

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Zheng v. Anderson Square Holdings Ltd.*,
2024 BCSC 1041

Date: 20240618
Docket: S1912984
Registry: Vancouver

Between:

**Baoming Zhang, Lu Fei Sun, Charlotte Ga Ling Tong, Christopher James Bak
Kan Tong, Xiao Qi Lucy Meng, Chun John Chak, Jie Gao, Xinyu Ji, Yong Song
Zhao, Hua Wei Li, Yan Zhu, Li Min Ma, Wan Cao, Qing Wei Li, Lan Guo, Chi
Sing Ng, Tsang Angela Mun Yee, Ravinder Kaur Hayer, Chun-Yao Wang, Jian
Chung Zheng, Chei Yong Lee, Xue Yu Han, Yong Jun Jiang, Han Yun Lu, Bo
Zhang, Chun Xue Chen, Yuan Tao, Mo Yeung, Tai Fung Chan, Bao Sen Han,
Peng Fei Zhu, Yuan Dong and Vivien Lan Xu**

Plaintiffs

And:

**Anderson Square Holdings Ltd., Keung Sun Ho aka Sunny Ho and Jia An
Liang aka Jeremy Liang**

Defendants

Before: The Honourable Justice K. Loo

Reasons for Judgment Re: Costs

Counsel for Plaintiffs:

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Written submissions:

May 3 and 30, 2024 (plaintiffs)
May 24, 2024 (defendants)

Place and Date of Judgment:

Vancouver, B.C.
June 18, 2024

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Introduction

[1] On February 9, 2024, I pronounced reasons for judgment in this matter (the “Reasons”), finding the defendant Anderson Square Holdings Ltd. (“Anderson Square”) liable to the plaintiffs for damages totalling \$13,093,900. The plaintiffs’ claims against Keung Sun (Sunny) Ho and Jia An (Jeremy) Liang (the “Personal Defendants”) were dismissed.

[2] The proceeding involved a presale of units in a residential development project known as “ALFA” located in Richmond, British Columbia (the “Project”). Anderson Square was the developer of ALFA. The Personal Defendants were the sole directors and officers of Anderson Square.

[3] The plaintiffs signed presale contracts in 2015 and 2016. On July 12, 2019, they received notices from Anderson Square purporting to terminate their contracts. Approximately two years after the termination notices were sent, the Project was completed and the units were offered for sale to other purchasers at higher prices.

[4] The plaintiffs advanced claims against both Anderson Square and the Personal Defendants for breach of contract, inducing breach of contract, unjust enrichment, and breach of the duty of honest performance of a contract.

[5] At para. 137 of my Reasons, after allowing the claims against Anderson Square and dismissing the claims against the Personal Defendants, I held:

Unless there are matters such as settlement offers which would impact this Court’s decision on costs, in which case the parties shall arrange through the registry to make submissions, the plaintiffs’ costs of this action shall be payable by Anderson Square at Scale B, subject to one exception. That one exception is the plaintiff Qing Wei Li who shall not receive any costs of the action on account of his conduct and that of his son in relation to his examination for discovery.

[6] Subsequently, the parties sought leave to make submissions regarding costs. I invited them to make written submissions which I have now considered. In those written submissions, no settlement offers have been brought to my attention.

Issues

[7] The plaintiffs seek special costs, or in the alternative, increased costs of the action from Anderson Square. In response, Anderson Square submits that it should be required to pay costs only at scale B. Further, the Personal Defendants submit that their costs ought to be paid by the plaintiffs.

[8] I will address the issues arising from these positions in turn.

Discussion

Special Costs

[9] The threshold for the awarding of special costs is set out in the well-known decision in *Garcia v. Crestbrook Forest Industries Ltd.*, [1994] B.C.J. 2486, in which the Court of Appeal held:

... it is my opinion that the single standard for the awarding of special costs is that the conduct in question properly be categorized as "reprehensible". As Chief Justice Esson said in *Leung v. Leung*, the word reprehensible is a word of wide meaning. It encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke.

[10] The plaintiffs rely on the decision in *SHH Holdings Limited v. Philip*, 2021 BCSC 1232 wherein Justice Basran set out a variety of circumstances in which special costs may be and have been ordered, including misleading or deceiving the court, giving false evidence under oath, or bringing a proceeding for an improper motive.

[11] However, the Court in *SHH Holdings* also held that these actions will not always give rise to an inference of obstructive conduct, that the Court must exercise restraint in awarding special costs, and that the party seeking special costs must demonstrate exceptional circumstances to justify a special costs order. Moreover, the Court held at para. 14:

Orders of costs should not be made against the principals of corporations if the only evidence is that they were directing the operations of the corporation but can be made if there is fraud, misconduct, or abuse of process ...

[12] In *SHH Holdings*, the Court awarded special costs but, in my view, the facts of that case are distinguishable from those here. In *SHH Holdings*, the party against whom special costs were ordered was found to have been “deceitful and dishonest in the manner in which he conducted himself at the trial”. He deliberately lengthened the trial by repeatedly failing to comply with court orders, deliberately swore a false affidavit, and fabricated evidence in the form of a “hand-delivered” letter.

[13] In this case, the plaintiffs seek special costs on three grounds. First, they submit that the defendants sought to derail the trial by filing a Notice of Intention to make a Proposal (“NOI”) under the *Bankruptcy and Insolvency Act* on the eve of trial. Second, they submit that special costs are warranted based on my finding in the Reasons that Anderson Square acted dishonestly when it terminated its presale contracts with the plaintiffs. Third, they argue that special costs should be awarded because of Mr. Ho’s dishonesty at trial.

[14] With regard to the first of these grounds, I issued oral reasons on November 29, 2023, in relation to the plaintiffs’ application to lift the stay of proceedings automatically imposed following Anderson Square’s filing of the NOI, in which I held that I was not able on the evidence before me to make a specific finding that Anderson Square filed the NOI in order to derail this trial. None of the evidence that I have heard or seen since then has changed my conclusion in this regard.

[15] With regard to the second of these grounds, the Court of Appeal has made it clear that special costs should only be awarded to punish and deter reprehensible conduct in the course of litigation, and that pre-litigation conduct should not be considered in determining whether such an award is appropriate: *Smithies Holdings Inc v. RCV Holdings Ltd*, 2017 BCCA 177 at paras. 133-134.

[16] With regard to the third of these grounds, I found in the Reasons that Mr. Liang gave his evidence in a fairly straightforward manner, but Mr. Ho’s evidence was successfully challenged in a number of ways which raised doubts about his reliability and credibility. However, dishonest or untruthful testimony alone does not attract an award of special costs. There must be something more egregious to

warrant an order for special costs: *Boissonnault v. Marler*, 2021 BCSC 678. In my view, none of my findings regarding Mr. Ho's testimony is sufficient to warrant a conclusion that his conduct at trial was reprehensible.

Uplift costs

[17] The plaintiffs seek increased costs of the proceeding. These are also known as "uplift costs". Sections 2(5) and (6) of Appendix B to the *Rules* provide:

(5) If, after it fixes the scale of costs applicable to a proceeding under subsection (1) or (4), the court finds that, as a result of unusual circumstances, an award of costs on that scale would be grossly inadequate or unjust, the court may order that the value for each unit allowed for that proceeding, or for any step in that proceeding, be 1.5 times the value that would otherwise apply to a unit in that scale under section 3 (1).

(6) For the purposes of subsection (5) of this section, an award of costs is not grossly inadequate or unjust merely because there is a difference between the actual legal expenses of a party and the costs to which that party would be entitled under the scale of costs fixed under subsection (1) or (4).

[18] In *Shen v. West Continent Development Inc.* (BC0844848), 2022 BCSC 462, Justice Maisonville held:

[29] Costs under s. 2(5) are known as uplift costs. To award uplift costs, there must first be unusual circumstances and, second, the unusual circumstances must result in the award of costs being grossly inadequate or unjust: *Chandler v. Rasmussen*, 2013 BCSC 1461 at para. 39.

[30] Uplift costs are meant to indemnify the successful party where there are unusual circumstances, not punish the unsuccessful party: *Sheppard v. Vancouver Coastal Health Authority*, 2021 BCSC 539 at para. 56.

[31] Section 2(5) does not prescribe what constitutes "unusual circumstances" or an award that is "unjust or grossly inadequate". This inquiry is highly fact-specific: *Herbison v. Canada (Attorney General)*, 2014 BCCA 461 at para. 42.

[32] Misconduct may amount to an "unusual circumstance" justifying an award of uplift costs. However, the party asserting misconduct must show there was misconduct deserving of some form of rebuke, including disobedience of court processes, incivility, frivolity, actions taken in bad faith, and impertinence: *J.P. v. British Columbia (Children and Family Development)*, 2018 BCCA 325 at para. 57.

[33] The Court of Appeal in *Berthin v. British Columbia (Registrar of Land Titles)*, 2017 BCCA 181 at para. 41 set out this statement from *ICBC v. Patko*, 2009 BCSC 578 regarding the requirement for misconduct in awarding uplift costs:

[18] It is also clear that before a party's conduct in the litigation process can constitute "unusual circumstances" within the meaning of s. 2(4.1), it must be conduct that is deserving of some form of rebuke: *Gurney v. Gurney*, 2007 BCSC 1745 (uplift not ordered); *Bajwa v. Veterinary Medical Association*, 2008 BCSC 905 (multiplicity of proceedings, failure to provide particulars, failure to abide by document disclosure obligations, general non-compliance with the Rules), *D. v. D.*, 2008 BCSC 1260 (wife's evidence unnecessarily lengthy, uninformative and irrelevant, needlessly and significantly prolonging the trial).

[34] Similarly, in *380876 British Columbia Ltd. v. Ron Perrick Law Corp.*, 2009 BCSC 1209 at para. 37, Justice Allan noted that the following have been cited as factors that may attract an award of uplift costs:

- misconduct by the unsuccessful party;
- the serious nature of the allegations;
- the complexity or difficulty of the issues in the litigation; and
- the importance of the litigation to the parties or to the development of the law generally.

See also *J.P.* at para. 58.

[35] Other factors that could constitute "unusual circumstances" include misbehaviour by a party that added to the expense incurred by the party claiming costs, and the degree of disparity between costs calculated at Scale B and actual legal fees incurred: *Neil v. Martin*, 2022 BCSC 134 at para. 36.

[Emphasis added.]

[19] In the case at bar, I am unable to find that Anderson Square's conduct of the trial, including its filing of the NOI, constitute unusual circumstances that warrant uplift costs. In my view, the positions taken by the defendants in this proceeding were advanced in a professional manner, albeit unsuccessfully. The trial was not characterized by incivility or impertinence. The allegations were serious, but not unusually so. None of the other "unusual circumstances" described in *Shen*, such as unusually complex or difficult or important issues, are found in this action.

[20] Finally, and in any event, I have not been provided with any evidence regarding a disparity between costs calculated at Scale B and the actual legal fees incurred. I am therefore unable to find that an award of costs at Scale B would be grossly inadequate or unjust.

Costs in favour of the Personal Defendants

[21] As indicated above, the plaintiffs' claims against the Personal Defendants were dismissed. I found that all of the claims were barred by the principle in *Said v. Butt* which provides that employees shall not be held liable for their employers' wrongs except in cases involving separate torts, or fraud and dishonesty.

[22] The Personal Defendants cite the decision of this Court in *Antrobus v. Antrobus*, 2012 BCSC 613 at para. 22 for the proposition that mere joint representation with an unsuccessful defendant will not negate a successful defendant's entitlement to costs. That general proposition is undoubtedly correct, but when determining whether a successful defendant jointly represented with an unsuccessful defendant is entitled to costs, the Court must consider whether additional costs were incurred on the successful defendants' behalf: for example, see *Pang v. Zhang*, 2021 BCSC 1435 at paras. 67-70.

[23] In this case, in my view, the claims against the Personal Defendants did not add significant extra expense to the trial. All of the defendants used the same legal counsel, and the Personal Defendants gave evidence on their own behalf and on behalf of Anderson Square. There were arguments made during closing submissions specifically regarding the personal liability of the Personal Defendants but, in my view, those arguments were not so lengthy as to make a significant difference to the defendants' costs in the context of an 18-day trial.

Conclusions

[24] For all of these reasons, I am not prepared to award special costs or uplift costs in favour of the plaintiffs, or any costs in favour of the Personal Defendants. As stated in paragraph 137 of my Reasons, the costs of the plaintiffs, except Qing Wei

Li, shall be payable by Anderson Square at Scale B. There shall be no other awards of costs.

“The Honourable Justice Loo”