IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Flavel v. Comeau,* 2024 BCSC 1527

Date: 20240807
Docket: S131255
Registry: Kelowna

Between:

Nathan William Flavel and Randy Thomas Leslie

Plaintiffs

And

Daniel Henri Joseph Comeau and Ayu Putri Comeau

Defendants

Before: The Honourable Justice Hardwick

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiffs:	A. Spraggs
Counsel for the Defendants:	S.M. Kelly
Place and Date of Trial/Hearing:	Kelowna, B.C. July 18, 2024
Place and Date of Judgment:	Kelowna, B.C. August 7, 2024

[1] **THE COURT:** These are my oral reasons for judgment in respect of the notice of application filed by the plaintiffs on June 5, 2024 (the "Application").

[2] For reasons that will be apparent when I review the history of this matter, there is a strong possibility that this matter will be back before this Court again. Accordingly, on my own initiative, I will order that a transcript of my oral reasons be prepared. Specifically, I make the direction that a transcript be prepared because this is the second time this action has been before me on a contested basis regarding the pleadings. Should it come before another presider in due course, I consider a chronology of the underlying factual matrix and the basis for my resulting orders to be of potential assistance.

Prior Pleadings Application

[3] The plaintiffs commenced this action on June 8, 2021.

[4] The defendants' response to the notice of civil claim was filed on September 21, 2023.

[5] The counterclaim was filed on September 22, 2023 (the "Original Counterclaim").

[6] On November 2, 2023 I gave my oral reasons for judgment in respect of an interlocutory application seeking mandatory injunctive relief and an order sought to strike the counterclaim. A transcript of those oral reasons was subsequently ordered, but have not been published. I ultimately concluded as follows in the material terms at paras. 26 through 28 and 39 of my reasons:

> [26] On this basis, I am ordering that the counterclaim—as presently drafted—is struck pursuant to R. 9-5(1)(a) of the *Rules* with liberty to the defendants to file an amended counterclaim within 30 days pleading relief under s. 35 of the *Property Law Act*.
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> [27] The plaintiffs shall have 45 days to file a response to the counterclaim. I have given the plaintiffs additional time having regard to the intervening Christmas holidays.
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> [28] With respect to the injunctive relief claim as set out in the application, having regard to my order allowing the amendment to the counterclaim, my conclusion regarding the mandatory injunction should be apparent. I am not

> going to order a mandatory injunction that the retaining will be removed until such time as the issues can be properly addressed on their merits.
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> [39] Specifically, the defendants came to court with pleadings that were at present manifestly deficient, hence the order under R. 9-5(1)(a). In this case the costs are appropriate, and I am satisfied that this is not arbitrary or capricious as defined in *Tisalona*. The cost shall be on the basis that the application was a one half-day application, even though there was some additional time spent this morning to receive these reasons for judgment. But that should hopefully result in this matter not needing to come before the registrar in order to assess those costs.

[7] Unfortunately, despite the intervention of the Court, the procedural wrangling in this action continues, which is, frankly, unfortunate when one appreciates the nature of the dispute as I will outline in a moment.

[8] On November 27, 2023, pursuant to my order, the defendants filed an amended counterclaim (the "Amended Counterclaim"). Having regard to my order, the Amended Counterclaim is admittedly difficult to read due to the multiple insertions and strikethroughs. This, however, could be and often is remedied without issue at a trial management conference so that the pleading included in the trial record is as legible as possible for the presiding trial judge.

[9] The larger issue, which prompts the application, is that the Amended Counterclaim seeks:

a) damages for breach of a settlement agreement;

b) punitive and/or aggravated damages; and

c) special costs.

[10] In the Application the plaintiffs initially sought relief which was tantamount to redrafting the Amended Counterclaim for the defendants. The plaintiffs have wisely withdrawn that relief. It is not the role of plaintiffs' counsel to draft a defendant's counterclaim. They have rights under the British Columbia *Supreme Court Civil Rules* (the "*Rules*") to object to the form and/or substance of the pleadings, but the remedy is not to stand in the shoes of the defendants and have the court endorse their preferred manner of pleading the applicable cause (or causes) of action.

[11] On the other hand, my November 2, 2023 order was not intended to be *carte blanche* permission to plead a new theory of the case from the defendants. It was intended to allow them to proceed with relief under s. 35 of the *Property Law Act*, R.S.B.C. 1996, c. 377 [*PLA*] given that this had not been previously plead but was, I accepted, a reasonable cause of action which was not frivolous or vexatious.

[12] The parties were also all pragmatic in agreeing it made sense to allow this relief to be pled in the Amended Counterclaim versus in a separate petition proceeding, given that the underlying factual matrix and what would have resulted, I surmise, in an inevitable joinder application, yet more procedural wrangling.

The Dispute

[13] I now turn to the aforementioned factual matrix of this dispute.

[14] The parties are neighbours. Specifically, they are legal owners of adjacent residential properties in a small subdivision. The relevant residences appear to be nicely constructed dwellings. They are what I would describe as larger than average residential lots and there is a degree of grade or slope as between the properties, most notably as it pertains to their driveways. This is a broad overview, but it sets the relevant visual from the affidavit material tendered.

[15] The Application, as did the prior application resulting in my November 2, 2023 order, relates to a dispute over an easement registered on title to the property owned by the defendants in favour of the property owned by the plaintiffs (the “Easement Land”).

[16] On or about September 18, 2018, the defendants encroached upon the Easement Land. As is apparent from the chronology of the pleadings, this remained a point of contention between the parties for more than three years.

[17] The parties then entered into a settlement agreement on or about May 30, 2022 to modify the terms of the easement (the “Modified Easement”) to allow the

defendants to construct a retaining wall (the “Wall”) on the Easement Land (the “Agreement”).

[18] It is admitted that the Wall as built is two inches wider than permitted by the Agreement and as set out in the Modified Easement. The defendants were aware of this prior to commencing construction of the Wall and proceeded to build the Wall without advising the plaintiffs or seeking the consent of the plaintiffs and without further varying the Modification Easement.

[19] It is also admitted that the Wall as built is six feet longer than agreed upon pursuant to the Agreement and as set out in the Modified Easement. The defendants were again aware of this non-compliance with the Modified Easement ahead of proceeding with construction. Unlike the width of the Wall, I accept this can be remedied by reducing the length of the Wall without its removal. The width of the Wall, however, on the basis of the evidence before me, cannot.

[20] Returning to the chronology. On July 10, 2023 the plaintiffs sent an email advising that the Wall as built did not conform with the Agreement or the Modified Easement. Further, the plaintiffs demanded in that email that the defendants cease all further work on the Wall (the “Demand”).

[21] Despite the Demand, on or about September 11, 2023, the defendants had their contractor complete the Wall. This is admitted.

[22] In response to the notice of civil claim, which effectively sought the same relief as sought in the application resulting in the November 2, 2023 order, the defendants also filed the Original Counterclaim referred to above. The Original Counterclaim essentially relied exclusively on the material facts plead in the response to civil claim. The Original Counterclaim included a cause of action for general damages against the plaintiffs resulting from the “failure to respond” to the defendants’ admitted encroachment of the Easement Land “within a reasonable time frame".

[23] Importantly, the Original Counterclaim did not seek relief pursuant to s. 35 of the *PLA*, nor had a petition been commenced by the defendants in accordance with the *Rules* to seek relief pursuant to s. 35 of the *PLA*. This is effectively where matters laid at the time of my November 2, 2023 orders. There was no trial date, no discoveries had been undertaken and the action was stunted at the pleadings phase.

[24] The Amended Counterclaim seeks relief pursuant to s. 35 of the *PLA*, as I intended. However, based upon the law I will summarize below, there is merit to the plaintiffs' argument, as articulated in the Application, that the Amended Counterclaim is inconsistent with my November 2, 2023 order.

[25] Before turning to said law, I think it is helpful to summarize that the basis for my November 2, 2023 order was that I was satisfied that there is a meritorious claim for relief under s. 35 of the *PLA*. The encroachment of the Wall upon the boundaries of the Modified Easement, while admitted, is quite minor. In contrast, the removal of the Wall and its reconstruction in specific compliance with the Settlement Agreement and Modified Easement would, I accept, come at significant cost to the defendants. It is not my role in considering the relief sought in the Application to determine what those costs would be, but they are quite obviously significant as the Wall is a substantial engineered structure.

The Law Regarding Striking Pleadings

[26] In a notice of civil claim, a party must plead facts that are material to ground a viable cause of action. Although pleadings may be general, they must be specific enough to show on what grounds the opposing party or parties are being sued: *Forde v. Interior Health Authority*, 2007 BCSC 1706 at para. 15.

[27] The test under R. 9-5(1)(a) is whether it is plain and obvious that the plaintiff's claim discloses no reasonable cause of action. The pleadings are taken to be true for the purpose of an application to strike. Pleadings will be struck where they do not establish a cause of action, do not advance a claim known in law, or are groundless and fanciful: *Olenga v. British Columbia*, 2015 BCSC 1050 at para. 17.

[28] As set forth in *Willow v. Chong*, 2013 BCSC 1083 at para. 20, a claim is "unnecessary or vexatious if it does not go to establishing the plaintiff's cause of action, if it does not advance any claim known in law, where it is obvious that an action cannot succeed, or where it would serve no useful purpose and would be a waste of the court's time and the public's resources".

[29] *Willow* was referred to in the helpful summary of the law related to striking pleadings by Mr. Justice Voith in *Sahyoun v. Ho*, 2015 BCSC 392, appeal dismissed as abandoned at 2017 BCCA 96. Specifically, at para. 57 Justice Voith said:

> [57] The test on an application to strike an action under R. 9-5(1)(a), on the basis the pleadings do not disclose a cause of action, is whether it is plain and obvious the claim cannot succeed. It requires a conclusion that, assuming that the facts as stated are true, those facts disclose no cause of action and the pleadings disclose no arguable issue. If there is a chance that the action may succeed, then the action should be allowed to proceed; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 980; *Thompson v. Webber*, 2010 BCCA 308 at para. 11; *Canadian Bar Assn. v. British Columbia*, 2008 BCCA 92 at para. 37.

[30] Of note, *Willow* was also fairly recently followed by this Court in *Gaucher v. British Columbia Institute of Technology*, 2021 BCSC 289 at para. 58.

[31] *Willow*, *Sahyoun*, and *Gaucher* make clear this Court's jurisdiction to strike and dismiss meritless claims where doing so serves the objective of the *Rules*; namely, to secure the just, speedy and inexpensive determination of every proceeding on its merits.

Analysis

[32] For the reasons I have articulated, I remain satisfied that the defendants have a viable claim for relief under s. 35 of the *PLA*. That is what the counterclaim should articulate in accordance with the requirement under R. 3 of the *Rules*, that parties plead material facts and not evidence or argument.

[33] Moreover, having regard to the facts of this case, I have already permitted the defendants to fix one manifest defect in the pleadings to defend as against the plaintiffs' claims; namely, the s. 35 *PLA* remedy. The order was not intended to and

did not provide the opportunity for pleadings of other claims which were not discussed in the course of the underlying hearing wherein the Court did not have the benefit of a draft revised pleading to review, as is helpfully often the case.

[34] In the circumstances, I remain of the view that the defendants should be permitted to file a counterclaim that appropriately pleads for relief under s. 35 of the *PLA*. The defendants are also entitled to make any claim for costs that may be appropriate in the circumstances. The defendants were not, however, given leave to bring a new or completely revised clause of action for damages or some other novel or creative cause of action under the terms of my November 2, 2023 order.

[35] Subject to my orders below, I have concluded that the appropriate solution is to give the defendants yet one more opportunity to file a counterclaim that conforms with my November 2, 2023 order and under the *Rules* generally.

Section 36 of the *Property Law Act*

[36] Since this matter was previously before me, a new issue has arisen, I was advised, in the materials. Specifically, the plaintiffs now allege (paraphrased to be in continuity with the defined terms in these reasons for judgment) that, subsequent to the application, a further breach of the property rights was identified on the upper driveway, where the defendants have constructed a small wall which encroaches on the plaintiffs' property, not on the easement or Modified Easement and as a result of the construction of the retaining wall that was the subject of the application, the defendants are required to use a significant portion of the plaintiffs' property to navigate their vehicles into their upper parking area.

[37] The plaintiffs acknowledge that this issue was not before me at the time of the prior application and thus was not addressed in my November 2, 2023 order.

[38] The defendants, while remedying the identified defects in the Amended Counterclaim, are thus granted leave to include relief pursuant to s. 36 of the *PLA*. The defendants shall have the opportunity to respond accordingly and the matters can be adjudicated in due course.

Practical Remedy

[39] With recognition that these reasons are being delivered in early August and it is quite reasonable to expect counsel or their administrative support may have plans to be out of the office on a summer holiday, I consider it appropriate for the defendants to have 45 days to file a further amended counterclaim in accordance with this order. The plaintiffs shall, unless otherwise agreed, have 30 days to respond.

[40] The further amended counterclaim shall be a clean pleading which denotes, as required under the *Rules*, the dates of the previous filings and that it is amended pursuant to this order. There is, however, no blacklining or strike through required. In the event there are unfortunately further disagreements regarding the further amended pleadings, any application can be brought, on proper notice, under the *Rules*, after the expiry of the 75-day period contemplated above.

[41] For the benefit of any future presider and to provide context to my orders, I order that the Amended Counterclaim be appended as Schedule “A” to the now permitted further amended counterclaim. This allows it to be conveniently available as a cross-reference if required but without making the pleadings, as I fear, verging on unintelligible by virtue of multiple amendments.

Special Costs

[42] The plaintiffs seek special costs of the Application.

[43] The basis for the relief is related almost exclusively to the manner in which the relief sought has been pled. The other basis for this relief is that there was an intentional breach of the November 2, 2023 order. I recognize this is the second occasion when the Court has had to intervene at the pleading stage. However, it is not a situation, for the reasons articulated, which merits special costs.

[44] In *Vassilaki v. Vassilakakis,* 2024 BCCA 15, the Court of Appeal dealt with a somewhat analogous situation and concluded special costs, which had been

ordered, were not appropriate. *Vassilaki* is not on all fours with this case, which I acknowledge, but Justice Hunter's conclusions at paras. 40 to 54 are instructive:

> [40] Special costs may be awarded when a party has engaged in reprehensible conduct during the course of the litigation: *Garcia v. Crestbrook Forest Industries Ltd.,* (1994), 9 B.C.L.R. (3d) 242 (C.A.).
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> [41] One form of conduct that has typically attracted an order for special costs is an unfounded allegation of serious misconduct such as fraud or perjury: *Mayer v. Mayer Estate*, 2020 BCCA 282 at paras. 39–44.
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> [42] The chambers judge held that the allegations in the Petition relating to the respondents did not meet the standard of reprehensible conduct, a conclusion with which I agree.
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> [43] The issue on appeal is whether it was open to the judge to award special costs on the basis that by pursuing a claim they should have known was "manifestly deficient", the appellants displayed reckless indifference to such a degree that special costs were warranted. The judge expressed her conclusion in this way:
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> > [68] I find, described by Mr. Justice J. Williams as cited above, this is to be a situation where a party has displayed "reckless indifference" by not seeing early on that its claim was manifestly deficient.
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> [44] The "manifestly deficient" principle relied on by the chambers judge is based on a statement by Justice Williams in *Webber v. Singh*, 2005 BCSC 224 [*Webber BCSC*] that "special costs may be ordered where a party has displayed 'reckless indifference' by not seeing early on that its claim was manifestly deficient". The authority for this statement in *Webber BCSC* is stated to be *Concord Industrial Services Ltd. v. 371773 B.C. Ltd.,* 2002 BCSC 900.
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> [45] However, the special costs order in *Webber BCSC* was set aside on appeal: *sub. nom. Webber v. Dulai Roofing Ltd*., 2006 BCCA 501 [*Webber BCCA*]. In *Webber BCCA*, Justice Lowry explained the basis for the reversal in these terms:
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> > [18] Certainly, the mere fact that Dulai took a position that proved to be legally ill-founded and that it sought to challenge Jhajj's rather unique 1/100 registered interest as being his true beneficial interest was in no way conduct that was reprehensible and deserving of rebuke. The three authorities on which the judge relied in particular speak to the situation where litigants are careless or indifferent with respect to the facts on which they have advanced unmeritorious positions with serious repercussions. The considerations in this case are not the same where, with the benefit of legal advice, Dulai simply took a position that proved not to be sound. There is nothing in its conduct justifying an award of special costs against it.
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> > [Emphasis added.]
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> [46] In *Merit Consultants International Ltd. v. Chandler,* 2014 BCCA 121, this Court set aside a special costs order made by reference to the principle

in *Concord Industrial Services* that was relied upon by the chambers judge in the case at bar. Justice Newbury made the following comments:

> [44] There is a fine line between the bringing of an action that has little chance of success but which the plaintiff *bona fide* believes in, and the assertion of hopeless arguments recklessly or spuriously. I am mindful of the comments of Cumming J.A. in *Young v. Young* (1990) 50 B.C.L.R. (2d) 1 (C.A.), rev'd on other grounds [1993] 4 S.C.R. 3:
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> > Solicitors who think that they may be mulcted in costs for advancing points which they honestly believe to be fairly arguable may not act fearlessly and in the best traditions of an independent profession. If solicitors are limited in what they think they can say or do on behalf of their clients, then the rights of those clients are also necessarily limited. The potential for a chilling effect, especially if solicitors may be exposed to orders that they pay costs as between solicitor and client, the repercussions on solicitors' positions and consequently upon that of their clients, if adverse costs awards are made, underscore the need for judges to exercise caution in the making of such orders. [At 63–4.]

[47] The statement in *Webber BCSC* that "special costs may be ordered where a party has displayed 'reckless indifference' by not seeing early on that its claim was manifestly deficient" has not been endorsed by this Court, and I would not do so now. As a principle, it comes too close to penalising a party simply for bringing a claim with no merit, which has never been a basis alone for awarding special costs.

[48] In my view, something more is required than a meritless case that the plaintiff ought to have recognized was deficient. In *Webber BCCA*, this Court recognized that "carelessness or indifference with respect to the facts on which they have advanced unmeritorious positions with serious repercussions" could be characterized as reprehensible conduct, but not, with the benefit of legal advice, taking a position that proved not to be sound. In *Malik*, this Court endorsed the appropriateness of an award of special costs "where a party pursues a meritless claim and is reckless with regard to the truth": *Malik* at para. 31, emphasis added.

[49] Justice Saunders explained the need for an "extra element" to support a special costs award against a party whose claim has failed on the merits in *Berthin v. British Columbia (Registrar of Land Titles),* 2017 BCCA 181:

> [53] In rare circumstances an entirely meritless claim may attract special costs as observed in *McLean v. Gonzales-Calvo*, 2007 BCSC 648, but those circumstances invariably have an extra element, for example, a case that was utterly without hope so as to amount to misconduct or an abuse of process. In circumstances of an extant appeal which, if successful, would support the litigant, and where the result may seem clear in hindsight but was not so clear as to attract extra costs from this court, I consider special costs as a sanction for lack of merit generally are to be eschewed for their potential to chill members of the community from solving disputes in the forum

> designed for that very purpose. This is an access to justice and openness of the court processes issue.
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> [50] The difficulty in the case at bar, as the chambers judge recognized, is that it is not possible to determine whether the claim is meritless on the material filed. The appellants made a tactical decision to lead very little evidence, evidently assuming that the respondents would respond and a factual inquiry would ensue.
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> [51] Instead, the respondents made their own tactical decision to lead no evidence and challenge the application on the onus of proof, which was a successful strategy. That entitles them to costs of the application, but in my opinion does not establish reprehensible conduct on behalf of the appellants supporting a special costs order.
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> [52] The chambers judge characterized the pleadings as "manifestly deficient", which is a fair characterization, but she also recognized that the merit of the claim could not be adequately assessed on the evidence filed. There is no suggestion that the appellants were reckless as to the truth of their allegations.
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> [53] This is not a case where a party has pursued a claim that has turned out to be meritless and was reckless with regard to the truth. This is a case where the appellants filed deficient pleadings based on a theory of their evidentiary burden that was incorrect. While the respondents can fairly say that they warned the appellants of the deficiencies in their pleadings, this is not a case of reprehensible conduct so much as a deficient litigation strategy.
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> [54] In those circumstances, in my respectful opinion it was not open to the judge to award special costs. I would allow the appeal on the special costs issue and replace that award with ordinary costs.

[45] In my conclusion, and directly adopting the above language of Justice Hunter, this is not a case where the defendants have pursued a claim that has turned out to be meritless and was reckless with regard to the truth. It is not a case of reprehensible conduct so much as a deficient litigation strategy. On this basis, the claim for special costs is dismissed.

Ordinary Costs

[46] Turning, then, to ordinary costs.

[47] Costs are awardable at the discretion of the hearing judge. The general principle is that costs are awarded to the successful party, but those costs are at the discretion of the presiding judge: *see R.* 14-1(9). This is the same in chambers, at a summary trial or under a petition.

[48] In *Tisalona v. Easton*, 2017 BCCA 272, the Court of Appeal stated the law regarding costs as follows:

> [71] Rule 14-1(9) … grants unqualified discretion to depart from the *prima facie* rule that the successful litigant should be awarded its costs.
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> [72] This discretion must of course be exercised judicially, not arbitrarily or capriciously. An error in principle in an order departing from the usual rule will justify intervention by this court: *Brito (Guardian ad litem of) v. Woolley*, 2007 BCCA 1. Subject to such an error, the discretion is very broad.

[49] In my view, there is no basis to depart from the general rule in this case. The plaintiffs have been substantially successful again. They are entitled to their costs of this application in any event of the cause.

[50] Those are my reasons.

"Hardwick J."