IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Real Organics & Natural House Ltd. v. Canadian Phytopharmaceuticals Corporation,* 2025 BCSC 1

Date: 20250102
Docket: S177788
Registry: Vancouver

Between:

Real Organics & Natural House Ltd. and Ivy Liou

Plaintiffs

And

Canadian Phytopharmaceuticals Corporation, Kok-Sing Lim, Daniel Wang and Carina Cai

Defendants

Before: The Honourable Justice Veenstra

Reasons for Judgment as to Costs

The Plaintiff, Ivy Liou, appearing on her own behalf and as Representative for the Plaintiff, Real Organics & Naturals House Ltd.:	I. Liou (September 16, 2024 submissions)
Counsel for the Plaintiffs:	C. Ohama-Darcus N. Welsh (October 16, 2024 submissions)
Counsel for the Defendants:	R. Cooper, K.C. E. Aitken
Dates of Written Submissions from the Plaintiffs Received:	September 16 and October 16, 2024
Dates of Written Submissions from the Defendants Received:	September 16 and October 11, 2024
Place and Date of Judgment:	Vancouver, B.C. January 2, 2025

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Introduction

[1] On July 19, 2024, I released Reasons for Judgment in this matter, which are indexed at 2024 BCSC 1303 ("RFJ"). I awarded the plaintiff, Real Organics & Natural House Ltd. ("RO"), judgment against the defendant, Canadian Phytopharmaceuticals Corporation ("CPC"), for damages for breach of contract totalling $84,420, plus applicable court order interest. All claims involving the individual parties were dismissed. At para. 344, I said:

> The parties are at liberty to make submissions as to costs. Should either party seek an order of costs, they should provide their submission to me in writing through Supreme Court Scheduling within 60 days of the date of this judgment. The other party may reply within 30 days thereafter. I will advise whether I believe a hearing is necessary – although the parties are welcome to indicate in their submissions whether they believe a hearing would be appropriate.

[2] Both the plaintiffs and the defendants provided an initial submission on September 16, 2016, asserting claims for costs. Each then responded to the other's submissions.

[3] Determination of an appropriate costs award in this case is complicated by the involvement of various individuals as parties. While the corporate plaintiff was successful in obtaining a judgment against the corporate defendant, it did not succeed against the individual defendants – however, all of the defendants have been jointly represented by one set of counsel throughout the proceedings.

The Trial Judgment

[4] The RFJ reviewed the facts in detail. At paras. 213-216, there is a discussion of the primary claims made, which include breach of contract, breach of fiduciary duty, conspiracy and fraud or deceit, and disgorgement of fees. With respect to the claims of breach of fiduciary duty, I noted at para. 214 that no authorities were presented at trial by which a fiduciary duty could be said to arise in the circumstances. With respect to the claims of fraud and deceit, I noted at para. 215 that the pleadings with respect to this related to the preparation of "forged"

documents and the giving of evasive, incomplete or false answers in response to RO's inquiries.

[5] At paras. 223-243, the RFJ reviewed the positions asserted in closing submissions at trial. With respect to the individual defendants, I noted at paras. 226 and 228-229 that:

> [226] With respect to the individual defendants, the plaintiffs submit that the individual defendants arranged for CPC employees to create new production records, made to look like they were properly kept, but not accurately reflecting the actual process undertaken. This was done in an effort to cover up CPC's breaches.
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> …
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> [228] The plaintiffs also say that Dr. Cai signed COAs for the Beauty Secret powder wrongly showing that the product complied with health standards governing mould content.
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> [229] RO argues that when CPC's senior management learned that the processed Chaga was not satisfactory to RO, those senior employees (primarily among them, the three individual defendants) embarked on a strategy to delay and ignore the situation, then when pressed, they produced new production records that reflected not what had actually been done, but what the contract said was supposed to be done, then failed to tell RO that these were not the actual production records, then refused to take responsibility. RO says that this was, in effect, a conspiracy amongst those individuals and the company.

[6] I note my comments on credibility at para. 264:

> [264] Three more senior CPC employees gave extensive evidence. Two of them – Daniel Wang and Alice Chen – continue to be employees of CPC. Dr. Cai, as noted above, left CPC in February 2019. Both Mr. Wang and Dr. Cai are personal defendants in the action. In my view, all three of theses witnesses sought to minimize their roles – Mr. Wang, for example, claimed not to have spoken with Ms. Liou until the summer of 2017, yet there is a photograph of him explaining the processing system to her in February 2017. Ms. Chen's evidence that she only prepared one set of replacement records is difficult to reconcile with the differences between what was photographed on July 26, 2017, and what eventually appeared in Mr. Ying's affidavit, and with Mr. Ying's own evidence. Dr. Cai was clearly a primary contact for Ms. Liou throughout yet sought to downplay her role. She was identified by Kevin Ma as the person who instructed him to dry out the Chaga residue before manufacture of the Beauty Secret powder; she denied this, even though Kevin Ma was not challenged on this evidence. It seems clear to me having reviewed the entirety of the correspondence that CPC's senior employees were, throughout the first seven or eight months of 2017, trying to put off Ms. Liou while they tried to figure out a way to extricate CPC from the situation it

> found itself in. I approach the evidence of all three of these witnesses with caution.

One of the individual defendants, Mr. Lim, did not testify at trial. He was very ill when the trial commenced and passed away during the trial.

[7] The breach of contract claims are discussed at paras. 281-322. At para. 286, I concluded that the contract with respect to the Chaga powder extraction was to follow a specific process, and not to produce a specific result. At para. 292, I concluded that there was an implied term in the parties' contract with respect to the Beauty Secret powder that CPC would store the Chaga residue in a safe manner between the two processes. At paras. 293-298, I concluded that each of these contracts had been breached. Beginning at para. 299, I concluded that there had also been a breach of the duty of honest performance, concluding at paras. 300-303 that:

> [300] By the spring of 2017, Mr. Wang must have realized that there were significant issues with RO's Chaga project. He would have first had those issues drawn to his attention when he learned of the test results that were unsatisfactory to the client, then realized there were significant problems when the production records could not be located, then when he talked to Mr. Cheung, Mr. Ying and Mr. Li, he would have learned that each of them had a different recollection of how the processing was undertaken – and that none of their recollections matched the contract that CPC had entered into.
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> [301] Rather than own up to the problems and seek a reasonable solution, CPC created new production records. While it may well be that part of the purpose of creating these documents was to satisfy regulatory requirements, it seems clear that the immediate pressure to create the production records came from Ms. Liou's requests to see them. Importantly, and key to my conclusion as to a breach of the duty of honest performance, CPC provided both the three-page "batch record" and the newly recreated production records to Ms. Liou without telling her that these were recreated after the fact and were – at best – an attempt to reconcile what the technicians had to say with what Ms. Liou had specified in the contract documents.
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> [302] I am highly skeptical of the assertion CPC made that the company's policy was that clients could not be given copies of production records. No document was produced reflecting such a policy, nor was any explanation given as to why it was necessary. It seems most likely to me that this was simply a means of attempting to put off Ms. Liou.
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> [303] The recreated production records appear to reflect some sort of effort to reconcile the contractual requirements (including the purchase order emails) with what Messrs. Cheung, Ying and Li recalled of the actual production process. I can accept that to some degree, it might be reasonable

> to think that whoever created the original production sheets used by the production staff would have done so with a view to the contract. However, it is my view that given the discrepancies between what Mr. Ying and Mr. Cheung actually had to say and what was in those production records, and given the unsatisfactory result that Ms. Liou was trying to understand and that was key to her business prospects moving forward, it was a breach of the duty of honest performance to provide those documents to Ms. Liou without advising her that there was significant uncertainty as to whether they were in fact accurate. The provision of the production sheets to Ms. Liou in the circumstances is exactly the sort of half-truth disclosure of information discussed in *Callow*.

[8] Issues of causation are dealt with beginning at para. 304. At paras. 305-306, I commented that:

> [305] RO advances a claim for damages based on the assertion that CPC's breaches caused the destruction of its business. Implicit in that is the suggestion that, had CPC simply processed the Chaga in accordance with RO's instructions, RO would have had a marketable Chaga capsule product. RO's damages claim is based primarily on the loss of profit from that product.
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> [306] In my view, that proposition is not established on the evidence. While I accept as a basic proposition that variations in such things as the liquid to Chaga ratio, the processing temperature and pressure, and the alcohol concentration can all impact the composition of the processed product, on the whole of the evidence before me, I do not see a basis to conclude that changing the processing method to match what was in the RO instruction emails would have led to a polysaccharide concentration in the range of 50%. The evidence of Dr. Fatehi suggests the concentration would be less than 20% and Ms. Liou's own research, as reflected in the various patent applications she made over time, seems to suggest that she herself has concluded that what was in her July 2016 emails may not actually be the ideal process.

[9] RO had calculated its damages claim for loss of profits at over $1.7 million (see para. 233). That claim could not succeed in light of my conclusions on causation. I dealt with assessment of damages for breach of contract beginning at para. 315, awarding RO a total of $84,420 as against CPC, which as summarized at para. 340 is made up of:

a) $30,000 in respect of the loss of the Beauty Secret Powder product;

b) $950 in respect of the mould testing costs for Beauty Secret Powder;

c) $39,600 in respect of the acquisition costs for the raw Chaga;

d) $3,870 as a refund of deposits paid; and

e) $10,000 in respect of the breach of the duty of honest performance.

[10] At para. 322, I concluded that:

> [322] Given the award I have made with respect to the breach of the duty of honest performance, it is my view that an award of punitive damages is unnecessary. The award of compensatory damages adequately reflects the goals that would otherwise be achieved by an award of punitive damages.

[11] The final section of the RFJ deals with the other claims that were advanced, including the claims against the individual defendants. With respect to the claims in fraud, as set out at paras. 324-326:

> [324] As I understood the plaintiffs' submissions, the claim of civil fraud was primarily advanced with respect to the initial Beauty Secret Powder mould test results. It was suggested that Dr. Cai signed the initial COA knowing that it falsely misrepresented the mould content of the powder. In my view, the evidence does not support that assertion. It seems clear on the evidence that Dr. Cai was simply certifying the results based on her review of documentation produced by the technician. There is nothing that would support any assertion that Dr. Cai had knowledge that the information was false.
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> [325] RO also claims fraud with respect to the production records. That claim is, to some degree, duplicative of the claim for breach of duty of honest performance, which I have already dealt with.
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> [326] In any event, it is my view that there is merit to the defendants' submission that RO has not established that it relied on the production sheets, given the short time between the sharing of the production records with Ms. Liou and her employees and Ms. Liou's assertion that they were inaccurate.

[12] With respect to the claims in conspiracy, as noted at para. 327:

> [327] There is an issue between the parties as to whether conspiracy was properly pleaded. At trial, the plaintiffs relied on their Amended NOCC which has not changed since it was filed in August 2017. That document contained a general reference to CPC having instructed or permitted its employees to participate in unlawful schemes. In their Trial Brief, the plaintiffs included amongst the issues to be decided whether the defendants conspired together "to provide falsified records" and "to cover up their wrongdoings" and did so by engaging in "quasi-criminal acts", and whether the defendants made "knowingly false representations". In its Trial Brief, the defendant made no reference to conspiracy. It was apparent in the plaintiffs' opening statement at trial that they intended to advance claims in conspiracy, while the defendants throughout trial have asserted that conspiracy is not properly pleaded.

[13] Notwithstanding this issue with respect to pleadings, I went on to conclude that there was no merit to the conspiracy claims, noting at paras. 333-334 that:

> [333] For the reasons I have already discussed, I do not accept that either CPC or Dr. Cai can be said to have knowingly misrepresented the mould content of the Beauty Secret powder.
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> [334] With respect to the sharing of the production records, I have significant doubts as to whether this rises from the level of a normal contractual breach to constituting unlawful conduct for purposes of the tort of conspiracy. But in any event, I would not conclude that the evidence establishes that the various defendants engaged in concert with respect to that. Dr. Cai had no role in the production records. It is not clear on the evidence that Mr. Lim actually saw the production records prior to them being produced, or that he instructed Mr. Wang that the records were to be inaccurate or presented to RO in a particular way. The only defendant who is shown on the evidence to be involved at the material times with the production records is Mr. Wang, and I am not satisfied that the evidence establishes that he acted in combination even if his conduct might be wrongful in a private law sense.

[14] Finally, with respect to the claims involving individuals, I concluded at paras. 338-339 that:

> [338] There is nothing to suggest that Mr. Wang and Dr. Cai were anything other than employees of CPC, while Mr. Lim was one of several shareholders and several directors. There is nothing to suggest that CPC was under domination of or being used as a shield by any of the individual defendants. The claim to pierce the corporate veil has no merit in the circumstances of this case.
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> [339] Finally, I note that Ms. Liou was named as a plaintiff in her individual capacity. It is not clear what if any claims were advanced in that personal capacity. She is a shareholder and director of RO and, pursuant to the longstanding rule in *Foss v Harbottle* (1843), 2 Hare 461, 67 ER 189, she has no right to personally advance claims that belong to RO.

[15] With respect to those claims, I concluded at paras. 342-343 that:

> [342] To the extent the Notice of Civil Claim asserts any claims on behalf of Ms. Liou, those claims are dismissed.
>
> [343] The claims against the various individual defendants are also dismissed.

The Offers to Settle

[16] The defendants rely on two sets of offers to settle made prior to trial.

[17] The first such set of offers was made by way of four separate letters (one on behalf of each defendant) sent to the plaintiffs' then-counsel on March 9, 2020, three

weeks prior to the then-scheduled trial date of March 30, 2020. The second set of offers –consisting of one letter in respect of CPC and one letter in respect the individual defendants – was made on November 3, 2022, three weeks prior to the November 21, 2022 trial date.

[18] Each set of offers included an offer by CPC to pay $150,000 in satisfaction of the claims against it, while in respect of the individual defendants what was proposed was a consent dismissal without costs. Each set of offers provided two weeks for acceptance.

[19] In the offers to settle, counsel for the defendants provided rationales for the offers that were made. With respect to the claims against CPC, the rationale included the following:

> The plaintiffs claim for breach of contract against CPC requires it to prove that, had CPC followed its extraction procedure exactly, it would have resulted in an end-product with a 50% polysaccharide concentration. [RO] has no evidence to support that contention, as it has never conducted any testing on the extraction process it says CPC was required to follow.

[20] With respect to the claims against the individuals, the rationale included the following:

> The Individual Defendants were named as defendants solely because they were representatives or employees of CPC at the material time (2016-2017). The plaintiffs do not have valid claims against any of the Individual Defendants, who were acting in the scope of their duties as employees or representatives of CPC. There is no basis at law for the plaintiffs to have named the Individual Defendants personally in this action. The claims against the Individual Defendants are virtually certain to be dismissed, resulting in costs being payable to them. Because the plaintiffs have proceeded with unfounded allegations of fraudulent conduct, the Individual Defendants intend to seek special costs.

Positions of the Parties

The Plaintiffs

[21] RO says that it was substantially successful in recovering a judgment against CPC. It says that costs should follow the event.

[22] RO says that it should be awarded either uplift or special costs. It submits that it should be entitled to uplift costs pursuant to s. 2(5) of Appendix B of the *Supreme Court Civil Rules*, based on what is said to be an "unusual circumstance", in that the trial "ballooned" from the originally scheduled nine days to 22 days. It says that it should be entitled to special costs based on CPC withholding admissions and denying facts, due to its witnesses giving evidence that conflicted with documents, and due to the challenges made to the admissibility of evidence which did not succeed (see 2023 BCSC 2525, 2023 BCSC 2526 and 2023 BCSC 2527).

[23] In response to CPC's submissions with respect to RO being limited to fast track costs, RO submits that there were either "special circumstances" or "exceptional circumstances" (or both) in this case, given that the trial reasonably took longer than three days. As well, the trial raised complex issues, requiring numerous witnesses, expert evidence and evidentiary motions. CPC submits that the Court should either exercise its discretion to award regular tariff costs or at the very least, increase the amount of the fast track tariff to reflect the 22 days of trial.

[24] RO says that, although its claims against the individual defendants were dismissed, those defendants should not be entitled to a separate award of costs given that they were all represented by the same counsel as CPC. It submits that issues distinct to the individual defendants took very little time. Alternatively, RO says that the individuals should only be awarded costs for that portion of the action that involved determining their personal liability.

[25] With respect to the individual defendants' claims for special costs, RO submits that there was triable merit to the claim of independent tortious conduct, given the presentation of records as being actual production records when they were not. RO also submits that dealings external to the litigation (such as the dealings with Health Canada or Dr. Cai's later employer) would not properly ground an award for special costs, which must be based on litigation conduct.

[26] Finally, RO says that it was not unreasonable for the plaintiffs to have rejected both sets of offers to settle, particularly given that they gave no account to the claim in civil fraud that was advanced.

The Defendants

[27] CPC acknowledges that RO is, in law, a substantially successful party. However, it submits that because the judgment was for less than $100,000, RO is limited to the costs it would have been entitled to in a fast track action unless the Court otherwise orders. CPC submits there is no basis for the Court to order otherwise.

[28] CPC submits that, pursuant to R. 15-1(16), the Court can consider the offers to settle in exercising its discretion under R. 15-1(15), and submits that the fact that the offers to settle would have provided RO with $150,000, nearly double the amount it recovered at trial, is a further reason not to exercise its discretion to order otherwise.

[29] CPC says that, as a result of the offers to settle, RO should be awarded its costs only up to March 9, 2020, and that CPC should be entitled to party and party costs at Scale B after that point. Alternatively, CPC submits that as between CPC and RO, they should bear their own costs after the date of the offer. It notes that RO ended up recovering just over half of the amount that was offered after a 22-day trial that stretched over nine and a half months. CPC submits that the offers were clearly worded, unambiguous, and easily capable of being evaluated. They submit that the offers are ones that RO ought to have accepted. In particular, they submit that:

> The plaintiffs' claim for damages for lost profits at trial floundered because the plaintiffs could not prove that had CPC processed the chaga in accordance with [RO's] exact instructions, [RO] would have been provided with chaga with a polysaccharide concentration in the range of 50%. That ought not to have come as a surprise to [RO] – it was highlighted in CPC's March 9, 2020 offer to settle …

[30] CPC submits that there is no basis for RO to receive either special or uplift costs. While acknowledging that not all of its positions at trial were accepted, CPC

says that the required standard for an award of special costs is a deliberate attempt to mislead a trier of fact through contrived, concocted or false evidence – a standard not met in this case. With respect to uplift costs, CPC submits that the defendants are not to blame for the length of trial, that uplift costs are not available where a plaintiff is limited to fast-track costs, and that costs on a regular scale would not be grossly inadequate or unjust.

[31] The individual defendants submit that they were entirely successful in having the claims against them dismissed, and thus they should be awarded costs as against the plaintiffs. The individual defendants submit that those costs should be assessed as special costs, on the basis that the plaintiffs made and maintained through the course of trial serious allegations of fraud and criminal conduct on the part of the individual defendants. The defendants acknowledge that the failure to prove allegations of fraud will not automatically result in an award of special costs, but submit that in this case the allegations were pursued recklessly and without a proper foundation, and thus constitute reprehensible conduct. They submit that the allegations of forgery of records were particularly serious to Dr. Cai and Mr. Wang given their scientific roles within CPC.

[32] In support of this claim for special costs, the individual defendants note certain steps taken by the plaintiff outside of the litigation, specifically:

a) A complaint to Health Canada (as discussed in the RFJ paras. 167-178);

b) A complaint to the RCMP (see RFJ para. 183); and

c) A letter written to Dr. Cai's new employer, after she had left CPC (see RFJ para. 186).

[33] The defendants note the comments of Justice Voith (as he then was) on a summary trial motion in this matter, reported at 2019 BCSC 394 at para. 12:

> [12] Counsel for Real Organics acknowledged at the outset that the Amended Notice of Civil Claim, filed by previous counsel, was a poor pleading in multiple respects. I agree. It is not clear, for example, what claim the Plaintiffs have against the various individual defendants.

[34] Despite this caution by Justice Voith, the plaintiffs did not further amend the Amended Notice of Civil Claim and proceeded with it to trial. The defendants submit that the plaintiffs' failure to grapple with the nature of the claims against the individual defendants is evidence of recklessness with respect to the pursuit of those claims.

[35] The individual defendants alternatively submit that they should be awarded uplift costs based on the seriousness of the allegations made against them and the complete lack of any foundation for those claims. They note in particularly the length of the cross-examinations of Dr. Cai (two and a half days) and Mr. Wang (almost two days), and the allegations of forgery canvassed in those cross-examinations.

[36] The individual defendants submit that the formal offers to settle made clear that the plaintiffs' claims against the individual defendants were demonstrably without foundation, and provided the plaintiffs an opportunity to walk away from those claims on a no costs basis and focus their time and resources on the claims against CPC, without risking the costs consequences of maintaining meritless claims against the individuals that were sure to be dismissed. The individual defendants submit that they should be awarded double costs of the proceeding from and after March 9, 2020.

[37] The defendants acknowledge that there are cases where successful defendants jointly represented with an unsuccessful defendant have been denied costs on that basis. Other cases have awarded costs to the successful defendants, to be offset against any costs owing by the jointly-represented unsuccessful defendant.

[38] The individual defendants submit that this is an appropriate case to award them costs, given that they have advanced a claim for special costs due to reprehensible conduct. They submit that it would be inappropriate for the plaintiffs to escape the costs consequences of pursuing those claims, and of refusing to accept the offers to settle from the individual defendants, simply because of their joint representation.

[39] Alternatively, the defendants submit that the plaintiffs' conduct in advancing unfounded claims of fraudulent conduct on the part of the individual defendants ought at minimum to offset any costs awarded to RO – citing for that proposition *Canaccord Capital Corporation v. 884003 Alberta Inc.*, 2004 BCSC 1025, in which Justice Sinclair Prowse reduced a successful plaintiff's costs by 50% on account of their pursuit of an unfounded fraud claim against an individual defendant.

Legal Context

Ordinary Costs and Fast Track Costs

[40] Pursuant to *Supreme Court Civil Rules* R. 14-1(9), costs of a proceeding must be awarded to the successful party, unless the court otherwise orders. Pursuant to R. 14-1(1), costs are in most cases assessed pursuant to the tariff in Appendix B.

[41] Where multiple issues are raised and success is mixed, the court should determine which party was substantially successful: *Advantage Tool & Machine Ltd. v. Cross Industries Ltd*., 2023 BCSC 827 at para. 4. As noted in *Advantage Tool* at para. 7:

> [7] It would appear that a separate cause of action, or a counterclaim tried together with a main claim may qualify as a discrete "matter in or in relation to a proceeding" for the purposes of apportionment of costs under Rule 14-1(15): *Consbec Inc. v. Walker*, 2015 BCSC 410 at paras. 28–31; see also *Lee v. Jarvie*, 2013 BCCA 515 at paras. 17–39, explaining that costs can be apportioned on the basis of divided success on various "issues" at trial. However, the use of apportionment to award costs to a party that did not attain substantial success against a party that did is relatively rare: *Loft v. Nat*, 2014 BCCA 108 at para. 49, leave to appeal to SCC ref'd, 35893 (4 September 2014); *Lewis v. Lehigh Northwest Cement Ltd.*, 2009 BCCA 424 at paras. 35–36. Apportionment should only be considered where: (i) there were one or more separate and discrete issues on which the party seeking apportionment was successful at trial, (ii) there is a basis on which the trial judge can identify the trial time attributable to those discrete issues, and (iii) apportionment would be a just result: *Lee* at para. 40, applying *Sutherland v. Canada (Attorney General)*, 2008 BCCA 27 at para. 31.

Jointly Represented Defendants

[42] With respect to multi-party litigation generally (per *Advantage Tool* at para. 12):

> [12] In cases of "multi-party" litigation, the Court retains a broad discretion to determine the appropriate costs award. The starting point in the exercise of that discretion is the general proposition that costs are usually awarded to successful parties. Beyond this, there is no overarching formula for costs in relation to "multi-party" litigation: *West Lonsdale Medical Clinic Inc. v. 0706394 B.C. Ltd.*, 2020 BCSC 170 at para. 24, citing *Seaport Crown Fish Co. v. Vancouver Port Corp.*, 2000 BCSC 68; *Lettuce Serview Limited Partnership v. Western Delta Lands Partnership*, 2008 BCSC 859 at paras. 15–16.

[43] In this case, all of the defendants were jointly represented; however, RO obtained judgment against CPC but had its claims dismissed as against the individual defendants. A number of cases discuss the appropriate approach in such circumstances, including the judgment of Justice Watchuk in *Pang v. Zhang*, 2021 BCSC 1435:

> [67] The defendants further submit that although the plaintiff was successful in the conversion claim against C&Z, and although both of the defendants were represented by the same counsel, neither fact ought to detract from Ms. Zhang's entitlement to costs. They rely on *Workers' Compensation Board of British Columbia v. Seattle Environmental Consulting Ltd.*, 2020 BCCA 365, leave to appeal ref'd [2021] S.C.C.A. No. 58:
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> > [92] In cases involving multiple defendants with differing outcomes, courts have sometimes ordered that the successful defendant is not entitled to their costs. However, in those cases the successful defendant's presence resulted in no additional litigation costs. For example, in *St. George Transportation Ltd. v. Sawicky and Sawicky,* 2004 BCSC 1488, the plaintiff was successful against only one of two jointly-represented defendants. The judge denied the successful defendant their costs because no additional costs had been incurred on their behalf. While counsel had prepared an affidavit for the successful defendant, the judge found that the affidavit would have been filed even if that defendant had not been a party.
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> > [93] In *Antrobus v. Antrobus,* 2012 BCSC 613, the judge was invited to apply *St. George* to find that successful defendants should not recover their costs if jointly represented. The judge declined, distinguishing *St. George* as standing for the proposition that where the inclusion of the successful defendant does not add any additional expense, no costs are warranted: at para. 22. The judge found that counsel had spent a single day's worth of submissions on behalf of the successful defendant, and awarded costs for a single day (of the eight-day trial), set-off against the costs awarded to the plaintiff.
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> > [underlining added]
>
> [68] However, I cannot agree that this is a proper case to find that although the plaintiff was successful only against C&Z, Ms. Zhang is entitled to costs. As in *St. George Transportation v. Sawicky and Sawicky,* 2004

> BCSC 1488, Ms. Zhang was jointly represented with C&Z and she incurred no additional costs to advance her personal defence. No separate Response to Civil Claim was filed, and no separate examinations for discovery were done. Unlike in *Antrobus v. Antrobus*, 2012 BCSC 613, defence counsel did not spend an extra day of trial just on the personal liability of Ms. Zhang, and there the successful defendant was only awarded costs for a single day. The defendants have not cited a step in the proceedings which was not taken jointly. Indeed, even their offer to settle was made jointly.

[44] In *Lotimer v. Johnston*, 2020 BCSC 119, a family case, the defendants were brothers who were jointly represented at trial. One brother (Ronald) was the former spouse of the claimant, while the other (John) was executor of the estate of their mother. One of the issues was whether an inheritance from the mother was family property. Justice Gomery noted at para. 8 that:

> [8] Ronald Johnston and John Johnston filed a common response to family claim and retained common counsel throughout the litigation. Obviously, they made arrangements amongst themselves to share the financial burden of the litigation. Neither is seeking the court's assistance in this regard. In these circumstances, it is appropriate to set off the costs payable by Ronald Johnston to Ms. Lotimer against the costs payable by Ms. Lotimer to John Johnston.

[45] More recently, in *Zheng v. Anderson Square Holdings Ltd.*, 2024 BCSC 1041, the corporate defendant was found liable for damages of over $13 million, but the claims against the individual defendants were dismissed. Justice Loo concluded at paras. 22-23 that:

> [22] The Personal Defendants cite the decision of this Court in *Antrobus v. Antrobus*, 2012 BCSC 613 at para. 22 for the proposition that mere joint representation with an unsuccessful defendant will not negate a successful defendant's entitlement to costs. That general proposition is undoubtedly correct, but when determining whether a successful defendant jointly represented with an unsuccessful defendant is entitled to costs, the Court must consider whether additional costs were incurred on the successful defendants' behalf: for example, see *Pang v. Zhang*, 2021 BCSC 1435 at paras. 67-70.
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> [23] In this case, in my view, the claims against the Personal Defendants did not add significant extra expense to the trial. All of the defendants used the same legal counsel, and the Personal Defendants gave evidence on their own behalf and on behalf of Anderson Square. There were arguments made during closing submissions specifically regarding the personal liability of the Personal Defendants but, in my view, those arguments were not so lengthy as to make a significant difference to the defendants' costs in the context of an 18-day trial.

Fast Track Costs

[46] In this case, the amount of the judgment awarded was under $100,000. The defendants rely on R. 14-1(1)(f), which provides an exception to the application of Appendix B where:

> (f) subject to subrule (10) of this rule,
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> (i) the only relief granted in the action is one or more of money, real property, a builder's lien and personal property and the plaintiff recovers a judgment in which the total value of the relief granted is $100,000 or less, exclusive of interest and costs, or
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> (ii) the trial of the action was completed within 3 days or less,
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> in which event, Rule 15-1 (15) to (17) applies to the action unless the court orders otherwise.
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> [Emphasis added.]

[I note, parenthetically, that R. 14-1(10) deals with judgments within small claims jurisdiction, and is thus not relevant in this case.]

[47] Rule 15-1(15) and (16) provides that:

> (15) Unless the court otherwise orders or the parties consent, and subject to Rule 14-1(10), the amount of costs, exclusive of disbursements, to which a party to a fast track action is entitled is as follows:
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> (a) if the time spent on the hearing of the trial is one day or less, $8,000;
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> (b) if the time spent on the hearing of the trial is 2 days or less but more than one day, $9,500;
>
> (c) if the time spent on the hearing of the trial is more than 2 days, $11,000.
>
> (16) In exercising its discretion under subrule (15), the court may consider an offer to settle as defined in Rule 9-1.

[48] Both of these rules include the words “unless the court orders otherwise”, which confirm that a court retains discretion to depart from the limits provided by R. 15-1(15). Such an order is warranted where there are “special circumstances”: *Majewska v. Partyka*, 2010 BCCA 236 at para. 29. In *Majewska*, the defendant had elected to file a notice invoking the fast track rules (now R. 15). While the plaintiff had asked to remove the case from the fast track rule, the defendant had not

consented and the plaintiff had not applied for a court order to do so. The trial judge had awarded damages of $62,195, plus ordinary costs on Scale B.

[49] At para. 2, Justice Neilson noted that the fast track rule had been introduced in 1998 to provide a speedier and less expensive process for trials that could be completed in two days, and provided for expedited discovery of documents, limited examinations for discovery, and early trial dates. At para. 16, she noted that its objective was “to provide a speedier and less expensive determination in actions that can be completed within two days”.

[50] Justice Neilson identified at para. 19, that the cases did not demonstrate a “unified approach” as to how costs should be determined where special circumstances exist. At paras. 30-32, she concluded that, in such cases, the court should not simply default to the tariff in Appendix B; rather, in most cases it will be appropriate to use the fixed amounts in R. 15-1(15) as “reference points” to determine the amount of costs. She went on at paras. 33-38 to comment:

> [33] This approach brings desirable consistency and predictability to costs awards following fast track litigation. The varied approaches that have developed under R. 66 have led to uncertainty with respect to both exposure to and recovery of costs under the rule. Having opted into the R. 66 process, fast track litigants should be able to reliably assess their potential costs liability or recovery in making decisions about the conduct of the case.
>
> [34] Moreover, it is important to recognize that parties to a R. 66 action are not compelled to remain in the fast track process. If the spectre of “special circumstances” emerges at any time during the action, whether in the form of complex issues, offers to settle, increased trial time, or any other situation, the parties may consent to removing the case from R. 66, or obtain an order to that effect under R. 66(8). Thus, if a concern arises that costs under R. 66(29) will not be adequate, this can be remedied by taking appropriate action during the proceeding.
>
> [35] In this case, the plaintiff twice approached the defendant to consent to removing the action from R. 66. When the defendant refused, she did not pursue it by applying for removal even when, at the outset of trial, it appeared certain the trial would last more than two days. The trial judge considered this and stated:
>
> > [6] In the circumstances of this case and in particular the relatively short period of time between the issuance of the notice of trial and the trial, I do not think that the failure to make an application to take the matter out of Rule 66 should persuade me to exercise my discretion against the plaintiff. I note that if I were to rely on the failure to make an application to

> remove the case from Rule 66, I would be inviting parties to make a formal application to have cases removed from Rule 66 whenever they were concerned about the effect that the failure to make such an application might have on a subsequent award of costs pursuant to Rule 37.
>
> [36] In my view, that comment demonstrates the need for predictable consequences in the conduct of litigation. I am unable to agree with the trial judge that applications for removal from R. 66 in such circumstances are undesirable. Here, if the plaintiff was concerned that R. 66 was no longer appropriate, the proper response was to apply for removal from fast track litigation. If she chose not to take that step, she should have no basis for complaint that her costs are limited by R. 66(29).
>
> [37] I would conclude that the discretionary nature of R. 66(29) is circumscribed by the objectives of R. 66: to provide a speedier and less expensive process for relatively short trials. Those objectives are best served by awarding lump sum costs, calculated by reference to the amounts in R. 66(29).
>
> [38] I acknowledge there may be situations that justify a departure from such costs. I anticipate these would be "exceptional" circumstances rather than "special" circumstances, and might include situations deserving of special costs or solicitor client costs, however, such matters must be left for another day.

[51] In *Pete Walry Construction Ltd. v. Canadian Adventure Company Holdings Ltd.*, 2017 BCSC 595, a construction dispute, the plaintiff sued for unpaid invoices totalling $40,320, plus interest and costs, while the defendant counterclaimed alleging deficiencies in the work. The plaintiff elected to proceed under the fast track rule, and an application by the defendant to remove the case from that rule was dismissed. After an eight-day trial, which took place in instalments over more than six months, the plaintiff's claim was granted, and the defendant's claim was dismissed. Justice Donegan noted at paras. 55-57 that:

> [55] In *Majewska v. Partyka*, 2010 BCCA 236, Neilson J.A. recognized there is discretion to award costs beyond the limits in the Fast Track rule. Where such an award is justified, costs are to be calculated using the Fast Track costs limits as a point of reference, not the usual tariff: para. 29.
>
> [56] In *Peacock v. Battel*, 2013 BCSC 1902, Mr. Justice Affleck discussed circumstances where it would be open to a court to exercise its discretion to award costs beyond the Fast Track rule limits:
>
> > [17] It is open to a court to "otherwise order" in cases where special circumstances warrant the departure from the limits set out in R. 15-1(15): see *Reid v. Insurance Corp. of British Columbia*, 2000 BCSC 1334 cited

> with approval in *Travelbea v. Henrie*, 2012 BCSC 2009 at para. 8; *Kailey v. Kellner*, 2008 BCSC 224 at paras. 18-21; *Majewska* at para. 19.
>
> [18] Special circumstances have been held to apply in cases where the trial took longer than the maximum amount of days referenced in the fast track litigation rule, or the action was complex or where a reasonable offer to settle was made but not accepted. In *Majewska*, the Court of Appeal allowed an appeal of a trial judge's decision to award the successful plaintiff costs in a fast track litigation action on Scale B. The trial judge had found that it was within his discretion to award costs on a Scale B rather than pursuant to R. 66(29) (the then equivalent of R. 15-1(15)) because the trial took longer than two days (the limit under the old rule) and both parties had made offers to settle the case: see *Majewska* at para. 12.

[57] Mr. Justice Affleck went on to consider how to tabulate additional costs where special circumstances justify a departure from the Fast Track limits:

> [20] Madam Justice Neilson held that the formula set out in *Anderson v. Routbard*, 2007 BCCA 193 should be applied to determine what amount should be awarded. This formula involves first determining what portion of the lump sum provided for in the Rule is for pre-trial and trial costs. Madam Justice Neilson calculated this by taking the amount enumerated for a one day or less trial and subtracting it from the amount allowed for a two day or more trial. The difference is then multiplied by the number of days that the trial went over (paras. 31, 39). She concluded:
>
> > 39 I would therefore allow the appeal, and calculate costs under R. 66(29) as follows. Under the present limits of $5,000 and $6,600 I take the pre-trial portion of costs to be $3,400, and $1,600 as representative of each day of trial. The plaintiff's offer to settle was delivered only six days before trial. Thus, she is not entitled to double costs for trial preparation. She is, however, entitled to double costs for three and a half days of trial, calculated at $3,200 per day. Total costs are thus $14,600 ($3,400 plus $11,200) before disbursements and taxes.

[52] Justice Donegan awarded costs calculated on the basis of the fast track limit of $11,000 for the first three days of trial, plus an additional $1,500 for each additional day of trial, then doubled the amount as the result of a formal offer to settle that had been made: para. 66.

[53] In *Costello v. ITB Marine Group Ltd.*, 2021 BCCA 154, a claim for damages for constructive dismissal was dismissed at a summary trial. The action had been advanced as a fast track claim pursuant to R. 15. The trial judge had awarded

ordinary costs on Scale B. This part of the judgment was overturned, with Justice Voith explaining at paras. 48-49:

> [48] Rule 15-1(15) governs fast track litigation costs orders "[u]nless the court otherwise orders or the parties consent". It was, in theory, open to the judge to deviate from Rule 15-1(15). However, departing from the fixed amounts of costs under Rule 15-1(15) is warranted only under "special circumstances," and awarding costs calculated by means other than the fixed amounts, such as by reference to the tariff, may require "exceptional" circumstances: *Majewska v. Partyka*, 2010 BCCA 236 at paras. 29, 38 (decided under the former Rule 66); see also *Pete Walry Construction Ltd. v. Canadian Adventure Company Holdings Ltd.*, 2017 BCSC 595 at paras. 55–57.
>
> [49] As this Court observed in *Majewska* at para. 13, a trial judge's award of costs is discretionary and not lightly interfered with on appeal, but that discretion must be exercised judicially and in accordance with applicable legal principles. The Court in that case concluded that the discretionary nature of what is now Rule 15-1(15) is circumscribed by the objective of avoiding the further time and expense of calculating tariff items for costs: at paras. 17, 37. The Court noted that, "[h]aving opted into the [fast track] process, fast track litigants should be able to reliably assess their potential costs liability or recovery in making decisions about the conduct of the case": at para. 33.

[54] All of these cases reflect actions in which one or the other party had taken steps to bring the claim within the fast track rule, and no order had been made to remove it from fast track. However, R. 14-1(1)(f) brings R. 15-1(15) into play even where the fast track rule had not previously applied to an action.

[55] The intent of R. 14-1(1)(f) is to place actions that should have been fast-tracked, but were not, under the fast track costs schema: *Axten v. Johnson*, 2011 BCSC 1005 at para. 27.

[56] There is a line of cases, not referenced by either party in their submissions, which distinguishes between cases that were subject to the fast track rule because one party had opted in to that rule, on the one hand, and cases that are subject to R. 15-1(15) only because the amount of damages awarded after trial was less than $100,000, even though they had never been designated as fast track cases: see *345 Builders Ltd. v. Su*, 2022 BCSC 949, *Dhillon v. Labelle*, 2023 BCSC 32, and *Dhaliwal v. Kakkar*, 2024 BCSC 2182. Those cases suggest that, in cases that did

not proceed as fast track cases, a court may determine it appropriate to award party and party costs based on considerations of proportionality, including the amount involved, the importance of the issues, and the complexity of the proceedings.

[57] As noted by Justice Schultes in *Dhaliwal* at para. 39:

> [39] These elements of proportionality are also similar to the kinds of "special circumstances" that permitted the court to increase the amount of costs in the decisions cited by the plaintiff. The key difference however, is that under the approach set out in the decisions I have referred to the exercise of the court's discretion permits costs to be awarded pursuant to Appendix B.

[58] I did not ask the parties to make further submissions with respect to this line of cases, given the conclusion I have reached with respect to costs.

[59] I would note, however, that given the prominence given in *Majewska* to the fact that parties knew that the proceeding had been designated as a fast track case, and that they could have applied to have it removed from fast track, it may well be appropriate to apply different considerations in cases that were never designated as fast track cases. In a case like the present, where the formal offers to settle were substantially in excess of $100,000, where the issues were complex, and where there was never any prospect of trying the claims in the nine days scheduled for trial, much less the three days contemplated by the fast track rule, a broader discretion to award costs beyond that contemplated by R. 15-1(15) may well be appropriate. That said, considerations of proportionality also come into play and would arguably militate in favour of applying the *Majewska* limits even where an action had not previously been designated as a fast track case.

Offers to Settle

[60] Where a formal offer to settle has been made in accordance with the requirements of R. 9-1, the court may consider that offer to settle when exercising its discretion in relation to costs: R. 9-1(4). The court may, among other things, deprive a successful party of some or all of the costs to which it would have otherwise been

entitled, or alternatively award either regular or double costs to the party who made the offer: R. 9-1(5). As set out in R. 9-1(6):

> (6) In making an order under subrule (5), the court may consider the following:
>
> (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;
>
> (b) the relationship between the terms of settlement offered and the final judgment of the court;
>
> (c) the relative financial circumstances of the parties;
>
> (d) any other factor the court considers appropriate.

[61] The purpose of R. 9-1 is to encourage the early settlement of disputes by rewarding a party who makes a settlement offer that should have been accepted and penalizing the party who declined to accept such an offer: *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 25.

[62] Rule 9-1(6) makes clear that the court considers not only whether the party making the offer did "better" at trial, which is factor (b), but also whether the offer was one that "ought reasonably to have been accepted". As noted in *Hartshorne* at para. 27:

> [27] The first factor - whether the offer to settle was one that ought reasonably to have been accepted - is not determined by reference to the award that was ultimately made. Rather, in considering that factor, the court must determine whether, at the time that the offer was open for acceptance, it would have been reasonable for it to have been accepted: *Bailey v. Jang*, 2008 BCSC 1372, 90 B.C.L.R. (4th) 125 at para. 24; *A.E. v. D.W.J.* at para. 55. As was said in *A.E. v. D.W.J.*, "The reasonableness of the plaintiff's decision not to accept the offer to settle must be assessed without reference to the court's decision" (para. 55). Instead, the reasonableness is to be assessed by considering such factors as the timing of the offer, whether it had some relationship to the claim (as opposed to simply being a "nuisance offer"), whether it could be easily evaluated, and whether some rationale for the offer was provided. We do not intend this to be a comprehensive list, nor do we suggest that each of these factors will necessarily be relevant in a given case.

[63] Rule 9-1 was recently discussed in *Cottrill v. Utopia Day Spas and Salons Ltd.*, 2019 BCCA 26 at paras. 30-31:

> [30] As recently noted by Justice Gomery in *Kobetitch v. Belski*, 2018 BCSC 2247 at paras. 24–25, the wording of the subrule is important. The issue is not whether the offer was reasonable but whether it was unreasonable to refuse it. He explained the distinction as follows:
>
> > [24] In my opinion, the wording of the subrule stating this consideration is important. The consideration is not whether it would have been reasonable for the plaintiff to have accepted the offer. It is whether the plaintiff ought reasonably to have accepted the offer. The difference is this. An offer might be such that a reasonable plaintiff could choose to accept it or not. One might term it "a reasonable offer". On the other hand, to say that an offer ought reasonably to have been accepted is to say that a reasonable person should have accepted it. It was unreasonable to refuse it.
> >
> > [25] According to the distinction I am drawing, having regard to the wording of the subrule, the consideration is not whether the offer was a reasonable offer. It is whether it was unreasonable for the plaintiff to refuse it.
> >
> > [Emphasis in original.]
>
> [31] We agree with that analysis. It is also important to point out that the fact that it may be reasonable for a party to refuse an offer does not necessarily immunize that party from the consequences of a reasonable offer to settle: *Wafler v. Trinh*, 2014 BCCA 95 at paras. 79–82. For example, in the oft cited cases of *Bailey v. Jang*, 2008 BCSC 1372, and *A.E. v. D.W.J*, 2009 BCSC 505, referenced in the above quotation from *Hartshorne*, the plaintiffs were sanctioned in costs notwithstanding that the trial judges in each case found that it was not unreasonable for them to reject the offer to settle.
>
> [32] In this case the Company's offer to settle accurately forecast the outcome of the trial. Ms. Cottrill had adequate time to consider the offer as evidenced by her rejection of the offer while it remained outstanding. A reasonable person may have chosen to accept the offer. The offer was, however, for but a small fraction of the amounts that Ms. Cottrill was seeking in the litigation and gave no recognition to the possibility that Ms. Cottrill may be awarded more than eight weeks severance, as well as costs. The offer did not offer a genuine compromise or an incentive to settle. Given the amounts sought in the litigation, it was not unreasonable for her to refuse it. Ms. Cottrill did not act unreasonably by taking a chance and proceeding to trial. We are of the opinion that the offer was not one that ought reasonably to have been accepted by the plaintiff.

Uplift Costs

[64] As noted above, costs are ordinarily assessed as party and party costs, based on the tariff found in Appendix B of the *Supreme Court Civil Rules*: R. 14-1(1). Pursuant to s. 2 of Appendix B, the court may fix a scale of costs, which impacts the unit value of tariff items. Matters of ordinary difficulty are assessed on Scale B ($110

per unit), while matters of more than ordinary difficulty are assessed on Scale C ($170 per unit).

[65] Section 2(5) and (6) of Appendix B provides for uplift costs:

> (5) If, after it fixes the scale of costs applicable to a proceeding under subsection (1) or (4), the court finds that, as a result of unusual circumstances, an award of costs on that scale would be grossly inadequate or unjust, the court may order that the value for each unit allowed for that proceeding, or for any step in that proceeding, be 1.5 times the value that would otherwise apply to a unit in that scale under section 3 (1).
>
> (6) For the purposes of subsection (5) of this section, an award of costs is not grossly inadequate or unjust merely because there is a difference between the actual legal expenses of a party and the costs to which that party would be entitled under the scale of costs fixed under subsection (1) or (4).

[66] The legal test for uplift costs was discussed in *Ding v. Canam Super Vacation Inc.*, 2024 BCCA 102 at paras. 211-213:

> [211] The exercise of discretion to award uplift costs requires two things: (1) unusual circumstances, that would result in (2) a grossly inadequate or unjust award of costs at the fixed scale. This is necessarily a fact-based inquiry driven by the nature of the litigation and the conduct of the parties: *Herbison v. Canada (Attorney General)*, 2014 BCCA 461 at para. 42; *Shen* at para. 31. An award of uplift costs is a discretionary costs order that attracts a high degree of deference.
>
> [212] A party's conduct can constitute unusual circumstances if it is deserving of some form of rebuke (less than that required for special costs), but there are numerous circumstances that may be "unusual" within the meaning of s. 2(5). These include (a) misconduct by the unsuccessful party; (b) the serious nature of the allegations; (c) the complexity or difficulty of the issues in the litigation; and (d) the importance of the litigation to the parties or to the development of the law. These last two factors overlap with some of the factors that are considered in determining the appropriate scale of costs: *British Columbia v. Adamson*, 2017 BCSC 168 at para. 53, citing *International Energy and Mineral Resources Investment (Hong Kong) Company Limited v. Mosquito Consolidated Gold Mines Limited*, 2012 BCSC 1475 at paras. 23–24; *Shen* at paras. 32–35.
>
> [213] Whatever constitutes the unusual circumstances, uplift costs are not intended to punish the unsuccessful party but rather to indemnify the successful party: *Shen* at para. 30.

Special Costs

[67] A court may order that the costs of a proceeding (or any step within a proceeding) be assessed as special costs: R. 14-1(1)(b). If special costs are ordered, then the party awarded such costs is entitled to the actual amount of "those fees that were proper or reasonably necessary to conduct the proceeding": R. 14-1(3).

[68] The circumstances in which special costs may be awarded were summarized in *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177 at paras. 56-57:

> [56] Special costs are typically awarded when there has been some form of reprehensible conduct on the part of one of the parties: *Young v. Young*, [1993] 4 SCR 3 at 134–138. Special costs are not compensatory; they are punitive: *Grewal v. Sandhu*, 2012 BCCA 26 at para. 106. They are awarded when a court seeks to disassociate itself from some misconduct: *Fullerton v. Matsqui (District)* (1992), 74 B.C.L.R. (2d) 311 (C.A.) at para. 23. There are circumstances where special costs may be ordered where there has been no wrongdoing: *Gichuru v. Smith*, 2014 BCCA 414 at para. 90. These reasons are not concerned with such types of cases.
>
> [57] The leading authority on special costs is this Court's decision in *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 (C.A.). There, Mr. Justice Lambert, writing for the Court, set out that the threshold for special cost awards is "reprehensible conduct". He noted the continuum of circumstances in which special costs could be awarded, ranging from "milder forms of misconduct deserving of reproof or rebuke" to "scandalous or outrageous conduct":
>
> > [17] Having regard to the terminology adopted by Madam Justice McLachlin in *Young v. Young*, to the terminology adopted by Mr. Justice Cumming in *Fullerton v. Matsqui*, and to the application of the standard of "reprehensible conduct" by Chief Justice Esson in *Leung v. Leung*in awarding special costs in circumstances where he had explicitly found that the conduct in question was neither scandalous nor outrageous, but could only be categorized as one of the "milder forms of misconduct" which could simply be said to be "deserving of reproof or rebuke", it is my opinion that the single standard for the awarding of special costs is that the conduct in question properly be categorized as "reprehensible". As Chief Justice Esson said in *Leung v. Leung*, the word reprehensible is a word of wide meaning. It encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke. Accordingly, the standard represented by the word reprehensible, taken in that sense, must represent a general and all encompassing expression of the applicable standard for the award of special costs.

[69] Special costs may only be awarded in respect of reprehensible conduct in the course of litigation – it may not be awarded in respect of pre-litigation conduct or in respect of acts occurring outside the course of litigation: *Evergreen Building Ltd. v. IBI Leaseholds Ltd.*, 2009 BCCA 275 at paras. 24-33; *Smithies Holdings* at paras. 133-134; *Kong v. Lee*, 2021 BCSC 606 at para. 171.

[70] With respect to the bringing of serious claims that turn out to be unfounded, a number of authorities were discussed by Justice Ballance in *International Hi-Tech Industries Inc. v. FANUC Robotics Canada Ltd*., 2007 BCSC 1724 at paras. 6-12:

> [6] Special costs are punitive and are intended as well to encompass an element of deterrence: *Fullerton v. Matsqui (District)* (1992), 74 B.C.L.R. (2d) 311, 12 C.P.C. (3d) 319). The purpose of awarding them is to chastise and discourage reprehensible conduct. Accordingly, the focus of the inquiry is on the party's blame-worthiness and intent: *Bank of Credit and Commerce International (Overseas) Ltd. v. Akbar et al*, 2001 BCCA 204, 86 B.C.L.R. (3d) 312, at para. 23.
>
> [7] The case law demonstrates a wide variety of circumstances that have resulted in the awarding of special costs. The failure to prove allegations of fraud will not automatically result in such an award (see: *307527 B.C. Ltd. v. Langley*, 2005 BCCA 161, 210 B.C.A.C. 155). However, where the totality of the circumstances reveal that allegations of fraud have been made frivolously, are without foundation, or made in circumstances where the alleging party had access to information sufficient to conclude that the defendant was merely negligent or had committed no wrongdoing at all, the allegations themselves are seen to be reprehensible warranting an order of special costs: *Chaplin v. Sun Life Assurance Company of Canada et al.*, 2004 BCSC 116, 1 C.P.C. (6th) 271); *Hamilton v. Open Window Bakery Ltd.*, [2004] 1 S.C.R. 303, 235 D.L.R.(4th) 193.
>
> [8] In *Ip v. Insurance Corp. of British Columbia* (1994), 89 B.C.L.R. (2d) 251 at 253, 23 C.P.C. (3d) 345 (S.C.), Mr. Justice MacKinnon remarked that a party must give thoughtful consideration before making serious allegations of fraud. He stated, "At the very least, a *prima facie* case must exist and if it does not then special costs by way of 'chastisement' is a reminder…to exercise better care in the future." Also noteworthy in the context of the case at hand are the remarks of Madam Justice Sinclair Prowse in *Webber et al v. Cdn. Aviation Ins. Mgrs. Ltd*., 2003 BCSC 274, 29 C.P.C. (5th) 226 at para. 14:
>
> > There is no dispute that if the Court finds that there has been a deliberate attempt to mislead it through contrived, concocted, or fabricated evidence, that such conduct can found an order for special costs. See: *Jogia v. Aetna Life Insurance Co. of Canada*, [1999] B.C.J. No. 1502 (S.C.); *Unternaher v. Wheat Sheaf Inn Ltd*., [1998] B.C.J. No. 2568 (C.A.); *S.S.G. Trucking Ltd. v. Standard Building Maintenance Ltd.*, [2000] B.C.J. No. 1042 (S.C.); and *Smith v. Garbutt*, [1998] B.C.J. No. 2460 (C.A.).

> [9] In *Ahluwalia v. Richmond Cabs Ltd.* (1994), 28 C.P.C. (3d) 226 (S.C.) [In Chambers], the plaintiffs brought an action for specific performance, deceit, and fraudulent misrepresentation. Newbury J. (as she then was) stated at p. 230:
>
> > The question in every case is whether, on a consideration of the substantive conduct of the party making the allegation, and the conduct of the litigation itself, the person or persons against whom the order is sought, has acted in a manner that is sufficiently reprehensible to warrant chastisement by the court.
>
> [10] Madam Justice Newbury further stated at p. 231 that where a party has "consciously advanced allegations of fraud and deceit and testified as to facts which were found to be untrue…" as well as created delays, pressured the defendants, and failed to comply with court orders and the *Rules*, such actions qualify as reprehensible conduct and warrant an order for special costs. (Also see: *Paz v. Hardouin* (1996), 138 D.L.R. (4th) 292, 25 B.C.L.R. (3d) 201 (C.A.)).
>
> [11] An underlying rationale of the authorities which have considered the relationship between unproven allegations of fraudulent conduct and special costs is an obvious one: a recognition that such allegations are potentially damaging to those accused of practising such deception and, accordingly, should not be made lightly.
>
> [12] Baseless allegations of conspiracy may also be susceptible to an order for special costs: *World Wide Treasure Adventures Inc. v. Ralph*, [1996] B.C.J. No. 154 (QL) (S.C.) [In Chambers].

[71] More recently, in *Imbamar S.A. v. Coutinho & Ferrostaal GmbH*, 2015 BCSC 2218, Justice Voith (as he then was) reviewed a number of judgments dealing with whether special costs should be awarded upon a dismissal of claims involving allegations of fraud, criminal conduct or moral turpitude, which he noted have a "real prospect of causing harm to 'those accused of deception'": para. 27. At paras. 28-32, he commented:

> [28] There are numerous cases where an award of special costs is made against a party who has improperly, and without an adequate basis, made an allegation of fraud against a defendant: see, for example, *Johal v. Virdi,* 2011 BCCA 412 at para. 36.
>
> [29] A plea of fraud and/or the failure to make out a claim of fraud does not, however, automatically give rise to an award of special costs; *MicroCoal Inc. v. Livneh*, 2014 BCSC 1288 at paras. 21, 36; *307527 B.C. Ltd. v. Langley,* 2005 BCCA 161 at para. 8; *Hamilton* at para. 26. Otherwise, parties would be unreasonably daunted from pursuing perceived wrongful conduct; *Chaplin v. Sun Life Assurance Company of Canada et al.,* 2004 BCSC 116 at paras. 26-28, leave to appeal ref'd 2004 BCCA 361.

> [30] Nevertheless, where "allegations of fraud have been made frivolously, are without foundation, or made in circumstances where the alleging party had access to information sufficient to conclude that the defendant … had committed no wrongdoing … the allegations themselves are seen to be reprehensible warranting an order of special costs"; *International Hi-Tech Industries Inc. v. FANUC Robotics Canada Ltd.,* 2007 BCSC 1724 at para. 7; *Hamilton* at para. 26.
>
> [31] This guidance is directly relevant. Imbamar likely had, on the basis of what it had been told by Messrs. Mitarakis, Krause and Ocampo, some basis to file a pleading that included an allegation of fraud. It was entitled to seek disclosure of documents on this issue and to conduct an examination for discovery of a representative of C & F.
>
> [32] At that point, however, Imbamar was required to make a measured assessment of the state of its case. It was required to consider whether there was even a *prima facie* basis or foundation for the fraud claim it was advancing; *Chaplin* at para. 26; *Ip v. Insurance Corp. of British Columbia* (1994), 89 B.C.L.R. (2d) 251 (S.C.) at para. 8.

[72] At paras. 36-37, Justice Voith concluded that:

> [36] I am mindful that an award of special costs should be made both sparingly and cautiously. Nevertheless, I consider that the conduct of Imbamar was "reprehensible" and that that conduct warrants rebuke. Imbamar alleged that a major company, whose reputation would be important to it, had, through two senior corporate executives, whose reputations would be important to them, though I recognize they are not the applicants, knowingly perpetrated or directed a fraud. That fraud included the preparation of forged and falsified documents. It was a fraud that C & F was alleged to have undertaken to, *inter alia*, deceive its insurer. There was no basis for the claim and there was, correspondingly, no means by which Imbamar could make out the claim.
>
> [37] I, therefore, consider that C & F is entitled to an award of special costs in this action. I consider that it is entitled to such costs incurred from one month prior to the start of the trial through to conclusion of the trial. I say this because by that time, a month before the start of trial, Imbamar ought to have appreciated that it was making allegations of serious wrongdoing that had no basis, and that it would not be able to make out.

Analysis

[73] As noted above, it is not disputed that as between RO and CPC, RO was substantially successful and would ordinarily be entitled to its costs.

[74] Ms. Liou, although a named plaintiff, did not advance any specific claims (other than through her status as a shareholder of RO). In the circumstances of the

case, no material amount of trial time was spent dealing with her status as a plaintiff, and no costs consequences would arise.

[75] In my view, the offers to settle made by the defendants on November 3, 2022, ought reasonably to have been accepted by RO. Those offers were made a few weeks in advance of trial, at a time when the parties had exchanged documents, conducted examinations for discovery, and were presumably ready to proceed to trial. They had attended mediation and a judicial settlement conference. The offer remained open for two weeks to give the plaintiff time to consider it. The offer provided for a substantial payment to RO.

[76] The letters pointed out key weaknesses in the plaintiff's damages claim – in particular, the lack of evidence that had the contractual process been followed, the resulting product would have contained a Chaga concentration at or about the concentration that had been obtained with the test batch. That of course is the very issue that I concluded in the RFJ made RO's claim for loss of profits untenable.

[77] By the time of the November 2022 formal offer to settle, RO had received the expert report of Dr. Fatehi. CPC had nothing in the way of a substantive response to Dr. Fatehi's conclusions. In my view, it was incumbent on RO to grapple with issues of causation and their impact on its financial claims. Given the issues with the loss of profit claim, RO should have considered carefully what other financial claims could realistically be advanced. Having done so, it should have been obvious that the offer of $150,000 was one that ought to have been accepted.

[78] I appreciate RO's submission that the offers to settle failed to make any specific financial allocation to its claims of fraud against the individual defendants. It is my view, however, that the offers should be viewed globally. The impugned conduct of the individual defendants all related to their actions as employees or directors of CPC, and any damages that might have arisen had those claims succeeded would have been informed by RO's actual losses. In my view, the difference between the amount that RO could reasonably have claimed as losses

arising from its dealings with CPC and its staff, and the global amount of the formal offers to settle, is such that those offers ought to have been accepted.

[79] RO has sought either uplift or special costs, based in part on the fact that the trial length "ballooned" and in part on what is said to be trial conduct of the defendants. In my view, the fact that the trial took longer than the nine days originally scheduled is not the fault of either party, and primarily reflects an underestimate of the time that would reasonably be required for trial. With respect to trial conduct, while it is clear that the defendants defended the claims vigorously, and they challenged the admissibility of certain evidence, it is my view that none of those steps were taken inappropriately. All three of the evidentiary rulings reflect significant issues raised. I do not think RO is entitled to either uplift or special costs.

[80] The question of whether the individual defendants should be entitled to special costs is more complicated. I agree with the plaintiffs that their contacts with Health Canada (which were initiated prior to the litigation) and with the RCMP are clearly external to the litigation, as is the letter that Ms. Liou wrote to Dr. Cai's subsequent employer. Thus, those matters are not properly considered as part of a claim for special costs.

[81] As set out above, I concluded that in the circumstances of this case there had been a breach of the duty of honest performance. I have quoted above what I said at RFJ paras. 300-303. As noted in those paragraphs, under the direction of Mr. Lim and Mr. Wang, new production records were created and provided to Ms. Liou. As well, Dr. Cai prepared a "batch record" which she provided to Ms. Liou. All of these were provided to Ms. Liou without telling her that these were not actually created contemporaneously with the manufacturing process. In such circumstances, I do not see the bringing of a claim in fraud as being reckless, and I would not award special costs in respect thereof.

[82] There remains the question of whether the individual defendants are entitled to an award of costs, notwithstanding that they were represented by the same counsel as CPC. In my view, the allegations grounding the claims against the

individual defendants all revolved around their conduct as employees of CPC, and only a small part of the trial was dedicated to those claims. In my view, the circumstances do not justify a full set of separate tariff costs being awarded to the individual defendants.

[83] Rather, it is my view that in the particular circumstances of this case, it is appropriate to consider costs globally in light of:

a) RO's substantial success as against CPC;

b) The formal settlement offers that RO should have accepted, which absent the involvement of the individual defendants would have the effect of depriving RO of costs after the offer was made (R. 9-1(5)(a)) and potentially entitling CPC to costs after the date of the offer (R. 9-1(5)(d)); and

c) Such entitlement as the individual defendants may have to a partial award of costs, reflecting the very limited portion of the time at trial spent dealing with their issues.

[84] In my view, the appropriate result in all of these circumstances is for all parties to bear their own costs.

Conclusion

[85] The parties are to bear their own costs of this proceeding.

"Veenstra J."