IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Hill v. Herd,*
2024 BCSC 1653

Date: 20240906
Docket: 21119
Registry: Nelson

Between:

Tammy Arlene Hill, James Robert Hill and James Daniel Hill, by his guardian Tammy Arlene Hill

Plaintiffs

And

William L.W. Herd, Herd & Smith Holdings Ltd. DBA Warfield Petro-Canada Regional District of Kootenay Boundary, The Corporation of the Village of Warfield

Defendants

Before: The Honourable Madam Justice Lyster

Reasons for Judgment on Costs

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Place and Dates of Trial:	Nelson, B.C. April 4-6, 11-14, 2022, January 30-31, February 1-3, 6-10 and August 9-10, 2023

Written submissions received from the Defendant, The Corporation of the Village of Warfield:	June 26, 2024
Written response received from the Plaintiffs:	July 8, 2024
Written reply received from the Defendant, The Corporation of the Village of Warfield:	July 21, 2024
Letter received from the Plaintiffs:	July 22, 2024
Written submissions received from the Plaintiffs (re Herds):	June 28, 2024
Written response received from the Defendants, William L.W. Herd & Herd & Smith Holdings Ltd. DBA Warfield Petro-Canada:	July 17, 2024
Written reply received from the Plaintiffs:	July 22, 2024
Place and Date of Judgment:	Nelson, B.C. September 6, 2024

Introduction

[1] On May 10, 2024, I rendered final judgment after trial in this matter. My reasons are indexed as *Hill v. Herd*, 2024 BCSC 797 (the "Decision"). The parties have been unable to agree on costs, and have filed written submissions. The parties' written submissions are extensive, and while I do not refer to all of them in this decision, I have considered them all in coming to my decisions on costs.

[2] The trial of this matter occupied 19 court days and resulted in a 533-paragraph decision. It is impossible to briefly summarize. In the introduction to the Decision, I gave the following overview of the case, the parties, and their positions:

> [1] This case arises out of an unfortunate dispute between neighbours in the small Village of Warfield ("Warfield"). The plaintiffs, Mr. and Mrs. Hill and their son, JD, for whom Mrs. Hill is the litigation guardian (collectively, the "Hills"), complain of noise pollution, light pollution and gasoline fumes emanating from a gas station located across the alley behind their home, which is located on Forest Drive in Warfield. The alley is vested in land vested in the Village. The Hills bought and moved to their home on Forest Drive in 2014.
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> [2] A gas station has operated since 1947 at 800 Schofield Highway. Since 1989, the gas station has been operated by the defendant, William Herd, or the defendant, Herd & Smith Holdings Ltd. (collectively, the "Herds" or the "Herd defendants"). For the first years of its existence under the Herds' ownership, until 2009, it operated as a Shell station. In 2009 or 2010, it began operating as a FasGas station. In 2018, pursuant to an agreement with Suncor Energy Products Partnership ("Suncor"), it was rebranded to become a Petro-Canada station.
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> [3] The gas station is now managed by the Herds' two daughters, Christine Coombes and Margaret-Ann Baziw (whom I also refer to from time to time as the "Herds"). The gas station operates pursuant to business licences issued by the Village of Warfield annually.
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> [4] The gas station is located in the Warfield commercial district, a relatively small area. 800 Schofield Highway provides access to the commercial district, and runs immediately adjacent to Highway 3B/22, the highway going from Trail up the hill to Rossland, through the Village of Warfield. Schofield Highway is separated from Highway 3B/22 by concrete blocks.
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> [5] The noise and light pollution and fumes complained of all relate to changes made to the gas station and its operations in 2018 when it changed from being a FasGas station to a Petro-Canada station. Those changes included an above ground tank nest being built at the rear of the gas station property, close to the alley, and the installation of a new 80,000 litre fuel tank

in that tank nest. Prior to October 2018, fuel deliveries to the then existing tank nest had been made from Schofield Highway on the north side of the gas station property. Since that time, fuel has been delivered to the new tank nest at the rear of the gas station, from the alley on the south side of the gas station property, directly across from the rear of the Hills' property. In order to deliver fuel, a tanker truck and pup trailer (also known as a B-train or eight axle configuration) parks in the alley and pumps fuel from the truck's tanks into the tanks on the gas station property.

[6] The Hills complain about the noise and fumes associated with the large B-train delivery trucks delivering fuel to the tank nest from the alley. They also complain about light pollution emanating from several lights on the gas station property, in particular a large light installed above the new tank nest, a light on the exterior side of the convenience store that is part of the gas station, and a light on a stand in the forecourt. The Hills allege that the Herds have been negligent in allowing these things to occur, and that the noise, smells and lights constitute a nuisance. They also plead the tort in *Rylands v. Fletcher* with respect to the escape of noxious fumes. They allege that JD, who has a number of special needs, is particularly adversely affected by the noise and smells.

[7] In addition to the Herd defendants, the Hills have named the Village of Warfield (the "Village") and the Regional District of Kootenay Boundary (the "RDKB") as defendants to this lawsuit. The RDKB administers aspects of the Village's *Building Bylaw* pursuant to a services agreement between the two local governments. It also provides fire protection services within Warfield pursuant to its bylaw.

[8] The Hills claim in nuisance against the Village. The Hills allege that the two local governments acted unlawfully in permitting the 2018 renovations to occur. They also allege that the Village and the RDKB were negligent in doing so. The case as against the two local governments is legally complex, as it encompasses both public law requests for declarations in the nature of a judicial review, and private law causes of action. I will describe it in greater detail later in this decision.

[9] By way of remedy, the Hills seek damages for the alleged nuisance, escape of noxious fumes and negligence. They also seek a permanent injunction to prevent the nuisance from continuing. They also seek a number of declarations relating to the local governments allegedly permitting the construction related to the rebranding to occur in breach of the *Fire Code* and relevant Village bylaws.

[10] The Hills initially also named Suncor and Austin Engineering as defendants to this claim. Austin Engineering Ltd. ("Austin Engineering") was the engineering firm retained by the Herds with respect to the renovations. On February 23, 2022, the Hills entered into a BC Ferries Agreement with Suncor and Austin Engineering, by which they agreed to discontinue the claims against those defendants.

[11] The remaining defendants all deny any liability on any of the grounds alleged. I shall address their positions, to the extent necessary, in the course of my legal analysis.

[3] I summarized my conclusions as follows at the conclusion of the Decision:

> [525] For the foregoing reasons I have concluded that Herd & Smith Holdings Ltd. is liable in nuisance to Mr. Hill, Mrs. Hill, and their son JD for the fumes, noise and lights emanating from the Warfield Gas station as a result of the changes made to the method and location of fuel delivery in 2018.
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> [526] I have declined to order a permanent injunction, as the balance of convenience favours the Herds being permitted to continue to deliver fuel from the alley.
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> [527] I have assessed general damages for nuisance against Herd & Smith Holdings Ltd. as follows:
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> a) Mr. Hill–$20,000
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> b) Mrs. Hill–$30,000
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> c) JD (to be paid in trust to the Public Guardian and Trustee)–$30,000
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> [528] In addition, I have assessed special damages in the amount of $650, payable by Herd & Smith Holdings Ltd. to Mr. and Mrs. Hill.
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> [529] I have dismissed the action in nuisance against the Village of Warfield.
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> [530] The tort in *Rylands v. Fletcher* was not extensively canvassed in the parties' submissions. In my view it would add nothing to the nuisance analysis in the circumstances of this case, and I decline to consider it further.
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> [531] I have dismissed the action in negligence against all defendants, with the two limited exceptions just discussed with respect to the Herds. Neither the Village of Warfield nor the Regional District of Kootenay Boundary owed the Hills a duty of care to comply with their bylaws or to enforce or otherwise ensure that others complied with their bylaws. The Herds did owe the Hills a duty of care, but complied with the requisite standard of care, with the two exceptions just discussed.
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> [532] I have declined to make any of the declarations sought by the Hills.
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> [533] Success has been divided, at least as between the Hills and the Herds. If the parties are unable to agree on costs, they may seek to appear before me to address costs by contacting Supreme Court Scheduling within 30 days of the date of this decision.

[4] The two exceptions referred to at para. 531 where I found the Herds negligent were discussed at paras. 521–524. I found the Herds were negligent with respect to the illumination of the tank nest light and the installation of the vapour recovery system, but as I had already taken those instances of negligence into account in the assessment of damages for nuisance, I did not need to consider them further.

[5] With one exception, the parties have been unable to agree on costs. The one agreement is as between the Hills and the Regional District of Kootenay Boundary ("RDKB"), who have agreed that costs are payable by the Hills to the RDKB in the amount of $67,500.

[6] As between the Hills and The Corporation of the Village of Warfield (the "Village"), the issue in dispute is whether the Village is entitled to double costs after May 6, 2021 as a result of the Hills' failure to accept the Village's offer to settle of that date.

[7] As between the Hills and the Herds, the issues in dispute are whether costs are payable by the Hills or by the Herds, and whether Mr. Herd stands in a different position to Herd & Smith with respect to costs.

[8] For the reasons that follow, I order that the Village is entitled to its costs against the Hills at Scale B. I also order that the Hills are entitled to a single set of costs at Scale B jointly payable by Mr. Herd and Herd & Smith Holdings Ltd.

Costs as between the Village and the Hills

[9] There is no dispute that the Village is entitled to an award of costs from the Hills as the successful litigant. The issue is whether the Village is entitled to double costs after May 6, 2021.

Relevant procedural history prior to Formal Offer

[10] The notice of civil claim was filed by the Hills in October 2019. It was subsequently served on the Village along with a copy of an expert report relied upon by the Hills – the Bergquist Report.

[11] The Village filed a response to civil claim in December 2019. Among other things, the Village pleaded that the allegations against it had no merit, were frivolous and vexatious and an abuse of process. The Village pleaded that it owed the Hills no duty of care. The Village further pleaded that it had no duty to enforce its bylaws,

and that its decisions to issue business licences and a temporary parking permission to the Herds were not *ultra vires*.

[12] The Village delivered its list of documents on March 2, 2020. The parties disagree about whether the Village produced all of the minutes of the relevant Council meetings and correspondence between the Village and the Hills at that time. The Hills say that only limited Council minutes were produced at that time, and that complete minutes were only produced when the Village delivered an amended list of documents on March 1, 2022.

[13] The Hills examined a representative of the Herds in early September 2020. The Village examined the Hills on February 3-5, 2021.

Formal Offer to settle

[14] The Village relies on a formal offer to settle it made on May 6, 2021 (the "Formal Offer"). In the Formal Offer, the Village set out its legal positions, including case law in support that breach of a statutory duty is not a cause of action and breach of a public law duty is not sufficient to establish a private law duty of care; that the Village owned the Hills no duty to enforce its bylaws; and that the Village was acting in a regulatory capacity. With respect to the nuisance claim, the Village stated its position that it had not used the land causing the lights, noise and fume. With respect to the *ultra vires* claims, the Village stated its position that it had express statutory authority to issue building permits, business licences and regulate traffic.

[15] In the Formal Offer, the Village asserted the Hills' claims against the Village had little to no prospect of success. The Village offered to waive its costs incurred to date if the Hills agreed to a consent dismissal order as against the Village. The Formal Offer was left open to July 31, 2021. It contained the language required under Rule 9-1(1) of the *Supreme Court Civil Rules*, B.C. Reg. B.C. Reg. 168/2009 [*Rules*].

[16] The Hills did not accept the Formal Offer and it expired in accordance with its terms on July 31, 2021.

Relevant procedural history after the Formal Offer

[17] On October 15, 2021, the parties attended a mediation. It was unsuccessful.

[18] The Hills examined the Village's representative on December 21, 2021.

[19] The Hills brought two pre-trial applications, on which the Village took no position.

[20] The trial proceeded as previously described in 2022 and 2023.

Parties' positions

[21] There is no dispute that the Village is entitled to its costs of this proceeding, as the Hills' claims against it were dismissed in their entirety.

[22] The Village submits it is entitled to double costs after May 6, 2021. They submit that the Formal Offer was a reasonable one, and that a party who rejects a reasonable offer should face some sanction in costs.

[23] The Village refers to the following passage from Justice Ball's decision in *Peace River Greenhouses Ltd. v. Taylor (District)*, 2016 BCSC 1455, for the general principles in relation to a claim for double costs following an offer to settle:

> [19] When exercising its discretion in relation to costs, the court may consider an offer to settle: Rule 9-1(4). Where such an offer has been made, the court has discretion to award double costs for all or a portion of the subsequent steps taken in a proceeding: Rule 9-1(5)(b).
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> [20] In deciding whether to award double costs based on an offer to settle, the court may consider the following factors listed under Rule 9-1(6):
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> > (a) whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or served or on any later date;
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> > (b) the relationship between the terms of settlement offered and the final judgment of the court;
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> > (c) the relative financial circumstances of the parties;
> >
> > (d) any other factor the court considers appropriate.

> [21] Double cost awards are a punitive measure designed to punish a party for failure to accept an offer that should have been accepted: *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 25. The *Rules* are meant to encourage parties to settle litigation and avoid the expense and delay, both private and public, resulting from unnecessary court proceedings: *Riley v. Riley*, 2010 BCSC 822 at para. 8. As noted in *Catalyst Paper Corporation v. Companhia de Navegação Norsul*, 2009 BCCA 16 at para. 16:
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> > It seems to me that the trend of recent authorities is to the effect that the costs rules should be utilized to have a winnowing function in the litigation process. The costs rules require litigants to make careful assessments of the strength or lack thereof of their cases at commencement and throughout the course of litigation. The rules should discourage the continuance of doubtful cases or defences. This of course imposes burdens on counsel to carefully consider the strengths and weaknesses of particular fact situations. Such considerations should, among other things, encourage reasonable settlements.

[24] The Hills submit that they should be required only to pay costs to the Village at scale B.

[25] I will address the parties' specific submissions with respect to each of the factors in the course of my analysis.

Analysis

Was the Formal Offer one which ought reasonably to have been accepted?

[26] The first factor to consider is whether the Village's Formal Offer was one that ought reasonably to have been accepted. As held by the Court of Appeal in *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 27, this factor is not determined by reference to the award ultimately made by the court, but by whether, at the time it was open for acceptance, it would have been reasonable for it to be accepted. As the Court of Appeal further explained in *Cottrill v. Utopia Day Spas and Salons Ltd.*, 2019 BCCA 26 at paras. 30–31, drawing on the analysis of Mr. Justice Gomery in *Kobetitch v. Belski*, 2018 BCSC 2247, "the issue is not whether the offer was reasonable but whether it was unreasonable to refuse it".

[27] The Formal Offer was made in May 2021, approximately 11 months before this matter went to trial. At the time, the parties had exchanged their initial lists of documents, and the Hills had been examined by the Village. The Hills had not yet examined the Village's representative. The Formal Offer remained open for nearly three months.

[28] I accept the Village's submission that the Formal Offer clearly explained the rationale for its terms, and that it was incumbent on the Hills to evaluate the validity of the legal arguments put forward by the Village in support of its position. However, I also accept the Hills' submission that disclosure was not complete at the time the offer was made, and that significant documents were disclosed by the Village in its March 1, 2022 amended list of documents. Further, the Hills had not yet examined the Village's representative at the time the offer was made and remained open. At the time the offer was made and remained open, the Hills did not have access to important factual information which may have affected their ability to assess the Formal Offer.

[29] I also accept the Hills' submission that the Village's position only assesses the reasonableness of the Formal Offer objectively, and fails to address the Hills' subjective reasonableness, as required under *C.P. v. RBC Life Insurance Company*, 2015 BCCA 30 at para. 9.

[30] As stated by Madam Justice Gropper in In *P.S.D. Enterprises Ltd. v. New Westminster (City),* 2011 BCSC 1646 at para. 26, an offer must offer an incentive to settle:

> [26] …The weight of authority suggests that the court should consider whether the offer **truly** provided an incentive to the plaintiff to settle the matter. In settlement parlance, the question is whether it gave the plaintiff a problem, something with which it had to grapple. This question is analysed based on the facts of each individual case and is done with a view of the circumstances at the time the offer was made. The fact that the offer was a nominal one may influence the analysis. … [Emphasis in original.]

[31] The Formal Offer was a consent dismissal without costs. As observed by Madam Justice Adair in *Casses v. Canadian Broadcasting Corporation*, 2016 BCSC

949 [*Casses*] at para. 54, such an offer may offer more than nuisance value, but still not offer anything in relation to the plaintiff's claims. As in *Casses*, this action was complex. The Formal Offer offered no genuine compromise and no incentive to the Hills to settle.

[32] Considered at the time the offer was made and remained open, I conclude that it was not unreasonable for the Hills to refuse the Formal Offer. The first factor favours not awarding double costs to the Village.

The relationship between the terms of the Formal Offer and the final judgment of the court

[33] I accept the Village's submission that there is a close correspondence between the court's ultimate Decision and the arguments the Village put forward in support of its Formal Offer. In terms of result, the Hills would have been better off had they accepted the Formal Offer, as they now face at a minimum an award of costs at Scale B against the Village. The Hills do not dispute that this factor favours the Village.

[34] This factor weighs in favour of an award of double costs.

Relative financial circumstances of the parties

[35] The Village submits that while, at first blush, it may appear that this factor favours the Hills, that is not in fact the case. The Village submits that its legal fees not covered by a costs award will be borne by the other residents of the Village. On this basis, the Village submits that the third factor should weigh in its favour, or at least be neutral in the court's assessment.

[36] The Hills submit that this factor clearly favours them, pointing to the evidence at trial about the Hills' financial circumstances, and the lack of evidence from the Village in support of its position.

[37] The Village did not provide a draft bill of costs, nor their actual legal fees in their initial submission. The Hills correctly point out that the Village also did not provide any information with respect to any insurance coverage the Village may

have. In reply, the Village sought to shore up this gap in the evidence by providing the affidavit of its Chief Administrative Officer, David Perehudoff. Mr. Perehudoff provides evidence about the Village's liability insurance, which did not cover the Village's entire defence, and in particular did not cover the defence of the administrative law claims. He says for this reason the Village has incurred more than $100,000 in legal fees and disbursements not covered by insurance in defending this action. He also says that the Municipal Insurance Association of British Columbia considers experience and claims in establishing premiums. He says the premium paid by the Village has increased more than 40% since 2019. He does not know what the average increase has been over the same period, but says that the Village's premiums were affected by the costs of defending this action.

[38] After the close of submissions, the Hills wrote a letter submitting that the Village had, through Mr. Perehudoff's affidavit, impliedly waived solicitor and client privilege, and asking if the court was seriously considering ordering double or increased costs, to bring an application for a declaration that privilege had been waived, further production of documents relating to the Village's fees, and to make submissions on the Village splitting its case.

[39] I have not found it necessary to seek further submissions as requested by the Hills. In my view, the Village did split its case in its reply submission. That said, the evidence provided by the Village in its reply submission does not affect my view with respect to the costs properly payable by the Hills.

[40] The Hills submit that the tariff for trial preparation and attendance for a 19-day trial is $35,112 with tax, and that double costs would be $70,224. They also say that the costs amount agreed to with the RDKB is $67,500, and it is reasonable to believe that the ordinary costs payable to the Village will be of a similar magnitude.

[41] The evidence at trial about the Hills' financial circumstances was that the Hills have $176,000 equity in their home and $162,000 in registered savings. Mr. Hill is the family breadwinner, and earns between $160,000 and $190,000 per year. The

Hills are not wealthy people and this litigation has been expensive for them to pursue given their means.

[42] Some of the Village's legal costs have been covered by insurance. I accept that likely has had an affect on the Village's premiums, but the evidence before me does not establish to what extent. The rest of the Village's legal fees and disbursements not covered by costs paid by the Hills will have to be borne by its taxpayers. In any litigation against a local government, any uninsured or unindemnified costs of the local government will be borne by its taxpayers. To accept the Village's submissions on this point could create a chilling effect against residents engaging in good faith litigation against local authorities.

[43] I find that this factor favours the Hills.

Conclusion on double costs

[44] Considering the matter as a whole, I conclude that, in the circumstances of this case, the Village has not established that it is entitled to double costs from the Hills. The Hills' decision not to accept the Formal Offer was not unreasonable, given their perspective at the time. While acceptance of the Formal Offer would have resulted in a better financial outcome for the Hills than their decision to pursue their claims against the Village, they were not unreasonable in rejecting it. Their primary objective was to obtain a permanent injunction, and it was not unreasonable for the Hills to believe that maintaining their action against the Village could assist them in pursuing that relief. To order double costs against them would, in the circumstances of this case, be unduly punitive.

Increased or uplift costs

[45] The Village submits in the alternative, or if double costs are not ordered, that the court should order increased costs of the entire proceedings pursuant to s. 2(5) of Appendix B of the *Rules*, which provides as follows:

> (5) If, after it fixes the scale of costs applicable to a proceeding under subsection (1) or (4), the court finds that, as a result of unusual circumstances, an award of costs on that scale would be grossly inadequate

> or unjust, the court may order that the value for each unit allowed for that proceeding, or for any step in that proceeding, be 1.5 times the value that would otherwise apply to a unit in that scale under section 3 (1).

[46] In support of this position, the Village refers to *Bajwa v. British Columbia Veterinary Medical Association*, 2008 BCSC 905 at para. 73, where the court stated that increased costs require "special circumstances" that would render costs awarded on the scale determined by the court "grossly inadequate or unjust". The Village submits that its actual legal costs will substantively exceed the tariff amounts, and that the Village should be indemnified for the costs incurred for the Hills' failure to settle at an appropriate stage.

[47] In my view, the Village has failed to identify any "special circumstances" which would warrant increased costs. Its submissions in support of increased costs are essentially a repetition of its submissions in support of double costs. I have already addressed and rejected those submissions in that context.

Costs as between the Hills and the Herds

Parties' positions

[48] The Hills submit that they were substantially successful as against the Herds, and seek one set of costs jointly payable by the Herds at scale B. They have a number of alternative positions, which I shall address to the extent necessary.

[49] The Herds acknowledge that the determination of substantial success may be challenging in a case of this kind, and submit that if the court determines that the Herds were substantially successful it may well be appropriate for the court to award costs to the Herds, notwithstanding the fact that the Hills succeeded in establishing their nuisance claim against Herd & Smith Holdings Ltd., and were partially successful in establishing their negligence claim against the same defendant. The Herds submit that in any event Mr. Herd, in his personal capacity, was successful on all issues, and ought to be entitled to his costs against the Hills.

Analysis

[50] In the Decision, I generally treated the two defendants, William Herd and Herd & Smith Holdings Ltd., as a collective entity. At para. 2, I created the defined term the “Herds” or the “Herd defendants”, which I used throughout the Decision except where it was necessary to distinguish between them.

[51] This treatment was consistent with how the parties, and in particular, the Herds, treated the Herds. The Herd defendants had a single counsel and a single defence. For most purposes, no distinction was drawn between them. A good example is the parties’ agreed statement of facts, which generally intertwined the two Herd defendants.

[52] I found that the Hills established their claim in nuisance against the Herds: para. 398. I then went on to consider what remedy ought to be ordered, beginning at para. 406. The Hills sought a permanent injunction, which I declined to grant: para. 428. Starting at para. 428, I considered what damages should be ordered for the nuisance. At para. 433, I ordered the Herds to pay damages in nuisance consisting of $20,000 for Mr. Hill, $30,000 for Mrs. Hill, $30,000 in trust for JD. I also ordered $650 in special damages at para. 439.

[53] Starting at para. 440, I addressed an issue raised by the parties in their closing submissions, which was the respective responsibility of Mr. Herd and Herd & Smith Holdings Ltd. for the nuisance damages. It is worth quoting the relevant passage in full:

> [440] There is also an issue with respect to the respective responsibility for damages of the Herd defendants, that is, Mr. William Herd and Herd & Smith Holdings Ltd. The Hills submit that Mr. Herd is responsible for a portion of the damages from November 2018 until he sold lots 10 to 13 to Herd & Smith on February 28, 2019. They rely on the fact that he applied for the building permit and signed the Suncor loan agreement. They further submit that Herd & Smith is solely responsible for damages from November 2018 to the date of judgment, as the operator of the enterprise.
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> [441] The Herds submit that the Hills have failed to demonstrate that Mr. Herd is personally liable in negligence. They do not appear to have responded to the Hills’ submission that Mr. Herd is personally responsible in

> nuisance for a portion of the damages between November 2018 and February 28, 2019.
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> [442] As outlined above, a proper defendant in nuisance is one who has made at least some use of land. The renovations and fuel delivery occurred on and from lot 9, which Mr. Herd was not the owner of at the relevant times. Herd & Smith was the owner of lot 9. Herd & Smith was at all times the operator of the gas station which caused the nuisances. I find that Herd & Smith is solely liable for the nuisance damages I have assessed.

[54] In sum, only Herd & Smith Holdings Ltd. was held liable for the nuisance damages.

[55] After addressing the administrative law claims against the two local governments, I then considered the Hills' negligence claim, starting at para. 479. I dismissed the negligence claims against the two local governments. I dealt with the negligence claims against Herd defendants, starting at para. 512. I dealt with the negligence claims against them relatively summarily, as I found at para. 518 that any negligence on the Herds' part would not alter the damages I had already awarded in nuisance. For the most part, I rejected the Hills' submission that the Herds were negligent, with the two exceptions I have already identified, being the tank nest light and the installation of the vapour recovery system. With respect to those two exceptions, I found the Herds jointly, and not just Herd & Smith Holdings Ltd., liable: para. 524. I did not quantify the damages in negligence because of the overlap with the nuisance damages.

[56] Rule 14-1(9) provides that costs follow the event. The trial was an event. The basic principles were summarized by Mr. Justice Goepel as follows in *The Owners, Strata Plan LMS 3259 v. Sze Hang Holding Inc.*, 2017 BCCA 346:

> [90] At its most basic, the successful party is the plaintiff who establishes liability under a cause of action and obtains a remedy, or the defendant who obtains a dismissal of the plaintiff's case: *Loft v. Nat*, 2014 BCCA 108 at para. 46.
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> [91] Different considerations, however, arise when the litigation concerns multiple causes of action. In such cases, the more flexible "substantial success" test will usually be more appropriate. The "substantial success" standard was described by Bouck J. in *Fotheringham v. Fotheringham*, 2001 BCSC 1321 at para. 45:

> [45] *Gold* now seems to say that substantial success in an action should be decided by the trial judge looking at the various matters in dispute and weighing their relative importance. The words "substantial success" are not defined. For want of a better measure, since success, a passing grade, is around 50% or better, substantial success is about 75% or better. That does not mean a court must descend into a meticulous mathematical examination of the matters in dispute and assign a percentage to each matter. Rather, it is meant to serve as a rough and ready guide when looked at all the disputed matters globally.
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> [92] While the "substantial success" formula is particularly well suited to family cases when the court has to wrestle with several separate and distinct causes of action, the principles in *Fotheringham* may be applicable in any case in which there are multiple causes of action.

[57] In *Loft v. Nat*, 2014 BCCA 108, cited by the Court of Appeal in *The Owners, Strata Plan LMS 3259*, the Court observed that, pursuant to Rule 14-1(9), costs must be awarded to the successful party unless the court otherwise orders: para. 46. The Court went on to explain that the court retains discretion to do otherwise for many reasons:

> [49] The fact that a party has been successful at trial does not however necessarily mean that the trial judge must award costs in its favour. The rule empowers the court to otherwise order. The court may make a contrary order for many reasons. One example is misconduct in the course of the litigation: *Brown v. Lowe*, 2002 BCCA 7, 97 B.C.L.R. (3d) 246. Another is a failure to accept an offer to settle under Rule 9-1. A third arises when the court rules against the successful party on one or more issues that took a discrete amount of time at trial. In such a case the judge may award costs in respect to those issues to the other party under Rule 14-1(15): *Lee v. Jarvie*, 2013 BCCA 515. Such an order is not a regular part of litigation and should be confined to relatively rare cases*: Sutherland v. Canada (Attorney General),* 2008 BCCA 27, 77 B.C.L.R. (4th) 142*; Lewis v. Lehigh Northwest Cement Limited,* 2009 BCCA 424, 97 B.C.L.R. (4th) 256. Whether a judge will order otherwise in any particular case will be dependent upon the circumstances of that individual action.

[58] The Hills were successful in nuisance against Herd & Smith Holdings Ltd., and in negligence against both Herd defendants. I agree with the Hills that the fact I did not quantify the negligence damages does not vitiate the fact they were successful in negligence against both Herd defendants. The Hills' primary objective in this action was obtaining a permanent injunction, the significance of which to them

is underlined by the fact they have filed a notice of appeal with respect to that issue only. They did not obtain the permanent injunction they were seeking, but I agree with them that their lack of success in obtaining that remedy does not detract from the fact they were successful in establishing the causes of action pled and obtaining a monetary remedy. This is not that relatively rare case where the court time and written submissions relating to the injunction issue took a discrete amount of time and costs relating to it should be assessed separately.

[59] I find that, given the manner in which these claims were pled by both parties, and the manner in which the trial was conducted, in particular by the Herd defendants with their joint defence, and the results after trial, the Hills were substantially successful against the Herd defendants, are therefore entitled to their costs against them. Even if it is not strictly accurate to say that the Hills were substantially successful against Mr. Herd in particular, I find that in the specific circumstances of this case it is fair and equitable that the Herds continue to be treated as essentially a single collective entity for the purposes of costs. Notwithstanding that only Herd & Smith Holdings Ltd. was held liable in nuisance, I conclude that both Herd defendants are jointly liable for costs to the Hills. I order that there be a single set of costs payable to the Hills by Mr. Herd and Herd & Smith Holdings Ltd. Neither Mr. Herd nor Herd & Smith Holdings Ltd. is entitled to costs from the Hills.

Conclusion

[60] For these reasons, I have concluded that it is appropriate to order the Hills to pay the costs of the Village at Scale B.

[61] I have further ordered that there is to be a single set of costs payable to the Hills by Mr. Herd and Herd & Smith Holdings Ltd.

[62] The Hills have been successful on both costs applications and are entitled to their costs of these applications against the Village and the Herd defendants.

"L.M. Lyster J."

LYSTER J.