IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *West v. The Owners, Strata Plan BCS 2637,* 2024 BCSC 567

Date: 20240409
Docket: S210043
Registry: New Westminster

Between:

Mariette West and Neville West

Petitioners

And

The Owners, Strata Plan BCS 2637

Respondent

Before: The Honourable Justice Schultes

Ruling on Application for Special Costs

Counsel for the Petitioners:	M.D. Carter
Counsel for the Respondent:	P.J. Dougan
Date of Written Submissions:	August 22, 2022
Place and Date of Judgment:	New Westminster, B.C. April 9, 2024

Introduction

[1] The petitioners seek special costs following their successful application for judicial review of a decision of the Civil Resolution Tribunal (the "CRT") (2021 BCSC 824).

[2] They allege that the respondent, which is the strata corporation for the residential building in which they have a leasehold unit, acted in ways that are deserving of rebuke during the litigation, in particular while the matter was before the CRT.

[3] The respondent maintains that it has acted reasonably throughout the relevant period, despite the ongoing hostile behaviour by the petitioners towards its members.

[4] The parties' submissions on this issue are voluminous. Because I have found that the petitioners' claims for special costs can be resolved at the threshold stage of whether the conduct complained of could support such an order, it is possible to summarize the petitioners' position at a high level, and it is not necessary to summarize the respondent's submissions, the petitioners' reply, or the affidavits that have been provided in support of them.

Background

[5] The petitioners' CRT claim arose from difficulties that they experienced with the temperature of their unit, where they began living in 2008. They believed that these difficulties were the result of deficiencies in their windows and doors, which are common strata property. Over time, they came to focus particularly on the windows as the source.

[6] The respondent obtained two engineering reports in 2009 that identified various deficiencies with the building as a whole, including some that could have accounted for the petitioners' difficulties. These reports found that overall the building envelope was functioning adequately, but recommended that the

deficiencies should be addressed as soon as possible, to avoid premature deterioration of the building's materials and other associated problems.

[7] The respondent pursued remedies for all of the deficiencies, including the ones that impacted the petitioners' unit, with the building's warranty provider. That process had not yet concluded when the petitioners began their CRT action. It was ultimately unsuccessful in obtaining any compensation, including in relation to deficiencies in the petitioners' unit, but the failure of that effort was not definitively conceded by the respondent until after the CRT process had been completed.

[8] The respondent obtained two additional reports in 2013 from a different company, which indicated that no significant evidence of "cold air infiltration" in the petitioners' unit could be found. The reports identified benign causes for the drafts that had been complained of, as well as for moisture on the inside of the windows. They referred to further tests that could be done to confirm that the windows were operating properly, but such tests would have required access to the windows from the exterior of the building, and were not carried out.

[9] An inspection requested by the respondent by a glass company, also in 2013, resulted in the installation of weather-stripping on the windows. According to the petitioners, this did not resolve the problems with the majority of the windows.

[10] They began their CRT claim in 2017. They alleged, among other things, that the respondent had failed in its duty to maintain and repair their windows, and failed to comply with their requests for document disclosure. They sought orders that the respondent be required to (1) obtain an engineering report that investigated the common property problems affecting their unit, including exterior window performance testing; (2) repair the unit's exterior windows and insulation; and (3) provide all of the requested documents, including details of the common property warranty claims.

[11] Another glass company did an inspection at the respondent's request in 2018, and while the representative of that company told the petitioners that some

deficiencies had been identified, the respondent would not disclose the documents that had been generated by the glass company on that issue. The relevant document turns out to be a quote form from the company, which lists a number of repairs to be undertaken. The respondent's position is that it has no record of receiving it.

[12] The CRT vice chair dismissed all of the claims that are in issue here (2018 BCCRT 695). That decision was released in November 2018.

[13] The petitioners began the judicial review proceeding in January 2019.

[14] On the judicial review, which applied a standard of correctness (the legislation has since been amended to require patent unreasonableness to findings of fact or law, or an exercise of discretion), I concluded that the CRT vice chair had erred by:

- finding that the respondent had acted reasonably in electing to pursuing coverage for the deficiencies under the warranty, instead of carrying out the repairs to the windows that were identified in the 2009 engineering reports;
- failing to address the fact that the 2013 reports that were unable to identify drafts had also described further steps that were required to confirm the nature of the problem; and
- declining to order that the relevant correspondence between the respondent and its property manager be produced.

[15] I also found that the petitioners had been denied procedural fairness when they were told by one CRT official that their written submissions could be as long as they wished, only to have them severely pruned back at a later stage.

[16] Although the normal remedy in this situation would have been to remit the matter back to the tribunal to be re-heard, I was persuaded by the petitioners' submissions that this was one of the "limited scenarios" envisioned by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*,

2019 SCC 65 at paras. 144-145, in which the reviewing court should make the required orders.

[17] In reaching that decision, I took into account the significant delay that had occurred before the judicial review application could be heard (from multiple adjournments due to insufficient court time and court closures). I also concluded that it was inevitable at a rehearing at the CRT that the respondent would be found responsible for the repairs outlined in the 2009 engineering reports, as well for those identified in two more recent reports that the petitioners had obtained themselves - one from the same glass company that had attended in 2018 and the other from a building services company.

[18] Accordingly, I ordered that:

- The respondent was to perform the work identified in the 2009 engineering reports with respect to any deficiencies affecting the windows and doors of the petitioners' unit, and in particular the perimeter sealants, by October 31, 2021; and

- After the work described was performed, the respondent was to retain an engineer to confirm in a certified report, through test and calculation, that the exterior windows and doors of the petitioners' unit meet the standards specified by the Canadian Standards Association for window performance. (The petitioners could waive this requirement if the windows were functioning properly after the required repairs.)

[19] I did not consider that any orders were needed to address the other successful aspects of the judicial review.

[20] In the absence of further submissions, I awarded the petitioners' their costs of the review proceeding, at the ordinary scale of difficulty. I gave the parties leave to make submissions on that issue if they felt it necessary, hence the current application.

Scope of Special Costs

[21] Much of the litigation conduct being relied on by the petitioners to justify special costs occurred while the case was before the CRT, and obviously predates the commencement of the judicial review proceeding.

[22] There is unquestionably a "bright line rule" that limits the availability of special costs to conduct that occurred "in the course of the litigation": *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177 at para. 134.

[23] The petitioners argue that the judicial review was a continuation of the CRT proceedings, which permits me to award costs for the period in which those previous proceedings were ongoing. My decision to grant remedies as part of the judicial review, rather than remitting the case back for a rehearing is said to enhance the strength of that argument. They point out that pursuant to the *Civil Resolution Tribunal Act* and the rules created under it, the respondent could have been ordered to pay their fees and expenses in relation to the proceedings. Notably, in *Parfitt et al v. The Owners, Strata Plan VR 416 et al*, 2019 BCCRT 330, the tribunal member found it helpful to consider the law that governs special costs when she was resolving a claim by the respondents to have their legal fees paid by the applicants.

[24] I am not persuaded that when dealing with judicial review from an administrative tribunal, "the litigation" for costs purposes includes the proceedings before that tribunal.

[25] Rule 14-1(1)(b) (ii) of the *Supreme Court Civil Rules* permits a court, as an exception to the default of "party and party costs in accordance with Appendix B" to order that "the costs of the proceeding be assessed as special costs". Rule 1-1(1) defines a proceeding as meaning "an action, a petition proceeding and a requisition proceeding, and includes any other suit, cause, matter, stated case under Rule 18-2 or appeal". These are all means of seeking relief that are undertaken within the Supreme Court. For example, proceedings before the Court of Appeal have been excluded from the definition: *Williamson Pacific Developments Inc. v. Johns, Southward, Glazier, Walton & Margetts*, 2000 BCSC 66, at para.8.

[26] The Ontario Court of Appeal has also held that the hearing before an administrative tribunal was not a "proceeding" for costs purposes in the court that conducted judicial review: *Poulton v. Ontario Racing Commission*, [1999] O.J. No. 3152 (C.A.) at para. 19 and I do not think that my granting the relief instead of remitting the matter back to the CRT makes any difference to this conclusion. As the passage from *Vavilov* that I relied on makes clear, it is an option that is open to a judge in exceptional situations in the exercise of their jurisdiction on the judicial review. It does not have the effect incorporating the proceedings before the tribunal into the judicial review proceedings.

[27] The converse is also true – as I will describe, the ability to order the payment of a party's legal costs is vested by the relevant CRT rule in "the tribunal", as are the usual orders for the payment of fees and expenses under ss. 48 and 49(1) of the *CRTA.*

[28] The usual extent of compensation from the unsuccessful party that is available under the *CRTA* is for the fees paid under it and "any other reasonable expenses and charges that the tribunal considers directly relate to the conduct of the proceeding" (s. 49(1)).

[29] The relevant parts of the CRT rule in question provide that[1]:

> Rule 9.5 – Recovery of Fees and Expenses
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> 3) The tribunal will not order one party to pay to another party any fees a lawyer has charged in the tribunal dispute process, except the tribunal has the discretion to make such an order if
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> > a) the dispute is under the tribunal's accident claims jurisdiction, or
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> > b) the dispute is under another area of the tribunal's jurisdiction, and the tribunal determines that there are extraordinary circumstances which make it appropriate to order one party to pay to another party fees that a lawyer has charged.

[1] At the time *Parfitt* was decided, then-Rule 132 simply provided that "Except in extraordinary cases, the tribunal will not order one party to pay to another party any fees charged by a lawyer or another representative in the tribunal dispute process."

> 4) To determine whether a party must pay the fees that a lawyer charged to another party, the tribunal may consider
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> a) the complexity of the dispute,
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> b) the degree of involvement by the representative,
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> c) whether a party or representative's conduct has caused unnecessary delay or expense, and
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> d) any other factors the tribunal considers appropriate.
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> [Emphasis added]

[30] It is an interesting question whether the petitioners are precluded from applying to the CRT to have the respondent pay the costs of the hearing before it, including legal fees if they believed that extraordinary circumstances equivalent to those that justify special costs existed. The effect of the successful judicial review was that the vice chair's decision was overturned, and it seems to me that by successfully obtaining in the review the remedies that they would have sought on a rehearing, they were unquestionably the successful party for the purposes of the CRT process. It is also worth emphasizing that the CRT provisions on costs and expenses do not relate the ability to award them to the outcome of the action.

[31] However, it is not necessary to resolve that question for the purposes of the present application. The inability of the petitioners to seek costs from the CRT because the remedies were granted in this court still would not make litigation conduct while the matter was before that tribunal a basis for special costs on the judicial review. If the petitioners seek to pursue the issue, the CRT will determine its own jurisdiction in that regard.

[32] As potential support for the petitioners' position, I note that in *Eggertson v. Alberta Teachers' Assn*., [2003] A.J. No. 384 (C.A.) at para. 8, the court found that although it had no jurisdiction to order costs in relation to the administrative hearings that had been subject to judicial review, it was nonetheless entitled to consider "the history of the proceedings" (that is, before the tribunals) when arriving at the scale of costs before it and the reviewing court. However, unlike the present case, there was no statutory regime that would have allowed the applicant to recover their costs before the administrative tribunals, so the reasoning is not applicable.

[33] Therefore, any potential award of special costs in this application will be limited to the judicial review proceedings.

[34] In addition to merely being contemporaneous with those proceedings, the conduct complained of will also have to have been carried out “in the course of them” - not merely in parallel to them as an aspect of the parties’ ongoing dispute.

Conduct Being Relied On

Failure to Disclose Documents

[35] This part of the claim rests on the respondent’s refusal of the petitioners’ request for disclosure of the documents that were generated by the glass company’s inspection in 2018.

[36] The petitioners contend that these were critical documents, as demonstrated by my comment that at a new CRT hearing the tribunal member could not have done less than order the repairs that it documented. They point out that special costs have been awarded to address a failure to disclosure in such circumstances, even when the failure was characterized as merely “foolhardy recklessness”, or carelessness (see *Laface v. McWilliams*, 2005 BCSC 1766, at para. 38; and *Bank of Credit and Commerce International (Overseas) Ltd. v. Akbar et al*, 2001 BCCA 204 at para. 19). In contrast, the non-disclosure by the respondent in this case was a deliberate choice.

[37] First of all, the petitioners have misunderstood my reasons for judgment on the significance of this non-disclosure. In para. 99, which they rely on, I was referring to the report that the petitioners themselves later obtained from the same glass company in 2020, along with a report from a building services firm that they also acquired after the judicial review proceedings, as forming the inevitable basis of orders after a CRT rehearing.

[38] In any event, this request, falling as it did in 2018, before the judicial review proceeding was instituted, falls outside the scope of special costs that I have previously identified.

Concealment of Failure to Submit Warranty Claim

[39] The petitioners explain that from 2016 onwards they persistently requested proof that the respondent had submitted the warranty claim, as well as correspondence showing that the respondent had requested their history of claims from the warranty provider. Their requests were finally partially complied with in November 2019. The correspondence that was produced showed that the claims were submitted out of time, and that the provider was refusing to honour them on that basis.

[40] The reason that this refusal is particularly important from the petitioners' perspective is that in the CRT claim the respondent argued that it was acting reasonably by proceeding under the warranty claim, rather than repairing the petitioners' unit immediately – an argument that ultimately prevailed with the vice chair.

[41] Like the request for disclosure of the glass company report, I think that this request relates to the proceedings before the CRT. Although the respondent's partial compliance with the request occurred about ten months after the judicial review proceeding was filed, it was in response to requests initiated before the CRT proceedings were commenced, and acquires its significance only in relation to the issue before the vice chair. The alleged breach was the concealment, not the eventual disclosure. As a result, there is no indication that it occurred "in the course of" the judicial review proceedings, even taking into account the short temporal overlap.

Maintaining an Indefensible Position

[42] This aspect of the claim arises from the respondent's failure to remedy the deficiencies identified in the 2018 glass company report, despite its duty to maintain common property under the *Strata Property Act*. This duty was "independent of any legal proceedings", the petitioners submit.

[43] The exchanges between the parties' counsel on this issue occurred in July 2019. In a letter to the respondent's counsel, the petitioners' counsel referred to their having obtained the relevant document that the glass company generated after inspecting their unit in 2018, setting out the work to be performed. The respondent's counsel took the position that it was not prepared to meet on "options that – subject to the [judicial review] – are otherwise res judicata", and that from the respondent's perspective "the CRT has closed their file".

[44] The petitioners subsequently made three offers to discontinue the judicial review if the respondent performed the repairs identified by the glass company in that document.

[45] The petitioners say that this approach by the respondent represents that kind of "failure to come to terms with the manifest deficiency of its claim" representing "reckless indifference to the interests of the opposing party" that was found to be deserving of special costs in *Concord Industrial Services Ltd. v. 371773 B.C. Ltd.*, 2002 BCSC 900 at para. 27.

[46] Unfortunately for them, that decision does not accurately state the law on this point. As explained in *Vassilaki v. Vassilakakis*, 2024 BCCA 15:

> [47] The statement in *Webber v. Singh*, 2005 BCSC 224, [which had relied on *Concord*] 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.
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> [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:
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> > [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.
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> [Emphasis added]

[47] I note that in the Court of Appeal authority relied on by the petitioners - *Solex Developments Co. v. Taylor (District),* (1998) 60 B.C.L.R. (3d) 53 - the basis for upholding the order for special costs in the judicial review proceeding in question was the unwarranted persistence in a claim that was bound to fail, combined with material non-disclosure by the unsuccessful party at an earlier stage of the proceedings. This requirement - of something in addition to a merely inadequate case in order to justify special costs - is in keeping with the authorities summarized in *Vassilaki*.

[48] It is difficult to see how the respondent treating its success before the CRT as the baseline of its position on further negotiations with the petitioner, even recognizing that the judicial review remained outstanding, could ever meet such a high standard. I found that the vice chair erred in concluding that it was reasonable for the respondent to pursue the issues with the petitioners' unit as warranty claims, instead of repairing them as they arose. The respondent's position on that issue at the review was not meritless, it just did not succeed. It was certainly not reckless with regard to the truth, or so utterly without hope as to amount to misconduct, as the authorities require.

Antithetical Positions on the Presence of Deficiencies

[49] The conduct allegedly deserving of rebuke under this heading consists of the respondent relying on the 2013 assessment, which found no evidence of drafts, to deny that any repairs were necessary, and calling the petitioners' CRT claims "baseless and vexatious", only to acknowledge at its 2017 annual general meeting that outstanding deficiencies that including with respect to the performance and installation of windows, were the builder/developer's responsibility. The respondent also advised the builder/developer in February 2019, shortly after the petitioners commenced the judicial review, that their failure to attend to the window deficiencies had been the cause of the petitioners' CRT proceedings.

[50] The petitioners draw an analogy to awards of special costs in situations where a party has taken inconsistent positions in parallel actions, such as denying liability in one personal injury action but admitting it in a second action arising from the same accident: *Glover v Leakey*, 2017 BCSC 1287. While these are not parallel proceedings as in *Glover*, they involved putting the petitioners to the expense of proving a claim that was actually admitted.

[51] In my opinion, this conduct arose before the judicial review was commenced and consisted of a position that was taken in the course of the CRT claim. It is not related to the judicial review. The respondent's accusation about the builder/developer's responsibility for the CRT claim in 2019 is only relevant because it supposedly contrasts to the position taken on the effect of the 2013 report.

[52] More fundamentally, I did not understand the respondent's position before the CRT to have been that there were no deficiencies that needed to be pursued under the warranty, only that the 2013 report did not produce evidence that supported the petitioners' specific complaints. The vice chair concluded (at para. 121) that those specific complaints were unfounded in light of the 2013 report, and that the respondent had taken reasonable steps to pursue the common property claims, which it did consider legitimate, through the warranty process. The "antithetical

positions" that are being complained of were in fact positions taken by the respondent on different issues.

Unreasonable Refusal to Discuss a Negotiated Settlement

[53] This claim was referred to under "Maintaining an Indefensible Submission". The petitioners do not say that standing alone the refusal to consider their three offers to discontinue the proceedings if certain repairs were carried out is in itself a basis for special costs, but that it should be considered in conjunction with other grounds, as part of the overall justification for such an award.

[54] At this stage I will just make the observation that the costs regime under the *SCCR*s does not involve itself with refusals to accept offers unless the offers met the criteria for a formal offer under Rule 9-1(1), and an application of the considerations in sub-rule (6) leads to court to apply one of the available cost options. These do not include special costs.

Disproportionate Financial Positions

[55] Finally, the petitioners submit that the use by the respondent of its financial advantage over them should be considered when deciding whether its conduct has been deserving of rebuke. They say that in a dispute like the present one, a strata will not be as concerned about cost consequences as unit owners have to be. In particular, it is inappropriate for the respondent to be able to draw on the collective resources of all of the owners, including the petitioners, to shield itself from the consequences of its inaction.

[56] The petitioners submit that such an attitude runs counter to the essential purpose of costs, which is to bring to bear a "winnowing function" in the litigation process – encouraging parties to assess the strength of their cases, both at the start of proceedings and throughout their progress: *Catalyst Paper Corporation v. Companhia de Navegação Norsul*, 2009 BCCA 16 at para. 16.

[57] I acknowledge that in appropriate circumstances a strata's oppressive use of its financial position in relation to an owner might justify consideration of special

costs, but that submission in the present case assumes conduct by the respondent that I did not find in the judicial review, and do not find on this application. The respondent's failure, if one can call it that, was to seek to uphold on judicial review a successful outcome at the CRT that I ultimately found was based on errors by the vice chair. While that attracts the usual cost consequences for an unsuccessful party, without more it is not a basis for special costs.

Conclusion

[58] The petitioners have not demonstrated their entitlement to special costs. The conduct complained of was either part of the proceedings before the CRT, which are not part of my costs jurisdiction, or were merely contemporaneous with the judicial review and cannot be said to have been committed "in the course of" it.

[59] Therefore, my initial costs order in my reasons for judgment on the judicial review is confirmed, except that the respondent, as the successful party in this application for special costs, will receive its costs of it, at the usual scale of difficulty.

"Schultes J."