IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Low v. Straiton Development Corporation,* 2023 BCSC 593

Date: 20230414
Docket: S179364
Registry: New Westminster

Between:

Sheila Low, and Anne Stene as administrator of the Estate of Gundhart U. Fleischer, Deceased

Plaintiffs

And

Straiton Development Corporation, 0746149 B.C. Ltd., 0746154 B.C. Ltd., 0746157 B.C. Ltd., White Castle Ventures Inc. and Abby Mews Development Corporation

Defendants

Before: The Honourable Mr. Justice Armstrong

Reasons for Judgment

Counsel for the Plaintiffs:	D.W. Donohoe
Counsel for Defendants Straiton Development Corporation and Numbered Companies:	B. Meckling
Counsel for Defendants Abby Mews Development Corporation and White Castle Ventures Inc.:	R. Soni
Plaintiffs' Written Submissions:	April 26, 2022 May 5, 2022
Defendants' Written Submissions:	April 27, 2022 April 6, 2023
Place and Date of Judgment:	New Westminster, B.C. April 14, 2023

Introduction

[1] The defendants White Castle Ventures Inc. (“White Castle”) and Abby Mews Development Corporation (“Abby Mews”) were successful in defending a claim by the plaintiffs to monies payable by 0746149 B.C. Ltd., 0746154 B.C. Ltd., and 0746157 B.C. Ltd. (the “Krahn Group”) and Straiton Development Corporation (“Straiton”) under a joint venture agreement in regard to a real estate development. Reasons for judgment in this case are indexed at *Low v. Straiton Development Corporation*, 2022 BCSC 302.

[2] There is consensus between the parties that White Castle and Abby Mews are entitled to costs of the action. Abby Mews and White Castle argued for a special costs order with an alternative claim for increased costs payable jointly and severally by the plaintiffs and the Krahn Group. The plaintiffs and the Krahn Group oppose the claims against them for a special costs order and increased costs.

Issues

[3] The issues on this application are:

i. whether the defendants Abby Mews and White Castle are entitled to costs on the interpleader proceedings;

ii. whether any costs payable by the plaintiffs should be payable jointly and severally by the Krahn Group;

iii. whether the defendants Abby Mews and White Castle are entitled to special costs against the plaintiffs; and

iv. in the alternative, whether Abby Mews and White Castle are entitled to costs at Scale C against the plaintiffs except costs arising from the adjournments granted at the outset of the trial due to White Castle’s counsel being unavailable, which costs are to be paid by White Castle.

Background

[4] Sheila Low and Gundhart Fleischer were the original principals and shareholders of Abby Mews. Mr. Fleischer was the main representative of Abby Mews before this litigation started and he died very shortly after this litigation was commenced.

[5] The origins of this dispute concern lands owned by Abby Mews which were transferred into a joint venture between Abby Mews, the Krahn Group and Straiton as trustee for the joint venture. The joint venture agreement contained a formula for distributing the proceeds of sale of the joint venture lands; firstly, funds were to pay off mortgages and liabilities to arm's length parties; next repayment of monies advanced by joint venturers in proportion to their respective contributions; and next Abby Mews was to receive the next $877,500.

[6] In September 2008, the plaintiffs transferred their 90% interest in the joint venture to White Castle and Abby Mews. They retained a 10% interest in the joint venture until certain other steps were taken. The agreement under which the 90% interest was transferred (the 90% Agreement) did not refer to any assignment to the plaintiffs of money payable to Abby Mews.

[7] In April 2010, the plaintiffs transferred the 10% balance of their interest in the joint venture to White Castle in exchange for notional consideration of $30. The agreement under which the 10% interest was transferred (the 10% Agreement) included the following term:

> The shareholders have notified Star 18 (now White Castle) that Abby Mews has a claim against… the Krahn group… in connection with an unpaid portion of the purchase price in the amount of approximately $600,000 arising from the disposition by Abby Mews of the property which is the subject of the Straiton Joint Venture.
>
> Star 18 has agreed to allow the shareholders to advance such claim on behalf of Abbey Mews and to authorize and empower the shareholders to proceed with such a claim at such time as the shareholders elect….

[8] It is this agreement that formed the foundation of the plaintiffs' claim that they were entitled to receive $877,500 from the joint venture distribution of sale proceeds before any other funds were distributed to the joint venturers.

[9] The plaintiffs also made a claim against Straiton or the Krahn Group for "equitable compensation" in the amount of $877,500.

[10] In April 2016 the Krahn Group brought an interpleader application seeking to interplead $1,286,706 into court and to be discharged from all such liability. Justice McEwan heard this application and ordered the Krahn Group to interplead that sum into court (the "First Interpleader Order").

[11] Abby Mews challenged the First Interpleader Order in March 2017. Justice Fleming heard the challenge and varied the First Interpleader Order, ordering that $577,500 of the original amount remain interpleaded into court with the balance paid out of court to Abby Mews.

[12] Also in March 2017, the plaintiffs brought an application to, among other things, add White Castle and the Krahn Group as defendants to the action. The Krahn Group took no position on whether they should be added as defendants. In October 2017, Justice Jenkins ordered that the Krahn Group be added as defendants in reasons indexed at 2017 BCSC 1775.

[13] My conclusions are set out in my reasons for judgment in *Low* included the following:

> [220] The burden of proof in this case rested on the plaintiffs and I am satisfied that on all of the evidence presented, the plaintiffs have not proven their entitlement to $877,500 as a return of an "unpaid purchase price" to be distributed under clause 26(d) of the joint venture agreement. Thus, I decline to make the order requested for reasons noted above. The plaintiffs' contention that they are entitled to a "vendor's lien" is inconsistent with the claim presented at trial that the funds were payable from the distribution of profits after the sale of lots under clause 26(d). Nothing in the agreement disclosed a claim for an interest in land arising under clause 26 of the 10% Agreement.
>
> [221] Abby Mews seeks an order that they be paid the sum of $577,500, which Fleming J. ordered to be paid into court as part of the interpleader proceedings. On the basis of my findings, I will make the order directing that Abby Mews' interest is properly payable to Abby Mews and the plaintiff's claims against this sum are dismissed.
>
> [222] On the question of interest, there are no contractual terms entitling the plaintiffs to interest on the sums claimed. Even if $877,500 had been found payable to them, interest was paid to Abby Mews as part of its agreement to sell its entire interest in the joint venture to the Krahn Group. As between Abby Mews and the plaintiffs, if any money had been owing, it would have

> attracted interest under the prejudgment rates of the *Court Order Interest Act*, R.S.B.C., c. 79, s. 1.
>
> [223] Alternatively, the plaintiffs' claimed against Straiton or the Krahn Group for "equitable compensation" in the amount of $877,500. Although the plaintiffs contend that Abby Mews "had a claim" against Straiton or the Krahn Group for this sum, on the evidence, the plaintiffs failed to establish an agreement for payment of that money or any entitlement to the clause 26(d) payments.
>
> [224] Finally, the plaintiffs' claimed damages in the alternative against White Castle and Abby Mews for breach of the 10% Agreement and for inducing Abby Mews to release their claims in favour of the Krahn Group for the recovery of $877,500. Notwithstanding Mr. Fleischer's belief that monies were owed to Abby Mews for an unpaid purchase price, the plaintiffs did not prove on a balance of probabilities the existence of that obligation. Again, for the reasons noted above, the plaintiffs' claim for this remedy is dismissed.

[14] After the trial eventually started, there were multiple occasions when the parties appeared at trial to address delays in the continuation due to White Castle's lawyer's inability to represent them because of difficulties regarding his status with the Law Society of BC.

[15] In the midst of this trial the plaintiff's decided that there claims should be advanced against White Castle and Abby Mews. The plaintiffs were permitted to file an amended NOCC eliminating Abby Mews as plaintiff and naming it as a defendant in their action.

The Positions of the Parties

The Position of Abby Mews and White Castle

[16] The defendants Abby Mews and White Castle contend that the plaintiffs' claims were legally and factually meritless. They contend there were no issues concerning contractual interpretation or otherwise to support the plaintiffs' claims. Moreover, the defendants contend the plaintiffs failed to disclose significant documents that were germane to this proceeding and the interpleader proceedings.

[17] The two documents referred to by Abby Mews and White Castle at the hearing of this application included a notice of civil claim (NOCC) from 2012 brought by Abby Mews against Straiton for the unpaid purchase price arising from the

transfer of the property to the joint venture by Abby Mews (the “2012 Action”). This NOCC was disclosed midway through this trial.

[18] The second document was another NOCC from dated July 28, 2014 in which Mr. Fleischer and Ms. Low claimed against Abby Mews and Straiton for an “unpaid purchase price” without reference to the assertions that monies were payable from the sale proceeds of the joint venture lands (the “2014 Action”). They say the 2012 Action did not proceed and the 2014 Action was settled.

[19] These two NOCCs were filed on Mr. Fleischer’s instructions and would have been well-known to the Krahn Group and Ms. Low. Abby Mews and White Castle allege claims in these two actions were inconsistent with the plaintiff’s claims in this proceeding. Further, they contend that the plaintiffs and the Krahn Group deliberately failed to disclose the existence of these actions and misled the interpleader judges by failing to reveal the existence of these prior claims. They contend that if this information had been available to the interpleader judges, no funds would have been paid into court.

[20] In short, the Abby Mews and White Castle claim that the failure of the plaintiffs and the Krahn Group to disclose these previous lawsuits justifies an award of special costs.

[21] Further, they claim that the Krahn Group acquiesced to their inclusion as defendants in this proceeding in order to secure the sum of $300,000 owed to them by Mr. Fleischer and Ms. Low. In final arguments, the Krahn Group supported the plaintiffs’ claims and did not make submissions on the plaintiffs’ claims against them.

[22] Abby Mews and White Castle claim that it was not until nine months after Mr. Fleischer’s death that the plaintiffs advanced a claim for funds payable under clause 26(d) of the joint venture agreement. This delay in making this claim highlighted absence of good faith in the plaintiffs’ claims made at trial.

[23] Abby Mews and White Castle contend if they are unsuccessful on their application for special costs, for reasons similar to their submissions seeking special

costs they should be entitled to increase costs. They contend conduct of the action was made more complex than warranted because of a series of assertions made by the plaintiffs' concerning the delayed recovery of $577,500 placed into court under the interpleader order. They contend the plaintiffs' claims were meritless and the trial lasted many days because of baseless positions taken by the plaintiffs throughout the trial. Overall, they contend that if the NOCCs in the 2012 Action and the 2014 Action had been revealed to the Court earlier, that the claims would have been *res judicata* or barred by issue estoppel.

[24] Abby Mews and White Castle contend that the plaintiffs' changed pleadings and strategies throughout the trial caused some delay in confusion in addition to new responses to the ANOCC. By improperly making the Krahn Group defendants in the proceeding the plaintiffs acted reprehensibly and abused the courts process. They contended the late disclosure of documents operated to mislead the court, all of which warrant either special costs or Scale C costs.

[25] The defendants Abby Mews and White Castle stress that they should also be entitled to special costs or increase costs for the interpleader application. They concede that the Krahn Group would not normally be liable for costs on the interpleader application but contend the Krahn Group should bear those costs consequences for the interpleader proceeding because they had ignored their release from liability when they participated in the action as parties.

[26] They requested that the Krahn Group and the plaintiffs be jointly and severally liable for costs of the interpleader applications.

The Position of the Plaintiffs

[27] The plaintiffs recognize that White Castle and latterly Abby Mews were the successful parties in these proceedings but oppose the claim for special or increased costs. They take no position on the claim that costs should be payable jointly and severally by the Krahn Group.

[28] They contend that there was no misconduct by the plaintiffs that justifies an award of special costs in this case. They assert that there was evidence to support their claim of an assignment by White Castle to the plaintiffs of payments due under clause 26(d) of the joint venture agreement. They say the central debate revolved around an interpretation of the wording in the agreement and that the plaintiffs provided the Court with reasons in their closing argument to support their suggested interpretation. As such, there is no substance to White Castle's assertion that the plaintiff's claim had no merit.

[29] The plaintiffs contend that they did not misconduct themselves by failing to disclose at an earlier date the NOCCs in the 2012 Action and the 2014 Action. They say they had no duty to disclose those pleadings pursuant to the *Supreme Court Civil Rules* as their disclosure obligation was limited to "documents that could be used at trial to prove or disprove a material fact". They say those pleadings were merely statements of legal position or legal theory by counsel.

[30] The plaintiffs deny that it is impossible to reconcile the claims made in the 2012 Action with the claims made in this action; they say both actions claimed recovery of a portion of an unpaid purchase price owing from the sale of land.

[31] Further, they assert that they did not mislead the interpleader judges by not revealing the existence of the 2012 Action and 2014 Action; the plaintiffs did not attend at and were not given notice of the hearing of the interpleader application before Justice McEwan. The allegation that the First Interpleader Order was the product of "joint actions" of the plaintiffs and Krahn Group is a false allegation without any proper factual basis. Further, they say that the Court being told of the 2012 Action and 2014 Action would not have made any difference to the interpleader proceeding; the previous framing of the claims is not material. There was no settlement of the 2012 Action and the 2014 Action lapsed into dormancy; it was not dismissed, discontinued, or otherwise released or adjudicated.

[32] The plaintiffs oppose the claim of Abby Mews and White Castle to costs of the interpleader proceedings, asserting that it is not possible to attempt to vary, years

later, the order of Justice Fleming from March 13, 2017 that the parties should bear their own costs of the interpleader proceeding. They say this application should be dismissed with "costs awarded to the plaintiffs, in set-off from the trial costs on scale B".

The Position of the Krahn Group

[33] The Krahn Group asserts that while Abby Mews and White Castle were successful in their defence of the plaintiff's claims, the Krahn Group and Straiton were equally successful. They say that in the normal course, the successful defendants are entitled to their costs of the action payable by the plaintiffs. They say Abby Mews and White Castle are not entitled to have their costs paid by the Krahn Group. They took no position on the claim for costs advanced against the plaintiffs.

[34] The Krahn Group relied on *Century 21 Coastal Realty Ltd. v. 0863846 B.C. Ltd.,* 2019 BCSC 5 where the Court held that successful defendants are not usually liable for costs even if they benefited from the wrongful conduct that resulted in the claim against them. They say that unless a "discretionary exception" to the usual rule should be made, Abby Mews and White Castle are not entitled to costs against the Krahn Group.

[35] They further oppose the claim for special or increased costs against the Krahn Group. They deny that they misled the Court in the interpleader proceeding by failing to disclose the existence of the 2012 Action or 2014 Action. They say that the prior NOCCs are not documents that could be used by a party in the action to "prove or disprove a material fact" in the action nor were they "material facts" that had to be disclosed to the Court on the without-notice interpleader application. Even if the NOCCs had to be disclosed in the interpleader proceeding, which the Krahn Group denies, any remedy Abby Mews and White Castle might have must be sought with respect to the orders made in those proceedings, not in this action.

[36] The Krahn Group contends that whether they opposed the application to have them added as defendants to the action or took no position makes no difference in this case. A claim was advanced against them by the plaintiffs and it was not

meritless. They say they were entitled to participate in the trial and that supporting a contractual interpretation sought by another party is not improper and in the usual course carries no adverse cost consequences. They deny that they contributed to the length or overall cost of the trial.

[37] The Krahn Group opposes the claim that they are liable for costs of the interpleader proceeding. They say that costs with respect to both applications were raised and decided by the presiding judges and that both orders are final and have not been appealed. Any argument regarding costs of the interpleader proceedings is precluded by issue estoppel or *res judicata.*

Analysis

Legal Framework

Special Costs

[38] The general rule on costs of proceedings is set out in Rule 14-1(9) of the *Supreme Court Civil Rules*:

> Costs to follow event
>
> (9) Subject to sub rule (12), costs of a proceeding must be awarded to the successful party unless the court otherwise orders.

[39] All costs are to be assessed as party and party costs under Appendix B unless the court orders the costs of a proceeding be assessed as special costs (Rule 14-1(1)(b)(i)).

[40] Principles relating to special costs awards were summarized by Justice Voith in *Concord Pacific Acquisitions Inc. v. Oei*, 2021 BCSC 129:

> [40] The general legal principles that pertain to an award of special costs are well-established and clearly understood. The parties agree with each of the following propositions.
>
> [41] This court has the jurisdiction to make an award of special costs pursuant to its inherent jurisdiction and Rule 14-1(1) of the *Supreme Court Civil Rules*: *Westsea Construction Ltd. v. 0759533 B.C. Ltd.,* 2013 BCSC 1352 at para. 25.

[42] Special costs are an extraordinary measure and an award of special costs should be made both cautiously and sparingly: *Grewal v. Sandhu*, 2012 BCCA 26 at paras. 106–07.

[43] In *Mayer v. Osbourne Contracting Ltd.,* 2011 BCSC 914, Justice Walker described the function and standard for special costs as follows:

> [8] Special costs are awarded where a litigant engaged in reprehensible conduct. The purpose of an award of special costs is to chastise a litigant. Special costs are punitive in nature and encompass an element of deterrence. A wide meaning is given to the word "reprehensible". The term represents a general and all encompassing expression of the applicable standard for an award of special costs. "Reprehensible" conduct includes conduct that is scandalous, outrageous, or constitutes misbehaviour, as well as milder forms of misconduct that in a court's view deserves reproof of rebuke. In determining whether the conduct of a party is reprehensible, courts may consider whether the conduct complained of is a type from which it should seek to dissociate itself …

[44] In *Westsea*, Justice Gropper identified various "thematic groups" where courts have considered that an award of special costs was appropriate. One such thematic group is "Misleading the Court": at paras. 65–72. Justice Gropper noted that "[f]raudulent claims and untruthful testimony are a particularly reprehensible form of conduct deserving of rebuke": at para. 65.

Increased Costs

[41] Section 2 of Appendix B provides:

> 2 (1) If a court has made an order for costs, it may fix the scale, from Scale A to Scale C in subsection (2), under which the costs will be assessed, and may order that one or more steps in the proceeding be assessed under a different scale from that fixed for other steps.
>
> (2) In fixing the Scale of Costs, the Court must have regard to the following principles:
>
> (a) Scale A is for matter of little or less than ordinary difficulty;
>
> (b) Scale B is for matters of ordinary difficulty;
>
> (c) Scale C is for matters of more than ordinary difficulty.
>
> (3) In fixing the appropriate scale under which costs will be assessed, the court may take into account the following:
>
> (a) whether a difficult issue of law, fact or construction is involved;
>
> (b) whether an issue is of importance to a class or body of persons, or is of general interest;
>
> (c) whether the result of the proceeding effectively determines the rights and obligations as between the parties beyond the relief that was actually granted or denied.

[42] In *Slocan Forest Products Ltd. v. Trapper Enterprises Ltd.,* 2010 BCSC 1494, the court set out seven factors developed by the court that continue to be relevant to the determination of the appropriate scale of costs to be awarded under Appendix B (at para. 6):

> (a) Length of trial;
>
> (b) Complexity of issues;
>
> (c) Number and complexity of pre-trial applications;
>
> (d) Whether or not the action was hard-fought with little or nothing conceded along the way;
>
> (e) The number and length of examinations for discovery;
>
> (f) The number and complexity of expert reports;
>
> (g) The extent of the effort required in the collection of and proof of the facts.

Interpleader Costs

[43] Dealing first with Abby Mews and White Castle's claim to costs for the interpleader proceedings, for the reasons that follow I find that claim has no merit.

[44] This action was not a trial of the interpleader proceedings but a trial based on the pleadings in this action. There is no authority permitting the Court to decide issues in another proceeding absent an order of the Court in that proceeding to make decisions.

[45] Most importantly, in the First Interpleader Order, Justice McEwan ordered that ""[c]osts of this application be paid out of the Funds to the Petitioners forthwith".

[46] On March 2, 2017 Justice Fleming varied the First Interpleader Order by allowing a portion of the funds interpleaded into court to be paid out to Abby Mews, and ordered that "[e]ach party shall bear their own costs of this Application". Absent a direction that costs could be dealt with in this proceeding, the matter of costs in the interpleader proceedings cannot be addressed by the Court in this proceeding.

[47] In *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 at paras. 24–25 the Court addressed the application of issue estoppel principles:

> 24 Issue estoppel was more particularly defined by Middleton J.A. of the Ontario Court of Appeal in *McIntosh v. Parent*, 1924 CanLII 401 (ON CA), [1924] 4 D.L.R. 420, at p. 422:
>
> > When a question is litigated, the judgment of the Court is a final determination as between the parties and their privies. Any right, question, or fact distinctly put in issue and directly determined by a Court of competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot be re-tried in a subsequent suit between the same parties or their privies, though for a different cause of action. The right, question, or fact, once determined, must, as between them, be taken to be conclusively established so long as the judgment remains.
> >
> > [Emphasis added by Binnie J.]
>
> This statement was adopted by Laskin J. (later C.J.), dissenting in *Angle*, *supra*, at pp. 267-68. This description of the issues subject to estoppel ("[a]ny right, question or fact distinctly put in issue and directly determined") is more stringent than the formulation in some of the older cases for cause of action estoppel (e.g., "all matters which were, or might properly have been, brought into litigation", *Farwell*, *supra*, at p. 558). Dickson J. (later C.J.), speaking for the majority in *Angle*, *supra*, at p. 255, subscribed to the more stringent definition for the purpose of issue estoppel. "It will not suffice" he said, "if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment." The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceeding. In other words, as discussed below, the estoppel extends to the material facts and the conclusions of law or of mixed fact and law ("the questions") that were necessarily (even if not explicitly) determined in the earlier proceedings.
>
> 25 The preconditions to the operation of issue estoppel were set out by Dickson J. in *Angle*, *supra*, at p. 254:
>
> > (1) that the same question has been decided;
> >
> > (2) that the judicial decision which is said to create the estoppel was final; and,
> >
> > (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[48] These principles are apposite to the circumstances in this case, namely that the same question was decided in the interpleader proceedings, the decisions were final, and the parties to those decisions were the same persons as the parties in this proceeding. Moreover, there was no appeal from either interpleader decision on the issue of costs, and this Court will not interfere with those decisions, as precluded by issue estoppel or *res judicata*.

Costs Claimed Against the Krahn Group

[49] The defendants Abby Mews and White Castle contend that the plaintiffs and the Krahn Group should be jointly and severally liable for special costs, or increase costs, based on the Krahn Group's support of meritless claims advanced by the plaintiffs and failing to disclose earlier the existence of the 2012 Action and 2014 Action.

[50] They contend that the Krahn Group should become jointly and severally liable to pay their costs in part because they took no position on the application to add them as defendants in the claim. They contend that the Krahn Group achieved immunity from any claims being brought in this proceeding because of the interpleader orders.

[51] Abby Mews and White Castle did not provide any legal authority for the proposition that underlies their claim to this broad reach of cost orders.

[52] The Krahn Group argued that this action was originally filed by Mr. Fleischer and Ms. Low against Straiton but in March 2017 the plaintiffs applied to add the Krahn Group as defendants to the action. Justice Jenkins made an order on October 3, 2017 adding the Krahn Group as defendants and allowing amendments to the NOCC.

[53] The plaintiffs amended the NOCC to include a claim that the plaintiffs were entitled to judgment against Straiton or the Krahn Group for equitable compensation in the sum of $877,500 for the transfer of the subject land with a direction that the compensation be paid to the individual plaintiffs.

[54] It is important to note that in October 2019 the plaintiffs were granted an order to remove Abby Mews as plaintiff in the action and add it as a defendant. Strangely, plaintiffs' counsel continued to act against Abby Mews notwithstanding his earlier representation of that party. The amended NOCC continued to claim a judgment against the Krahn Group for "equitable compensation".

[55] In this action, the claim for equitable compensation was dismissed. In short, the assertion of Abby Mews and White Castle that "no actual claim was advanced by the plaintiffs against the Krahn defendants" is wrong.

[56] The defendants Abby Mews and White Castle also mischaracterize the nature of this action in implicating the Krahn Group as supportive of a "meritless" claim. The Krahn Group was entitled to support the plaintiffs' contractual interpretation of the agreements; this was not an improper position for the Krahn Group to take and cannot in the ordinary course result in an adverse cost order. There is nothing in the record of proceedings to suggest the Krahn Group in any way prolonged the proceedings; it is significant that the agreements signed contained some uncertainty, albeit the plaintiffs' contentions were unsuccessful. The Krahn Group was required to defend the claims brought against them.

[57] The Krahn Group cited the decision of this Court in *Century 21 Coastal Realty Ltd.* in support of their position:

> [15] The usual rule is that costs follow the event, so that a substantially successful litigant is entitled to recover costs from the unsuccessful party unless the court orders otherwise*: Leung* v. *Chang*, 2014 BCSC 1243 at para. 32. Any discretionary exception to the usual rules regarding costs must be made judicially: *Bailey v. Victory* (1995), 4 B.C.L.R. (3d) 389 at para. 13 (C.A.).
>
> [16] As the plaintiffs were ultimately unsuccessful against Jagdev and Sukhpal, the plaintiffs must persuade the Court that the usual rule should be displaced: *Grassi v. WIC Radio Ltd.*, 2001 BCCA 376 at para. 24.
>
> [17] The plaintiff's primary contention is that Jagdev and Sukhpal, although not legally liable for any alleged wrongdoing, benefited from Prabhdev's tortious conduct. The plaintiffs rely on the observation of the Court of Appeal at para 37:
>
> > …it is readily apparent that Prabhdev's conduct in causing 086 to breach the Agreement to List <u>was for his own personal benefit and that of his brothers</u>. …
> >
> > [Emphasis added by Dardi J.]
>
> [18] The plaintiffs also underscore that the three Khera brothers jointly owned and developed the Lands.
>
> [19] In my view, there is no principled basis for departing from the usual rule. Jagdev and Sukhpal were entirely successful in defending the action. The fact that they benefitted from Prabhdev's wrongful conduct does not

> overcome the plain fact that the plaintiffs invoked the Court's jurisdiction against them unsuccessfully.

[58] I find that the defendants Abby Mews and White Castle have failed to establish any basis on which to depart from the usual rule that costs follow the event. In this case, the Krahn Group were entirely successful in defending the claim against it. For reasons that I will address further, the Krahn Group did not act in any improper way in not producing copies of pleadings in the 2012 Action and the 2014 Action.

[59] I find that no costs should be payable by the Krahn Group to Abby Mews and White Castle.

Special Costs

[60] The parties agree that special costs can be awarded by the court to chastise litigants engaging in reprehensible conduct. The defendants Abby Mews and White Castle rest their claim for special costs on the suggestion that the plaintiffs misled the Court by failing to disclose the existence of the 2012 Action and the 2014 Action. Summarizing the principles informing special costs orders, are the comments of Justice Gropper in *Westsea Construction Ltd. v. 0759533 B.C. Ltd.*, 2013 BCSC 1352 [*Westsea*]:

> [73] I have undertaken a thorough review of the cases involving special costs. Having examined the authorities provided by both sides, it is apparent to me that the courts have been somewhat inconsistent in their determination of what amounts to reprehensible conduct and that those authorities must be reconciled. Based upon my review of the authorities, I have derived the following principles for awarding special costs:
>
> a) the court must exercise restraint in awarding specials costs;
>
> b) the party seeking special costs must demonstrate exceptional circumstances to justify a special costs order;
>
> c) simply because the legal concept of "reprehensibility" captures different kinds of misconduct does not mean that all forms of misconduct are encompassed by this term;
>
> d) reprehensibility will likely be found in circumstances where there is evidence of improper motive, abuse of the court's process, misleading the court and persistent breaches of the rules of professional conduct and the rules of court that prejudice the applicant;

> e) special costs can be ordered against parties and non-parties alike; and
>
> f) the successful litigant is entitled to costs in accordance with the general rule that costs follow the event. Special costs are not awarded to a successful party as a "bonus" or further compensation for that success.

[61] In *Westsea*, the Court said that "meritless claims that are pursued for some improper motive have generally attracted special costs" orders (at para. 43). At paras. 44–48, Justice Gropper reviewed a number of decisions on this point. It is clear from Justice Gropper's findings that taking a position that is unsound does not rise to the level of reprehensible conduct that merits a special costs order. Meritless claims alone will not attract special costs: *Westsea* at para. 42. Most importantly, in this case Abby Mews and White Castle entered into the 10% Agreement in which they recognized the statement that "Abby Mews has a claim against" the Krahn Group and their principals and Straiton in connection with an unpaid purchase price of approximately $600,000 arising from the disposition of Abby Mews property which is the subject of the joint venture.

[62] Thus, while in the end, the plaintiffs failed to prove an entitlement to the $877,500 referred to in the joint venture agreement as payable to Abby Mews, it cannot be said the action was "meritless" from the outset.

[63] In *Westsea,* Justice Gropper also addressed the issue of abuse of the court's process as a basis for a finding of reprehensible conduct at paras. 53–57. In this case, I do not find that the plaintiffs abuse the process of the court notwithstanding the assertions that the late disclosure of the actions initiated by Mr. Fleischer. Mr. Fleischer died before the trial and his testimony would likely have assisted the plaintiffs and their claim, albeit would not likely have changed the result.

[64] Voith J. (as he then was) discussed the importance of non-disclosure of documents as a basis to ground a special costs award in *Sull v. Pengelly,* 2019 BCSC 1565 at para. 33:

> [33] These various authorities suggest that non-disclosure of material documents, without more, may not be sufficient to ground an award of special costs. This conclusion is, of course, largely dependent on the circumstances

> of each case. Material non-disclosure, on its own, may warrant special costs particularly if the material non-disclosure is egregious, gives rise to delay, and is "obstructive" in its purpose and result. In other less extreme cases, non-disclosure will be only one of several factors that, together, justify an award of special costs.

[65] The plaintiffs' failure to produce the NOCCs in the 2012 Action and 2014 Action until mid-trial did not substantially compromise the trial or the result. It is noteworthy that the plaintiffs produced these documents when they had come to counsel's attention. The parties were able to rely on inferences that could be drawn from those documents before final argument. More important, Mr. Fleischer was not available to give testimony about those proceedings. In the end they were not useful in the ultimate conclusions reached by the court.

[66] I do not accept that the late production of the 2012 and 2014 NOCCs was in any way sharp practice. It was not a tactical manoeuvre that detracted from the defence; there was no attempt at obfuscation by the plaintiffs and no delay attributable to the plaintiffs stemming from the revelation of the NOCCs.

[67] It should be noted that Mr. Fleischer, the person who initiated these claims on his own behalf and for Abby Mews died immediately after this litigation commenced and Ms. Low was not involved in the plaintiffs' decision-making process. I am not certain she was aware of the 2012 Action and 2014 Action.

[68] This trial had many delays beginning on the first day of trial and continuing through until final argument was made. Those delays occurred because the defendants Abby Mews and White Castles' counsel was temporarily suspended from practice and they were unable to retain counsel in a timely way after their original lawyer stepped aside in the first days of the trial and again later during the final stages of the trial. I accept that White Castle and Abby Mews caused much delay and additional cost to the plaintiffs and Krahn Group due to the conduct of their counsel.

[69] Finally, I am not satisfied that the plaintiffs in any way misled the court deliberately in this trial or the interpleader proceedings trial about the previous

actions. Again, Mr. Fleischer died immediately before this action was commenced and it was clear to me that counsel for the plaintiffs, Mr. Donohoe, was surprised at the discovery of the NOCCs from the 2012 Action and 2014 Action.

[70] In my view, those NOCCs may have represented a different approach or construction of events that happened before 2014; they were extant at the time of this trial and the existence of those prior actions did not substantially impact the outcome of this case.

[71] It is important to remember that the court must "exercise restraint" when asked to award special costs and should limit such awards to "exceptional circumstances: *Westsea* at para. 73.

[72] In my view, the behaviour of the plaintiffs in this case did not reach the level of "reprehensible" conduct as described by Justice Gropper in *Westsea*.

[73] By the end of the trial, it was clear that any hope the plaintiffs had was severely compromised because Mr. Fleischer could not attend and report on discussions or understandings he may have had with Mr. Cassels or Mr. Krahn.

Costs at Scale C

[74] White Castle and Abby Mews make an alternative claim for costs at Scale C due to the level of difficulty in this litigation. They contend this claim is supported by legal principles summarized by Justice McEwan in *Slocan Forest Products Ltd.* In that decision the court summarized some important factors to be considered in deciding a costs claim:

a. Complexity of issues
b. Number and complexity of pre-trial apps
c. Whether action was hard-fought with little to nothing conceded
d. Number and length of exams for discovery
e. Number and complexity of expert reports
f. Extent of effort required in collection/proof of facts

[75] The factors from Appendix B that the Court may consider are:

a. Where a difficult issue of law, fact or construction is involved;

b. Whether an issue is of importance to a class/body of persons or is of general interest; and

c. Whether the result effectively determines the rights/obligations as between the parties beyond the relief that was actually granted/denied

[76] The issues in this case were not unduly complex; the interpretation of the 10% Agreement was a pivotal issue but did not involve consideration of complex issues or facts. The plaintiffs did not have the benefit of Mr. Fleischer's testimony at trial concerning his assertions about the origins of the 10% Agreement.

[77] In this case, there were two pretrial applications and other applications made during the trial requiring changes and clarification to pleadings.

[78] Although both parties conducted the trial with vigorous efforts and attention to detail, I would not describe the action as "hard – fought" warranting costs at the higher scale.

[79] There were no expert opinions tendered in this case and the number of documents referred to in the trial was not significant.

[80] Although the outcome of the trial resolved all of the differences between the various parties, there was little in the substance of the litigation to elevate the entitlement to Scale costs in favour of White Castle and Abby Mews.

[81] White Castle and Abby Mews argued the plaintiffs had led no evidence that their claims were made under section 26(d) of the joint venture agreement. They contend that neither Fleischer and Low demonstrated that there was a clear legal obligation entitling them to payments stemming from section 26(d) of the agreement and identified no legal principles of contractual interpretation in support of their claims. In the end, they argued the plaintiffs' claims were legally and factually without merit.

[82] White Castle and Abby Mews repeat the allegations concerning late disclosure of the two NOCCs containing claims inconsistent with the claims in this action as a basis for a higher scale of costs.

[83] White Castle and Abby Mews claimed to have had no knowledge of these claims notwithstanding that Abby Mews was represented by the same lawyer representing the plaintiffs through a large part of this trial.

[84] White Castle and Abby Mews also argued that the plaintiffs' claims were amended several times during the trial including a change in the amount claimed from $600,000 to $870,000. That change was initiated by Mr. Fleischer but could not be explained without him.

Length of Trial

[85] This proceeding was commenced April 5, 2016 and the plaintiff set this trial for 10 days commencing July 15, 2019. Argument concluded after 24 trial days. There were several applications made by the parties and two amendments to pleadings after the trial began. The conclusion of the trial was delayed substantially by the difficulties faced by White Castle and Abby Mews with their counsel.

Meritless Claims

[86] As discussed above, although the plaintiffs did not succeed in their claim, I do not consider the claim to have been meritless.

[87] As noted above, Mr. Cassels, representing Abby Mews and White Castle, signed the 10% Agreement which suggested the plaintiffs had retained some claim to joint venture property and authorized this law suit to be brought. In the result, I am satisfied there was merit to the claim notwithstanding the lack of success in the end.

Improperly Adding the Krahn Group

[88] In 2017, Justice Jenkins heard an application brought by the plaintiffs Mr. Fleischer, Ms. Low, and Abby Mews to add the Krahn Group and Star 18 Enterprises Inc. (now White Castle) as defendants and to substantially amend their NOCC.

[89] White Castle and Abby Mews contend that when the Krahn Group did not oppose the application, they were in some way complicit in improperly permitting the claim to be advanced. In reasons indexed at 2017 BCSC 1775, Jenkins J. said:

> [27] The several actions in which the parties and proposed parties are involved together with the several complex agreements give rise to many discreet issues which could be litigated between several parties, not only including the current and proposed parties to this action.
>
> [28] After a review of all of the materials before me and the principles established in law, I am satisfied that the criteria required to support the order sought by the plaintiffs have been satisfied. In so deciding, I have considered the following:
>
> > a) There are issues between the plaintiffs and Star 18 which relate to the remedies sought by the plaintiffs in the proposed Amended Notice of Civil Claim. More particularly, Star 18 and the plaintiffs submit differing interpretations of clause 3 of the agreement of April 30, 2010. This clause permitted the personal plaintiffs to advance a claim against the Krahn Group in the name of Abby Mews for the balance of the purchase price of the Abbotsford property which is now represented by the balance of funds in court in action No. S163210. Both the personal plaintiffs and Star 18 are making claims against those funds. It is necessary for Star 18 to participate in this proceeding so as to be able to determine entitlement to the funds as between the personal plaintiffs, Star 18 and the Krahn Group, especially since the latter has not opposed being added as a defendant.
> >
> > b) Although Star 18 has gone to considerable lengths to convince the court that there is no merit to the proposed claims, the court is not in a position to be able to weigh the evidence at this point in time so as to be able to determine the chances of success if the amendments are ordered. It has been submitted by Star 18 that inconsistencies between the affidavit evidence and cross-examination of Ms. Low reveal inconsistent claims and credibility issues which could not support the proposed claims. There are issues between Star 18, Abbey Mews, the personal plaintiffs and the Krahn Group which is all the court need determine, not whether the allegations can be proven. (*Strata Plan LMS 1816,* 2004 BCCA 578, 246 D.L.R. (4th) 57, *MacMillan Bloedel Ltd.* 58 B.C.L.R. 173, 13 A.C.W.S. (2d) 16). In any event, if I am wrong the examination for discovery transcript of Ms. Low in Action No. S163210 is subject to litigation privilege and cannot be referred to in this action.
> >
> > c) All of the authorities suggest that the threshold on these applications is low. Even if there may be weaknesses apparent in the position of the plaintiffs, the evidence as I understand it shows a *lis* between them and the proposed defendants sufficient to justify the addition of Star 18 and the Krahn Group as defendants in this action.

[90] Based on the findings of Jenkins J., I cannot conclude that adding the Krahn Group as defendants was in anyway improper or that the position taken by the Krahn Group was inappropriate. The Court's decision to allow the application was

made after the interpleader proceedings had been addressed and any suggestion the Krahn Group did not face exposure to the plaintiff's claims is incorrect.

[91] The amended NOCC included a claim for equitable compensation to be paid to the plaintiffs. In my reasons on the merits in *Low*, I dismissed any claim against the Krahn Group under clause 26(d) of the joint venture agreement.

[92] I am satisfied there is no basis to assess costs of this proceeding against the Krahn Group.

Conclusion

[93] Considering the relevant factors above, I have determined the appropriate scale under which costs will be assessed is Scale B.

[94] In the result, the defendants White Castle and Abby Mews will have their costs at Scale B but not the costs relating to attendances before the court when the lawyer for White Castle and Abby Mews was unable to appear and represent those defendants. The plaintiff's will have their costs for those attendances.

[95] The plaintiff's will have their costs for submissions on this application.

"Armstrong J."