IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *De Angelis v. Siermy,*
2024 BCSC 485

Date: 20240325
Docket: S171068
Registry: Vancouver

Between:

Barbara De Angelis

Plaintiff

And

Annie Siermy and J & A Properties Ltd.

Defendants

456804 B.C. Ltd., Nick Kochan, Olga Kochan, B.B.J. Holdings Ltd., Bill Kochan, and John Does #1 Through 20

Third Parties

Before: The Honourable Justice A. Ross

Reasons for Judgment on Special Costs

Counsel for Plaintiff (Respondent):	C. Dennis, K.C. R. Power
Counsel for Defendants (Applicants):	R. Anderson, K.C. M. Wagner K. Smith
Place and Date of Hearing:	Vancouver, B.C. November 6–7, 2023.
Place and Date of Judgment:	Vancouver, B.C. March 25, 2024

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Introduction

[1] This application came before me following the dismissal of the plaintiff's action and appeal. The defendants seek special costs for the entire proceeding assessed on a summary basis.

[2] The underpinning of the defendants' claim for special costs relates to a finding that I made in the summary trial: that the plaintiff had forged two documents in an attempt to establish her claim in contract. The defendants submit that the finding of a forgery, on the facts of this case, warrants an award of special costs.

[3] In addition, the defendants seek a summary determination that the legal fees and disbursements incurred in defending this action (as billed by defence counsel to their clients) were fair and reasonable.

[4] In response, the plaintiff's position is:

a) This is not an exceptional case warranting an award or special costs. If the court determines that rebuke of the plaintiff is warranted, an award of increased costs is the appropriate result.

b) In the alternative, if special costs are to be awarded, any such award should be discounted by 70 percent to reflect both the fact that the forgery finding only affected her claim in contract (did not affect her claim in unjust enrichment), and the defendants' own conduct in the course of the litigation.

c) If special costs are to be awarded, the amount of those costs should not be assessed summarily. Hence:

    i. I should order that the amount of the costs claim be assessed by the registrar, and

    ii. I should bring this matter back after the registrar's hearing is completed for submissions on the proper order on the costs of that proceeding.

[5] Based on those positions, the plaintiff seeks an order that the defendants' application for special costs be dismissed and that I substitute an order that the defendants be awarded their tariff costs of the action to be assessed at Scale B (or, alternatively, at 1.5 times Scale B).

[6] I note, for context, that defence counsel's invoices to the defendants were tendered in evidence at this hearing. Those invoices, including disbursements, exceeded $2,400,000. It follows that the difference in the value between the opposing positions taken by the parties on this costs hearing is substantial. Put simply, the gap is larger than most actions brought in this Court.

[7] For the reasons set out below, I make the following orders:

a) The defendants are entitled to an award of special costs;

b) The defendants' special costs are to be discounted by 30 percent;

c) The defence application for a summary determination of the defendants' special costs is dismissed;

d) The assessment of the defendants' special costs is to be determined by a registrar;

e) Following the determination by the registrar, the parties are at liberty to appear before me to determine whether a further order is required regarding the costs of the registrar's hearing.

Issues

[8] The issues for me to decide are:

a) Are the defendants entitled to an award of special costs?

b) Should the award of special costs be discounted?

c) Should the defendants' costs be determined summarily?

[9] There are further ancillary issues and orders that arise, and I discuss them below.

Factual Background

[10] The factual background to this application is described at length in my summary trial reasons, indexed at 2022 BCSC 31, and the appeal thereof (2022 BCCA 401). For ease of reference, and consistency with the prior reasons, after identifying members of the family, I refer to the individuals by their first names. I mean no disrespect by doing so.

[11] In brief, the plaintiff, Barbara De Angelis (Barbara), is the niece of the individual defendant Annie Siermy (Annie). Annie is the owner of the defendant J & A Properties Ltd. (“J&A”).

[12] Both Barbara and Annie are members of a family that has benefited from land ownership and development in Vancouver beginning in the 1950s. That land development was started by Annie’s parents (Barbara’s grandparents), Steve and Eva Kochan.

[13] Through the purchase and development of land, Steve and Eva passed significant assets to their children. The majority of those assets comprised rental apartment buildings in Vancouver. The majority of those properties were owned by a family company, Vancouver Park Lane Towers Ltd. (“VPLT”). VPLT, in turn, was owned by holding companies. Those holding companies were owned by Steve and Eva’s children.

[14] Annie is the oldest child of Steve and Eva, born in 1934. She was married to Joe Siermy from 1953 until Joe’s death in 2016. They had no children. As of the date of the summary trial, Annie’s property was valued at approximately $30 million. The vast majority of that value is in the shares of a holding company, J&A. J&A owns 50 percent of VPLT.

[15] Barbara was born in 1967. She is the daughter of Bill Kochan. Bill was Steve and Eva's third child. Until his passing, Bill held shares in a company called BBJ Holdings Ltd. ("BBJ"). BBJ holds a 25% interest in VPLT.

[16] The day-to-day operation of the various rental properties involved members of the family.

[17] Barbara did a certain amount of work to the benefit of the family companies. She also did work that benefitted Annie and J&A.

Barbara's Action against Annie

[18] Barbara's action against Annie alleged that Annie had contracted to leave the bulk of her estate to Barbara (the "Legacy Agreement"). The plaintiff's theory was that Annie agreed to this contract in exchange for all the work that Barbara had done, and would continue to do, for Annie over the years. In the alternative, Barbara alleged that she had performed years of service for Annie, for which Barbara was not compensated. Hence, Annie had been unjustly enriched.

[19] Those claims proceeded to summary trial. Because of the nature of the allegations, both sides adduced significant historical evidence. Much of the evidence focussed on the family history and Annie's historical wills.

[20] For the majority of her marriage (starting in the 1950s), Annie had mirror wills with her husband, Joe. Hence, upon her death, her estate would go to Joe. The evidence established that in the late 1990s, Annie became concerned that if she died before Joe, Joe planned to leave the bulk of his estate to his side of the family. Starting in 1997, without advising Joe, Annie diverted from the mirror will concept. In 1997 she had a will drawn by a solicitor leaving her entire estate to her brother Bill (Barbara's father). Barbara was an executor of that will.

[21] Then, in 2002, Annie executed an *alter ego* trust. She did this because she was advised that the 1997 will would not have achieved her desired effect. The problem with the 1997 will was that the J&A shares were held in joint tenancy by Joe

and Annie. Hence, on her death, those shares would pass to Joe outside her estate. As a result, Annie needed a different estate plan that severed the joint tenancy in the J&A shares. She retained Mr. Gordon MacRae Q.C. for that purpose. Mr. MacRae created the *alter ego* trust, which had the following goals (according to my findings at trial):

> [177] According to Mr. MacRae, the MacRae Documents were designed to do the following:
>
> a) they created an *alter ego* trust for Annie;
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> b) under the terms of the trust, Annie declared that she held the assets as bare trustee, and would not deal with those assets except upon the direction of the trustees;
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> c) in addition, by a Deed of Gift, Annie gifted all her interest in J & A Properties and all her jointly held accounts, to the *alter ego* trust;
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> d) Annie and Barbara were appointed the trustees of the *alter ego* trust;
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> e) Barbara was named as the beneficiary of the *alter ego* trust;
>
> f) Annie retained the power to remove or appoint directors and, thereafter, the power to change the beneficiary of the trust.

[22] Annie alleged that the execution of the *alter ego* trust documents "formalized" the Legacy Agreement.

[23] The *alter ego* trust was in place from 2002 until 2011. In 2011 Annie hand-wrote a new will leaving the bulk of her estate to Barbara's cousin Anne Lawton. Annie changed her will again in 2015 when she and Joe came to an agreement on the handling of their joint estates. They reverted to mirror wills, with the final beneficiary being Anne Lawton.

[24] From 2002 until 2016, Barbara believed that she would inherit the bulk of Annie's estate *via* the *alter ego* trust.

[25] Barbara learned of the change in Annie's estate planning from Joe in 2016. In my summary trial reasons, I found as follows:

> [209] For context, it is important to note that Joe underwent vascular surgery on February 18, 2016, and died on April 21, 2016. At some point in March 2016, Joe told Barbara about his and Annie's 2015 Mirror Wills (see para. 88

> above). Those mirror wills did not leave anything to Barbara. It is common ground that on the same day that Joe informed Barbara about the 2015 Mirror Wills, Barbara confronted Annie. There was a heated discussion. The relationship between Annie and Barbara deteriorated immediately thereafter. Although Annie and Barbara both continued to be involved in VPLT, they were no longer on speaking terms. As noted above, the Kochan family is now fractured along the fault-lines between Barbara and Annie.

[26] Barbara commenced this litigation on February 3, 2017. She claimed relief under two legal theories:

a) Annie had contracted to leave the bulk of her estate to Barbara (the Legacy Agreement). That agreement was formalized in the documents that created the 2002 *alter ego* trust. In reliance upon that agreement, Barbara had performed significant work for the benefit of Annie, Joe and J&A. Annie's decision to draft a new will and change the beneficiary was a breach of that Legacy Agreement.

b) In the alternative, if there was no agreement, then Annie is entitled to be compensated because the work she performed for Annie and J&A constituted an unjust enrichment to Annie and J&A.

[27] In support of her claim in contract, Barbara produced three documents that were described as the "Letters from the Grave." Ostensibly, the three documents were designed to be given to Joe in the event that Annie predeceased him. The letters would explain Annie's reasons for her testimonial decisions.

[28] I found that the Letter from the Grave #1 was written by Annie.

[29] However, I found that the Letters from the Grave #2 and #3 were either forged by Barbara, or Barbara surreptitiously obtained Annie signature. I wrote:

> [332] It follows that I do not accept the plaintiff's evidence that she had nothing to do with the drafting of the letters. I am unable to make a finding about the date the letters were drafted or signed. Although the signatures on the two letters appear to be Annie's, it is clear to me that she could not have knowingly signed them. Hence, her signature was either obtained surreptitiously, or it was forged on Letters from the Grave #2 and #3.
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> [333] It follows that the plaintiff's claim in breach of contract is dismissed.

[30] My finding that Annie's signature was either obtained surreptitiously or forged was considered by the Court of Appeal:

> [28] The appellant submits that a finding the signature could have been obtained surreptitiously was an impermissible inference based on speculation and conjecture. She points out that Annie's signature could not have been obtained surreptitiously in the period following the March 2016 revelation of Annie's change in testamentary intentions, because Barbara immediately confronted Annie, and Annie confirmed that thereafter they were estranged and she did not sign any documents for Barbara. She submits that a finding that Annie's signature was obtained surreptitiously in the period before March 2016 is contrary to both the evidence and common sense because, in that period, Barbara believed she was the beneficiary of Annie's estate and had no reason to obtain Annie's signature surreptitiously.
>
> [29] The respondents say the inference was open to the judge because there was evidence that Barbara had in the past had Annie sign a blank document. The judge made no findings to that effect, and in any event, that evidence does not in my view support an inference that Barbara could have obtained Annie's signature on two blank sheets of paper after learning that she was no longer the beneficiary of Annie's will. However, the judge's conclusion, quoted above, was that Annie's signature was "either obtained surreptitiously *or forged*". Since I have found that the latter finding was open to the judge on the evidence, it suffices to support his determination that the letters were not authentic. It follows that any weakness in the supposition that the signature could have been obtained surreptitiously is not a material one.

[31] It follows that the only available conclusion on the Letters from the Grave #2 and #3 is that they were forged by Barbara.

The Summary Trial Hearing

[32] The action proceeded before me for a "summary" trial. That hearing was originally scheduled for four days, but expanded to eight days. At the close of that hearing, I advised counsel that the matter was not suitable for summary determination, but that the only unresolvable issue related to the conflict on the affidavits of Annie and Barbara. I advised that, with *viva voce* cross-examination, I would be able to decide the credibility issues. So, further dates were booked.

[33] In the intervening period, counsel exchanged a number of expert reports that opined on the authenticity of the Letters from the Grave.

[34] In the end, the summary trial consumed 19 days and involved the *viva voce* cross-examination of the two individual parties plus six experts who opined on the authenticity of the Letters from the Grave.

[35] I released my reasons for judgment on January 11, 2022, dismissing the plaintiff's claims. The plaintiff appealed. The Court of Appeal dismissed her appeal on December 1, 2022 (2022 BCCA 401). The plaintiff sought leave to appeal to the Supreme Court of Canada. That application was dismissed on July 27, 2023. This application for special costs came on before me on November 6–7, 2023, and I reserved judgment.

[36] With that procedural background explained, I now proceed to set out the rules regarding special costs and the parties' submissions regarding the appropriate award of costs.

Entitlement to Special Costs—The Law

[37] A party's entitlement to special costs is provided in *Supreme Court Civil Rules*, R. 14-1(1)(b)(i):

> (1) If costs are payable to a party under these Supreme Court Civil Rules or by order, those costs must be assessed as party and party costs in accordance with Appendix B unless any of the following circumstances exist:
>
> …
>
> (b) the court orders that
>
> (i) the costs of the proceeding be assessed as special costs, or

[38] There is no large gulf between the parties on the correct law to apply. Both sides agree that the process and applicable law is properly described in the Court of Appeal's decision in *Gichuru v. Smith*, 2014 BCCA 414. The parties differ on the proper interpretation of that decision and some other intricacies. As to the general test, there is no dispute that the onus is on the party seeking special costs to demonstrate that the opposing party's conduct in the litigation was "reprehensible". The meaning of that term was confirmed by Justices Harris and Goepel in *Gichuru* as follows:

> [78] The test for special costs was set out in *Garcia v. Crestbrook Forest Industries Ltd. No. 2* (1994), 9 B.C.L.R. (3d) 242 (C.A.) at para. 17, where Lambert J.A., speaking for the Court, after an extensive review of the authorities, concluded:
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> > ... it is my opinion that the single standard for the awarding of special costs is that the conduct in question properly be categorized as "reprehensible". As Chief Justice Esson said in *Leung v. Leung*, the word reprehensible is a word of wide meaning. It encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke. Accordingly, the standard represented by the word reprehensible, taken in that sense, must represent a general and all encompassing expression of the applicable standard for the award of special costs.

[39] In *Mayer v. Osborne Contracting Ltd.,* 2011 BCSC 914, the court set out a non-exhaustive list of the kinds of circumstances in which special costs will be warranted:

> [11] Special costs may be ordered in the following circumstances:
>
> (a) where a party pursues a meritless claim and is reckless with regard to the truth;
>
> …
>
> (c) where a party has displayed "reckless indifference" by not recognizing early on that its claim was manifestly deficient;
>
> (d) where a party made the resolution of an issue far more difficult than it should have been;
>
> …
>
> (g) where a party brings a proceeding for an improper motive;
>
> …
>
> (i) where a party pursues claims frivolously or without foundation.

[40] That list was both adopted and supplemented by Justice Voith's decision in *Sull v. Pengelly*, 2019 BCSC 1565. After noting that solicitor-and-own-client costs awards were only to be awarded in "extreme situations" such as an abuse of the court process or conduct that can be described as contempt or fraud perpetrated against the court, Justice Voith cited the list from *Mayer* (above) and continued:

> [23] Madam Justice Gropper added to this list in *Westsea* and highlighted decisions in which evidence was deliberately falsified and tendered at a proceeding to mislead the court …
>
> …

> [30] Dishonest testimony alone is insufficient to warrant an award of special costs; something more egregious in the impugned conduct at issue is required. This would include, for example, multiple instances of deliberate lying designed to mislead the Court, forgery of documents, or the deliberate concoction of evidence to support a party's position: *Mayer* at paras. 12–15. In *Grewal v. Sandhu*, 2012 BCCA 26, the Court addressed a party's lack of candour and commented that lack of candour and efforts to conceal evidence were an insufficient basis, on their own, to make an award of special costs. If such an award could be made based on the acceptance or rejection of testimony, "instead of being an extraordinary measure, special costs could be imposed whenever credibility was in issue": paras. 103–107.
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> [Emphasis added.]

[41] As discussed below, the defence focusses upon two of the elements discussed in these cases: forgery of documents and deliberate concoction of evidence.

[42] As a final coda on the general law of special costs, I note that the Court of Appeal provided updated guidance on the basis for an award of special costs in *Vassilaki v. Vassilakakis*, 2024 BCCA 15, which was delivered after the hearing in this case. In *Vassilaki*, Hunter J.A. rejected the concept that special costs can be ordered where the losing side failed to recognize that their claim had no merit. Justice Hunter discusses the *dictum* to that effect in *Webber v. Singh,* 2005 BCSC 224, and explains:

> [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.

[43] The Court of Appeal’s clarification of the law in *Vassilaki* does not affect my reasons, but I mention the case here in case a reader of these reasons should rely on my statements above as representing the current state of the law.

Defence Position

[44] In high overview, the defence submits that:

a) The plaintiff relied upon two forged documents. The entirety of the case was impacted by those documents.

b) Further, the plaintiff's evidence consisted of multiple instances of deliberate lying designed to mislead the court.

c) It is very difficult to prove that the opposing party committed perjury and forgery.

d) All evidence in support of the contract claim was based on the imaginary Legacy Agreement.

e) In addition, by pursuing her claim on the basis that she did, Barbara's allegations called Annie's credibility into significant question.

[45] The defendants submit that, individually and combined, these elements establish "reprehensible" conduct worthy of an award of special costs.

[46] The main force of the defence submission arises from the use of forged documents. That submission is buttressed by the other factors.

[47] The defendants submit that this case is analogous to the decision of Griffin J. (as she then was) in *Hoffman v. Percheson,* 2011 BCSC 1175, in finding reprehensible conduct deserving of rebuke and justifying an award of special costs:

> [19] This was not a case of a mere credibility dispute. Very serious allegations were advanced against Mr. Hoffman and the plaintiffs and defendant by counterclaim as a whole, and an attempt was made to support these false allegations through the deliberate creation of evidence designed to mislead the Court.

[48] I note that in *Hoffman*, a mortgage case, the defendant proceeded at trial on the basis that the plaintiffs (lenders) had, in fact, received mortgage payments. Documents were falsified in an attempt to establish that "fact". Those efforts were aimed at misleading the court. Justice Griffin found that such conduct, on its own, would constitute reprehensible conduct worthy of an award of special costs. Justice

Griffin continued (at paras. 23–24) and criticized the obstructionist manner in which the action had been defended. I wish to be clear, that obstructionist overlay does not exist in this case. In my opinion, the plaintiff's counsel proceeded through the summary trial in a manner that was exemplary and displayed the highest standards of the profession. The defendants do not suggest otherwise. Hence, while the facts are analogous, I read *Hoffman* as describing a different context than the current litigation.

[49] However, I accept the general proposition from *Hoffman* that falsifying evidence in an effort to mislead the court, combined with serious allegations of dishonesty against Annie, constitute reprehensible conduct.

[50] The defendants' second proposition is that proving a forgery is very difficult. Counsel points to the variety of experts that the defence retained as evidence of the complexity of that task.

[51] The defendants further submit that the plaintiff invented the Legacy Agreement, and to pursue that lie, the plaintiff alleged that Annie was committing perjury when she denied entering into such an agreement. The same submission holds for the creation of Letters from the Grave #2 and #3.

[52] The defence submits that proving a witness committed perjury and forgery, as with other types of fraud, is not an easy task. That is especially so when the underpinning of the alleged contract dates back decades to the 1980s. The defence submits that if the case at bar is not "outrageous in the extreme, and eminently worthy of rebuke", then no case is.

The Plaintiff's Position

[53] The plaintiff submits that special costs are an extraordinary measure and that I should exercise restraint in this case. The plaintiff submits that the party seeking special costs must demonstrate exceptional circumstances.

[54] The plaintiff submits that, because special costs are punitive in nature, the court should focus on a party's "blameworthiness and intent" (*Wong v. Rashidi*, 2011 BCSC 66 at para. 18) to determine whether punishment is appropriate, and that this assessment requires an objective, retrospective look into the mindset of the party at various points over the course of the proceedings. The plaintiff submits:

a) It is not sufficient that a witness was found to be untruthful: *Pacific Wagondepot Ltd. v. Hudson West Development Ltd*., 2017 BCSC 1993 at para. 16.

b) This is not a case wherein the plaintiff "weaponized litigation", as described in *Nouhi v. Pourtaghi*, 2022 BCSC 807 at para. 393.

[55] The plaintiff submits that both claims (contract and unjust enrichment) were arguable and merited determination when viewed in reference to the following:

a) Historical wills;

b) Barbara did provide services to Annie over many years;

c) Annie did write Letter from the Grave #1;

d) Annie's evidence shifted over time.

[56] I discuss each area below, noting that there is significant overlap.

Both Claims (Contract and Unjust Enrichment) were Arguable and Merited Determination

[57] The plaintiff submits that both aspects of her claim were arguable and merited determination at the summary trial.

[58] She cites Justice Watchuk's decision in *Roussy v. Savage*, 2020 BCSC 487 at para. 21, for the proposition that special costs are not generally warranted when there was an arguable case for the plaintiff's allegations at the relevant times. She says that there was a factual foundation upon which each aspect of the claim was

advanced. She further submits that that proposition remains true notwithstanding my finding that she forged two documents in support of the contract claim.

[59] Turning specifically to the unjust enrichment claim, she notes that the forgery had no relationship to that claim. She, correctly, points to the Court of Appeal's decision which found that the unjust enrichment claim could have proceeded regardless of the finding of a forgery in the contract claim (see paras. 37–39). I accept this general proposition, and I address it in more detail when addressing the percentage discount.

[60] The plaintiff also submits that the findings in the summary trial reasons describe a history between the parties that provided a factual underpinning for both the contract claim and the unjust enrichment claim. On that basis, she argues that the deep dive into the history of the parties' relationship was necessary for the unjust enrichment claim. That evidence formed the basis of my reasons for judgment. The plaintiff notes the following four points.

Historical Wills

[61] On this application, the plaintiff places significant emphasis on Annie's historical wills, which indicated that Annie preferred to leave her estate to Barbara's family. In particular:

(a) Annie and Joe's mirror wills from 1957–1978 provided that Barbara's father, Bill, would be the residual beneficiary;

(b) In the two 1997 wills, Annie left her estate directly to Bill, with Barbara named as a residual beneficiary in the latter of those two wills;

(c) In 2002, Annie executed estate documents which left the bulk of her sizeable estate to Barbara;

(d) In 2011, Annie wrote Barbara out of her will, and chose to keep this secret until Barbara learned of it in March 2016.

[62] The plaintiff says that this history provided a contextual backdrop and provided the factual underpinning for her claim.

Barbara Provided Services to Annie over Many Years

[63] Second, within the context of the historical wills, Barbara submits that there was a finding of fact in my reasons that she did perform many years of services for Annie and Joe, and in furtherance of Annie's business interests. Barbara cites para. 366 of my reasons for that finding. It states:

> [366] In that regard, on the facts of this case, I accept (with some reservation) Barbara's statements regarding the level of her involvement in the family business and her services to Joe and Annie. However, during her evidence Barbara conceded that the level of services that she provided to Annie did not increase after 2002 when she became Annie's beneficiary. Her level of services did not increase until 2011. As noted above, as of 2011, Barbara was a salaried employee of VPLT.

[64] I address this submission below. I put little weight upon it.

Annie Did Write Letter from the Grave #1

[65] Third, Barbara notes that Annie authored Letter from the Grave #1, which set out that Barbara "had plenty of experience with 'all us seniors' and with our family apartment business". She submits that this evidence provided a basis for the concept that Annie made a promise to Barbara, and the services performed by Barbara.

Annie's Evidence Shifted over Time

[66] The plaintiff further places significant weight on the fact that Annie's evidence shifted over time. Those shifting sands continued right up to the beginning of the summary trial. Hence, she argues, at any given moment in time, prior to the summary trial, the plaintiff's claims were arguable and merited determination by the court.

[67] In particular, there were important shifts between Annie's examination for discovery and her affidavit evidence. Notably, those two pieces of evidence were provided within weeks of each other in 2022. Annie presented a considerably

different version of events at the summary trial than had been presented at her examination for discovery. She points to the following chronology:

(a) The plaintiff produced Letters from the Grave #2 and #3 in a related petition on October 27, 2017.

(b) The summary trial began on October 27, 2020.

(c) The first time that Annie denied authorship of Letters from the Grave #2 and #3 was in her examination for discovery on September 15, 2020.

(d) Annie had the opportunity to, but did not, deny authorship of Letters from the Grave #2 and #3 in:

a. her affidavit filed in that other petition which proceeded to hearing on October 25, 2019,

b. in her March 6, 2020 affidavit filed in this action,

c. at any other time.

(e) The bulk of the defence's lay affidavits, including Annie's third affidavit, were delivered on the Friday before the summary trial. In her third affidavit, Annie gave conflicting evidence in respect of Letter from the Grave #3; first stating that it was "an example of Barbara telling me to write something, and making sure I did it", then later in the same affidavit stating that she did not type Letters from the Grave #2 and #3 and had no recollection of signing them.

[68] The plaintiff submits this was the shifting evidentiary landscape that she faced when preparing for the summary trial. Hence, she submits, any assessment of whether there was a factual basis for her to pursue the contract claim at summary trial must consider the evidence available at particular points in the litigation and how the defendants' pretrial conduct affected that position. In this regard, the plaintiff did

not argue that Letters from the Grave #2 and #3 were the actual contract; instead, at best, they were evidence pointing to the existence of a contract.

[69] The plaintiff submits that Annie's evidence on the Letters was vague and then shifted substantially from the pretrial period to the summary trial. Barbara submits that the proper lens through which to view her prospects in the litigation must take into account the state of the evidence as it existed before the summary trial. In other words, I should not substitute 20/20 hindsight that is now available following the trial judgment. She says that the proper assessment (on this application) requires consideration of whether it was reasonable for her to proceed based upon the state of the evidence as it existed prior to the summary trial.

Analysis of the Plaintiff's Positions

[70] I will address each of the plaintiff's arguments in order.

[71] First, on the need for the deep dive, as noted, I accept the general proposition that both aspects of the plaintiff's claims required a long look back at the history of the relationship.

[72] It is not disputed that the plaintiff tendered a substantial amount of information regarding the work that she claimed to have performed for Annie and Joe over the years. The plaintiff's first affidavit is the well-spring of all of her claims. It was the first document to which the defendants responded. The plaintiff's first affidavit, with exhibits, comprised more than five binders. It covered events from the 1980s through 2016. When discussing the work that she performed for Annie, the affidavit ranged back to the plaintiff's teenage years. For example, Barbara stated that, at Annie's request, she had driven down to the ticket office to pick up tickets to Expo '86 for Annie and Joe. By definition that task was undertaken in 1986 when Barbara was 19 years old. Annie's responsive affidavit stated that, through VPLT, she and Joe had purchased a number of Expo passes for the family, including one for Barbara. They simply asked Barbara to pick up the passes. Hence, an episode that Barbara described as a service, Annie described as a gift to Barbara.

[73] I accept the general proposition that the plaintiff put forward this evidence in an attempt to establish both aspects of her claim. I address this division below when discussing the percentage discount.

[74] In addressing the plaintiff's submission on the history of Annie's wills, I note the following:

a) The history of Annie's wills was not in dispute in the litigation.

b) The fact that Annie changed her wills (and her beneficiaries) over time did not assist or support Barbara's claims. Instead, that evidence had the opposite effect. I specifically found that Annie's wills, over time, tended to disprove the plaintiff's claim in contract and large parts of her claim in unjust enrichment.

c) A review of Annie's historical wills indicates that only the 2002 trust agreement named Barbara as the beneficiary. I made specific findings that Barbara knew, and had acknowledged, that those trust declarations were revocable (see paras. 189–194).

d) On the unjust enrichment claim, I wrote:

> [367] Hence, I am left to compare Barbara's reasons for providing services to Annie and Joe before and after the execution of the MacRae Documents. Before 2002, Barbara would have no claim in unjust enrichment. Barbara had simply performed services for her aunt. There was no promise from Annie. Barbara knew that Annie's will did not name her as the primary beneficiary. On those facts, I find that the presumption must be that Barbara had a donative intent in relation to those services. There was no evidence that Barbara was going to benefit from the services she performed, apart from whatever compensation she might receive from the family business. I discuss that compensation below.
>
> [368] So, the question is: What changed after Barbara was named as Annie's primary beneficiary in the 2002 MacRae Documents?
>
> [369] The answer is: Nothing changed.

[75] Thus, while a large portion of the historical overview established Annie's testimonial intentions over the decades, in my opinion, that evidence did not assist the plaintiff's claims. It did not form an evidentiary foundation for her claims in

contract. At best, those facts would indicate that Barbara expected to be Annie's beneficiary and (I infer) was disappointed to find out, in 2016, that she was not. However, none of those facts form the foundation for an action. The cause of action (in contract) was invented by the plaintiff. The claim in unjust enrichment was based on the assertion that, if there was no contract, then Barbara had done work for Annie without compensation.

[76] Second, the finding at para. 366 of my reasons (which was cited above), requires the further context. The plaintiff cited paras. 367–369 and suggested that those paragraphs gave some credence to both the contract claim and the unjust enrichment claim. To be clear, those paragraphs were addressing the unjust enrichment claim, and not the contract claim. The discussion of unjust enrichment begins at para. 334 and continues to para. 389.

[77] In this application, the plaintiff argues that her years of service to Annie formed the foundation for both aspects of her claim (contract and unjust enrichment). However, given my treatment of that evidence in the reasons, those facts could only be the foundation of an unjust enrichment claim. As I found in the summary trial, there was no linkage between Barbara's service and a "contract" with Annie. Also, on the unjust enrichment claim, I found that Barbara's services were either performed with a "donative intent" or as part of the family enterprise for which she received compensation (*i.e*., a juristic reason).

[78] Third, turning to Annie's authorship of Letter from the Grave #1, in my opinion, this fact does not assist Barbara on this application. Put simply, Letter from the Grave #1 does not mention a Legacy Agreement, or a contract, or an intention to provide a benefit to Barbara. I made that clear in my summary trial reasons:

> [285] In my reading of Letter from the Grave #1, it is clearly written as an explanation, by Annie, for diverging from the couple's earlier mirror wills. Hence, Annie addresses Joe's stated bitterness toward, and plan to "fix", her family. The letter does not address the new beneficiary of her estate. It is only clear that the beneficiary is not Joe. In my opinion, the letter was written from the standpoint of a loving, but long-suffering, wife to explain an act that may have been perceived as a betrayal by her husband (widower). Letter from the Grave #1 does not, in any way, indicate that Annie's intention was to prefer

> Barbara over any of the other possible beneficiaries. The subject is not raised.

[79] It stands to reason that if Letter from the Grave #1 provided a factual foundation for Barbara's claim in contract, then Barbara would not have felt the need to forge Letters from the Grave #2 and #3.

[80] As a result, in my opinion, the fact that Annie wrote Letter from the Grave #1 does not provide any factual underpinning for the plaintiff's action.

[81] Fourth, on the issue of Annie's shifting evidence, in my opinion there is a fatal flaw in this aspect of the plaintiff's submission: Barbara knew that Letters from the Grave #2 and #3 were forgeries. She had forged them. Thus, I do not accept the plaintiff's submission that my consideration of whether it was reasonable for the plaintiff to proceed should be based upon the state of the evidence as it existed prior to the summary trial. In my opinion, I cannot ignore the state of the plaintiff's knowledge. She knew that she had forged two documents. Her only assessment was determining whether the defendants would be able to prove that they were forgeries.

[82] Put another way, in my opinion, the plaintiff cannot argue that, based upon the state of the evidence prior to the summary trial, she perceived that her claim had a chance of success. She created that evidence. She created it for the purpose of the litigation.

[83] The plaintiff was proceeding in an action against her aging aunt, whose memory was checkered. As I found in my reasons:

> [76] Having read Annie's affidavit, and the transcript of her examination for discovery, there are clear inconsistencies in her professed recollection of events. However, when she testified (and was cross-examined) in court, I discerned that her memory was significantly better than was displayed at her examination for discovery.
>
> [77] In the end, I find that Annie is a generally credible witness. However, her recollection is inconsistent, which is not surprising given her age. Her recollection can be improved by providing context and some time to reflect.

[84] In my opinion, I cannot divorce the forging of Letters from the Grave #2 and #3 from my assessment of whether it was reasonable to proceed with the contract claim. In that regard, I infer that the plaintiff was counting on Annie's memory being a problem at the summary trial, or the eventual trial, of the action. That scenario does not provide her with a reason to proceed with the action. If anything, it provides a stronger basis for the defence claim for special costs. The plaintiff may have felt that she had been unfairly removed from Annie's will. However, her feelings are, and were, irrelevant. In this litigation:

a) Barbara forged documents in the name of a rich old lady;

b) Barbara hoped that the rich old lady's poor memory would be a problem at trial, and that the judge would award the old lady's fortune to her.

[85] Those factors are, in my opinion, reprehensible.

[86] I note that the plaintiff further cites the decision in *Sull* (supra) as support for the position that the entirety of my decision flowed necessarily from credibility findings regarding each party. Hence, she argues, the forgery finding flowed from my acceptance of Annie's testimony and my rejection of the plaintiff's testimony. She submits that my finding brings this case closer to the first part of para. 30 in *Sull*, where Justice Voith noted (consistent with other authorities) that dishonest testimony is not sufficient to justify special costs.

[87] Again, with the greatest respect to the plaintiff, this submission misses the point of *Sull* and the other cases in this area. If this case had been presented without Letters from the Grave #2 and #3, then the defence would find little purchase in their argument for special costs. It is the forgery of those two documents that leads to the defendants' application. In other words, looking in hindsight, we know which findings of fact that I made at the summary trial. However, in the process of putting forward her claim at the summary trial, the plaintiff attempted to mislead me into granting her judgment against her aunt for $30,000,000. She did that by forging documents and tendering them into evidence.

[88] Returning to the reasoning in *Sull*, Voith J. draws this distinction clearly at para. 30:

> [30] Dishonest testimony alone is insufficient to warrant an award of special costs; something more egregious in the impugned conduct at issue is required. This would include, for example, multiple instances of deliberate lying designed to mislead the Court, forgery of documents, or the deliberate concoction of evidence to support a party's position: …
>
> [Emphasis added.]

In my opinion, the reasoning in *Sull* assists the defendants' position.

[89] The plaintiff further submits that this application constitutes the defendants seeking retribution against the plaintiff. She acknowledges that the point of special costs is punitive. She says that "retribution" is an improper purpose. She points to several comments raised in the defendants' submissions that cast aspersions on the plaintiff. She says that the defence evidence and submissions, both at summary trial and on this application, delved into areas that were not the subject of my findings in the reasons for judgment. The plaintiff submits that the defence strategy at summary trial was to smear her. Further, the defence comments on this application suggest the motivation for this application is retribution against the plaintiff. She further submits that I should consider that conduct and that motivation in deciding whether to award special costs.

[90] As to the allegation that defence efforts to smear the plaintiff in an improper manner, I do not accept the plaintiff's submission. The affidavit material of both sides covered decades of intra-family politics. I do not find it surprising that either side sought to demean the other. I noted, at para. 71:

> [71] Not surprisingly, given the epic time span addressed, the affidavits in this application fill 15 binders. There are a further five binders of notices to admit with corresponding responses plus several days of transcripts from the examinations for discovery and cross-examinations. The evidence touches on myriad issues that range in relevance from the core (*e.g.*, instructions to the lawyer drafting estate documents), to the upper-atmosphere (*e.g.*, the plaintiff's behaviour as a child). As discussed below, I find that the evidentiary disputes over distant facts do not interfere with my ability to make the necessary findings to dispose of the core issues in this case.

[91] As to the plaintiff's proposition that this application constitutes the defendants seeking retribution, I do not accept this submission for the following reasons:

a) I am not considering any of the defence comments or submissions in coming to my decision.

b) The clear motivation for the defendants seeking special costs is to recoup the legal fees they incurred in defending the plaintiff's claims.

c) To be frank, I am unable to discern the distinction between "punishing the plaintiff for her conduct in the litigation" and "seeking retribution against the plaintiff for bringing this litigation".

[92] On the basis of my analysis above, I do not accept any of the plaintiff's arguments which seek to dismiss, or diminish, the defendants' claim for special costs. It follows that I do not accept the plaintiff's submission that an award of increased costs would be appropriate.

[93] Turning back to the defence submissions, I accept that the defence was put to significant effort to respond to the plaintiff's evidence. In my opinion, much of that effort addressed the context, and not the truth, of the plaintiff's evidence. By that, I mean that the plaintiff alleged that she performed a lot of work for Annie and J&A over the decades. Much of the defence evidence placed the plaintiff's evidence within the context of the family business. Significant work was done to establish that the plaintiff had been paid for her work.

[94] The same cannot be said of the defence efforts in two areas:

a) Proving that the *alter ego* trust was not the formalization of the Legacy Agreement; and

b) Proving that Letters from the Grave #2 and #3 were forged.

[95] On the first issue, the defence was required to obtain evidence from the family accountant, Mr. Kozub, and from the solicitor, Mr. MacRae. Obtaining those

affidavits constituted significant effort. That effort was related, in part, to the forgeries. Both of those two professionals provided evidence that was pivotal on the issue of whether the *alter ego* trust constituted the formalization of the Legacy Agreement. That evidence, in turn, was important in determining that the Letters from the Grave #2 and #3 had been forged.

[96] I further accept that the defence was put to significant effort to establish that the Letters from the Grave #2 and #3 were forged. That effort included the retainer of three experts. It also required the unpeeling of many layers of the Kochan family history going back to the 1960s. I made specific findings about Annie's "belief structure" and how her beliefs were inconsistent with the underpinning of Letters from the Grave #2 and #3.

[97] In my opinion, the facts of this case provide ample basis for an award of special costs. Specifically, the plaintiff forged documents in support of her claim that her aunt had contracted to leave the bulk of Annie's estate to the plaintiff. That forgery was done in an effort to mislead the court about the underpinning of the case. The forgeries were placed before the court and required substantial effort from the defendants to disprove. In my opinion, that conduct was reprehensible.

[98] That being the case, I now move on to the other issues raised by the parties:

a) Should the award be discounted?

b) Should I summarily assess the defence costs and disbursements?

Should special costs be discounted?

[99] The plaintiff submits that if special costs are awarded, then they should be discounted. She submits that a discount of 70 percent would be appropriate (*i.e.*, awarding 30 percent of the special costs). She includes two components in that reduction:

a) the nature of the claim, and

b) the defendants' conduct.

[100] First, under the heading "nature of the claim", the plaintiff submits that there were two distinct aspects to her action: breach of contract and unjust enrichment. The plaintiff submits that:

a) the forgery finding related only to the contract claim;

b) the unjust enrichment claim was completely independent of the Letters from the Grave #2 and #3. (As noted above, this submission mirrors the Court of Appeal's ruling on that issue.)

[101] The plaintiff submits that a significant portion of the lawyers' effort in this litigation went toward establishing the amount of work she had done for Annie over the decades. That effort included the lawyers disclosing documents and assembling of evidence aimed at proving or disproving the claim for unjust enrichment.

[102] The plaintiff submits that the level of detail ultimately tendered by the defence in scrutinizing the services alleged by the plaintiff was relevant only to the unjust enrichment claim and the potential for the court having to fashion a restitutionary award. The plaintiff submits that she would not have needed any level of detail regarding those services to form the foundation of the contract claim.

[103] I do not accept the plaintiff's argument on this front. It was clear at the hearing of the summary trial that the plaintiff's case was formulated as follows (my paraphrasing):

a) The plaintiff did a substantial amount of work for her aunt and uncle over the decades;

b) Because the plaintiff did that work, Annie decided to leave her estate to the plaintiff;

c) Thus, Annie contracted with the plaintiff to leave her estate to the plaintiff;

d) In the alternative, if there was no contract, then all of the work the plaintiff did for Annie constitutes the basis of her claim in unjust enrichment.

[104] The plaintiff submits that it is open to me to make a partial award of special costs if it would be disproportionate to award special costs of the entire proceeding. *Gichuru* at para. 91.

[105] The plaintiff further submits, relying on *Shawnigan Residents Association v. British Columbia (Director, Environmental Management Act)*, 2018 BCSC 121 at paras. 61-64, that the court should distinguish between those costs of the proceeding that flowed directly from the reprehensible conduct and those costs that would have been incurred in any event:

> [61] In determining what proceedings in this case should be subject to an award of special costs, I make a distinction between those proceedings that were necessitated by the reprehensible conduct of CHH and those costs that would have been incurred in any event.
>
> …
>
> [64] I have concluded that it would be overly punitive to CHH to require it to pay special costs for making arguments and applications that it was entitled to make. …

[106] I accept the general underpinning proposed by the plaintiff, but not the math. In my opinion, the majority of the evidence adduced by the plaintiff went to support her claim for a breach of the Legacy Agreement. While there was some overlap in the evidence supporting her claim for unjust enrichment, I cannot ignore the fact that the claim in contract was valued in the range of $30,000,000. The unjust enrichment claim, if successful, would not have reached that stratosphere.

[107] In terms of the time taken at the hearing, I note that the matter was originally set down for a four-day summary trial. That was later extended. I directed the parties to attend for *viva voce* cross-examination. That direction, in turn, led to the introduction of five additional expert reports, with cross-examination of those experts. The “summary” trial ultimately ran to 19 days. Although it is not possible to re-create a hypothetical summary based solely on the unjust enrichment claim:

a) the experts would not have been required; and

b) in my opinion, the cross-examinations of the parties would not have been required.

[108] I say that because the experts only addressed the authenticity of the Letters from the Grave #2 and #3. The cross-examinations of the parties were only required to determine the authenticity of the Letters from the Grave.

[109] In my opinion, there were elements of the plaintiff's claim that were not successful, but that were not tainted by her reprehensible conduct in respect to the forgery. I note again that the Court of Appeal ruled that the finding of a forged document would not preclude the plaintiff from obtaining equitable relief as against Annie. At para. 39, Justice Fenlon wrote:

> [39] With respect, the judge's analysis does not accord with the test for unclean hands. The test does not require only that there is some relation between the misconduct and the claim in equity, the misconduct must be necessary to the claim. The central question was whether Barbara was required to rely on her misconduct—the forged Letters from the Grave—to establish the elements of unjust enrichment …

[110] On that basis, I accept that the entire claim was not tainted by the forgery.

[111] Having considered the amount of work required, both to answer the plaintiff's claims, and in respect of the hearing, in my opinion, a reduction of 30 percent of special costs is warranted. To be clear, that is the reduction that is warranted based upon the plaintiff's claim for unjust enrichment occupying 30 percent of the overall effort of the defence.

[112] On that basis, I award the defendants 70 percent of special costs.

Should costs be assessed summarily?

[113] The defendants submit that this is an appropriate case for summary determination of their right to special costs.

[114] The defendants acknowledge that the usual course is for the special costs to be assessed by the registrar. They submit, however, that in this case, I should exercise my discretion and assess the defence costs summarily.

[115] Both parties agree that the clearest direction on this issue is described in the Court of Appeal's decision in *Gichuru* at paras. 99–110. Those directions are summarized at para. 154 of the same decision:

> [154] We would briefly summarize the principles as discussed above. The decision to fix the quantum of costs under R. 14-1(15) is a matter of judicial discretion that should be sparingly exercised. The court officer best placed to conduct an assessment is usually the registrar, whose knowledge and experience in assessing legal bills is extensive and seldom matched by that of a trial judge. An exception may arise in cases when the judge is intimately familiar with the litigation or the time and cost of a registrar's hearing cannot be justified or where the parties consent. The fact that a judge has heard the trial does not necessarily lead to the conclusion that the best use of judicial resources is for the judge to assess costs. A concern that a party who might have to pay costs will prolong the costs assessment by requiring a microscopic review of the services provided by counsel must be balanced against the right of that party to challenge the reasonableness of the proposed costs.

[116] The defendants submit that:

a) I am intimately familiar with the litigation, having conducted the long summary trial;

b) the time and the cost of a registrar's hearing cannot be justified.

[117] It is patent that a trial judge who awards special costs to one party will usually be intimately familiar with the litigation. In this case, I do not consider that I have any unusual familiarity that would outweigh the benefit of the registrar's knowledge and extensive experience. Hence, I do not accept that the first principle is established.

[118] Turning to the second principle, the defendants submit that the plaintiff's conduct to date indicates that she will turn the registrar's hearing into an interminable dissection of the time and strategic decisions of defence counsel. They note the plaintiff's pursuit of this litigation, including the five-binder affidavit and her application for leave to appeal to the Supreme Court of Canada.

[119] In response to these submissions, the plaintiff says that assembling the evidentiary record and filing appeals cannot be used as evidence of an unreasonable approach to the litigation.

[120] The plaintiff further criticizes the evidence adduced by the defence in support of their accounts. That evidence boils down to a partner at the firm indicating that the time recording was accurate and reasonable. The plaintiff submits that the very nature of a registrar's hearing will look into those, among other, issues.

[121] More to the point, the plaintiff submits that any concerns about an ungainly assessment of the special costs can be allayed by a simple order: the costs of the registrar's hearing should come back before me. At that time, if the plaintiff's conduct is worthy of condemnation, the defendants can apply for special costs of that hearing.

[122] On this issue, I accept the position taken by the plaintiff. I exercise my discretion and dismiss the defence application for a summary determination of the defendants' special costs. In my opinion, that assessment should properly be performed by a registrar.

[123] I further order that, failing agreement between the parties, the final issue, relating to the costs of the registrar's hearing, should come back before me for determination.

Summary, Conclusion, and Costs

[124] In summary:

a) the defendants are entitled to an award of special costs;

b) the defendants' special costs will be discounted by 30 percent. This discount provides for the fact that the majority of the defence effort went toward opposing the plaintiff's claim in contract, whereas 30 percent of the effort went toward opposing the unjust enrichment claim;

c) the defence application for a summary determination of the defendants' special costs is dismissed;

d) the assessment of the defence special costs will be determined by a registrar;

e) following the determination by the registrar, the parties are at liberty to appear before me to determine whether an order is required regarding the costs of the registrar's hearing.

[125] There has been mixed success on this application. Each side should bear their own costs in respect of this application.

"A. Ross J."