replace that award with ordinary costs.

[55] The respondents have also sought special costs of the appeal. For the reasons I have outlined, I would not award special costs of the appeal, but the respondents are entitled to ordinary costs of the appeal, having prevailed on the central issue on the appeal.

Disposition

[56] I would allow the appeal in part, set aside the order for special costs, and substitute an order for ordinary costs. I would otherwise dismiss the appeal.

[57] The respondents are entitled to the ordinary costs of the appeal.

"The Honourable Mr. Justice Hunter"

I AGREE:

"The Honourable Mr. Justice Harris"

I AGREE:

"The Honourable Mr. Justice Willcock"