COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Parker Cove Properties Limited Partnership v. Gerow,* 2024 BCCA 316

Date: 20240906
Docket: CA49327

2024 BCCA 316 (CanLII)

Between:

Parker Cove Properties Limited Partnership

Appellant/
Respondent on Cross-Appeal
(Plaintiff)

And

Robin Gerow and Carmen Gerow

Respondents/
Appellants on Cross-Appeal
(Defendants)

And

Royal Bank of Canada

Respondent
(Defendant)

Before: The Honourable Madam Justice Bennett
The Honourable Justice Griffin
The Honourable Madam Justice Horsman

On appeal from: Orders of the Supreme Court of British Columbia, dated August 11, 2023 and December 27, 2023 (*Parker Cove Properties Limited Partnership v. Gerow*, 2023 BCSC 1397 and 2023 BCSC 2275, Vancouver Docket S2110233).

Counsel for the Appellant/Respondent on Cross-Appeal:	K.N. Ramji
Counsel for the Respondent/Appellant on Cross-Appeal, Robin Gerow and Carmen Gerow:	R.J. Robb S. Penney
Place and Date of Hearing:	Vancouver, British Columbia June 5, 2024
Place and Date of Judgment:	Vancouver, British Columbia September 6, 2024

Written Reasons by:
The Honourable Madam Justice Bennett

Concurred in by:
The Honourable Justice Griffin
The Honourable Madam Justice Horsman

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Summary

The appellant operates a residential subdivision on First Nations reserve lands. The respondents, who are spouses, acquired subleases for two adjoining properties in the subdivision. In the summer of 2021, a wildfire was identified as a serious risk by the Okanagan Indian Band and a mandatory evacuation order was issued. One of the respondents disobeyed the evacuation order. After a summary trial, the chambers judge found that the defiance of the evacuation order constituted a breach of the respondents' subleases, but not a fundamental breach such that the subleases would be terminated. She declined to order special costs but ordered costs at Scale C against the appellant. The appellant appeals the chambers judge's finding regarding fundamental breach, and her costs order at Scale C. The respondents cross-appeal the chambers judge's failure to order special costs to them. Held: Appeal allowed in part; cross-appeal dismissed. The chambers judge set out and applied the correct legal framework with respect to fundamental breach, however, she erred in principle in ordering costs at Scale C. The chambers judge did not err in exercising her discretion not to order special costs.

Reasons for Judgment of the Honourable Madam Justice Bennett:

[1] In July 2021, the White Rock Lake fire was identified as a serious wildfire risk by the Okanagan Indian Band ("the Band"). The risk to the lands of the Band increased, and a mandatory evacuation order was issued on August 1, 2021. The respondent, Robin Gerow, disobeyed the mandatory evacuation order that included his leased property in the development held by the appellant, Parker Cove Properties Limited Partnership ("Parker Cove"). His wife, Carmen Gerow, also a respondent, evacuated as required (both respondents are collectively referred to as "the Gerows").

[2] The chambers judge dismissed a claim initiated by Parker Cove claiming termination of the subleases for the properties in question. She concluded, amongst other things, that the subleases had not been fundamentally breached by the Gerows, in reasons indexed at 2023 BCSC 1397. Parker Cove appeals that decision and also challenges the order for costs to the Gerows at Scale C. The Gerows appeal the dismissal of their special costs application. The chambers judge's costs decision is indexed at 2023 BCSC 2275.

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[3] I would dismiss Parker Cove's appeal with respect to the dismissal of their claim but allow the appeal with respect to the costs order of Scale C and reduce it to Scale B. I would dismiss the cross-appeal with respect to an application for Special Costs by the Gerows. I would grant costs to the Gerows for the appeal and Parker Cove costs in relation to the cross-appeal.

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Background

[4] The Parker Cove Development, a residential sub-division of 600 leased lots, is located on the reserve lands of the Band. Parker Cove holds a head lease from the federal government in relation to approximately 100 acres of Band lands and subleases lots to individuals.

[5] On July 5, 2019, the Gerows bought two adjoining lease lots and improvements, including houses, in the Parker Cove Development on Lakeshore Drive and Elk Street. The subleases for the two properties are essentially identical, except for certain provisions related to the payment of rent and common costs (collectively, the "Subleases"). Ms. Gerow is a member of a Treaty First Nation (from Saskatchewan), and the leases were placed in her name to avoid property tax. Mr. Gerow holds a beneficial interest in the leases. The Royal Bank of Canada holds the mortgage and is a secured creditor but did not participate in the litigation.

[6] On August 1, 2021, the Band issued a mandatory evacuation order that required more than 1,000 Band members and a larger number of non-Band members to evacuate due to the White Rock Lake fire (the "Evacuation Order"). The Evacuation Order remained in effect until September 4, 2021. Firefighters could not use water bombers and fire retardant on property if people remained in the evacuated area.

[7] Mr. Gerow and a few other residents of Parker Cove refused to comply with the Evacuation Order. While Ms. Gerow evacuated, she was aware that Mr. Gerow did not. On August 13, the Chief of the Band, Byron Louis, sent a letter raising concerns about those who did not evacuate. On August 14, Parker Cove emailed residents advising that failure to comply with the order would be considered a breach

of their sublease and serious sanctions would follow. Mr. Gerow was served with the Band letter on August 14 by the RCMP, after which he evacuated. He returned once during the evacuation period to bring gas to his generator.

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[8] On November 22, 2021, Parker Cove commenced an action against the Gerows, alleging multiple breaches of the Subleases, including:

a) failure to pay the common costs owing for both properties in breach of s. 4 of the Sublease;

b) failure to pay the basic rent owing for the Elk Street property in breach of s. 4 of the Sublease;

c) undertaking deck renovations without prior approval in breach of s. 17(3) of the Sublease; and

d) failing to follow the Evacuation Order in breach of s. 13 of the Sublease.

[9] Parker Cove sought relief pursuant to the Subleases' terms, including orders for: (1) the termination of the Subleases; and (2) a writ of possession in favour of the appellant. Parker Cove did not plead fundamental breach as the legal basis for its claim. The issue of fundamental breach was raised for the first time in Parker Cove's response to the summary trial application. Parker Cove later clarified that it was not seeking to keep the equity in the property. It sought the right to have conduct of sale and reimbursement for what it says is owing to it.

[10] On December 21, 2021, the Gerows listed Lakeshore Drive for sale, with the intention of listing Elk Street as soon as some repairs were completed. Parker Cove advised that it would not consent to assign the Sublease to a prospective buyer because of the pending litigation.

[11] Parker Cove also raised other matters that it describes as "administrative breaches". Some of which are subsumed in the claim:

a. The failure to pay the 2019/2020 Annual Rent on time;

b. The failure to pay the 2020/2021 Annual Rent on time;

c. The failure to pay the outstanding fine for the use of the Golf Cart; and

d. The failure to get permission before carrying out renovations.

[12] Parker Cove took the position that these matters did not form part of the "fundamental breach" but showed a pattern of behaviour by the Gerows that could be considered by the judge.

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Summary Trial Reasons: 2023 BCSC 1397

[13] The Gerows brought an application for the dismissal of the claim by way of a summary trial. Parker Cove contested the suitability of a summary trial. The judge found that the matter was suitable for determination by summary trial (at para. 27). The question of the suitability of the summary trial process is not an issue on this appeal.

[14] The chambers judge identified the primary issue as whether Mr. Gerow's failure to comply with the Evacuation Order constituted a fundamental breach of the Gerows' lease agreement, thus permitting a termination of the Subleases. The judge concluded that the Gerows did breach the lease agreement but found that there was no fundamental breach of the lease agreement: para. 53.

[15] The chambers judge reached that result on two bases. First, she found that the conduct amounting to a breach did not constitute a fundamental breach:

> [52] My consideration of the context, circumstances and the intended benefit of the Subleases, leads me to conclude that Mr. Gerow's failure to immediately abide by the mandatory evacuation order did not destroy the commercial purpose of the Subleases and it did not cause a fundamental breach of the Subleases. Mr. Gerow's failure to abide by s. 13 cannot be said to have destroyed the commercial purpose of the Subleases because, it did not, for example, render the Subleased Premises forever unusable or otherwise eliminate the very thing bargained for.
>
> [53] Put another way, while the Gerow defendants breached s. 13 of the Subleases when Mr. Gerow failed to evacuate Parker Cove on August 1, 2021, I do not find that the breach deprives the plaintiff of substantially the whole benefit the parties intended from the Subleases.

[16] Second, the chambers judge held that Parker Cove failed to plead material facts going to the key element of a fundamental breach, namely, an act which deprived Parker Cove of substantially the whole benefit of the Subleases (para. 58).

[17] The chambers judge rejected Parker Cove's allegations that the Gerows had committed multiple other breaches of the Subleases, unrelated to the failure to follow the Evacuation Order (paras. 65–95). These findings are not in issue on appeal.

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Issues on Appeal

[18] Parker Cove raises three issues:

a) First, it submits that the judge erred by failing to conclude that the consequences of the failure of Mr. Gerow to obey the evacuation order put the entire community at risk, thereby constituting a fundamental breach. The real issue is whether the judge erred in concluding that there was no fundamental breach as the breach did not deprive Parker Cove of substantially the whole of the benefit of the Subleases.

b) Second, it contends that the judge erred in concluding that fundamental breach must be specifically pleaded, and it was not. The judge also found that the material facts on which to find a claim had not been pleaded.

c) Finally, Parker Cove submits that the judge erred in ordering costs, and in particular, Scale C costs.

[19] The Gerows cross-appeal the costs order, contending that the judge erred in dismissing their application for special costs.

Fundamental Breach

Relevant Provisions of the Subleases

[20] Parker Cove's submissions on appeal regarding fundamental breach focus on the Gerow's failure to comply with the Evacuation Order. Parker Cove alleged that in

doing so, the respondents fundamentally breached s. 13 of the Sublease, which provides:

> 13. COMPLIANCE WITH LAWS
>
> 1. Obligation to Comply with Applicable Laws – The Sublessee will, at his own expense, observe and perform all of his obligations under, and all matters and things necessary or expedient to be observed or performed by it, by virtue of any applicable law, statue, bylaw, ordinance, regulation, statutory notice or order, or lawful requirement of the federal, provincial or municipal government or authority, the Band, or any public utility company lawfully acting under statutory power.

[21] The provisions of the Subleases that relate to default provide as follows:

> 21. SUBLESSOR'S RIGHTS AND REMEDIES
>
> 1. Events of Default – It shall be a default under this Sublease if the Sublessee:
>
> > (a) fails to pay the Rent or any other sum required to be paid by the Sublessee when due under this Sublease, whether demanded or not; or
> >
> > (b) fails to perform or observe any other term, agreement, condition, covenant, warranty or proviso of this Sublease (including the Headlease, the Foreshore Licence and the Schedules hereto), whether demanded or not.
>
> 2. Rights and Remedies Upon Default – Upon the happening of a default, the Sublessor shall give the Sublessee written notice of the default (herein called a "Notice of Default") and the Sublessor shall, subject to the provisions of Part 23, have the following rights and remedies:
>
> > (a) the Sublessor shall have the right to re-enter and re-take possession of the Subleased Premises with all fixtures and Improvements thereon and terminate this Sublease;
> >
> > > (i) if such default is not remedied within 60 days from the giving of the Notice of Default; or
> > >
> > > (ii) if such default is not capable of being remedied within 60 days from giving of Notice of Default, the Sublessee has not diligently commenced to take all steps reasonably necessary to cure the default;
> >
> > and Sublessee will immediately and peaceably surrender possession of the Subleased Premises to the Sublessor;
> >
> > (b) in the case of a default which constitutes a default under the Rules and Regulations, impose any reasonable fines or penalties as set out in the Rules and Regulations;

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> (c) the Sublessor shall have the right to collect from the Sublessee any and all reasonable costs and expenses incurred by the Sublessor in enforcing the covenants and agreements set out in the Sublease …
>
> (d) the Sublessor shall be entitled to such other rights and remedies as may be available to it pursuant to this Sublease, at law or in equity …

3. <u>Rights and Remedies Cumulative</u> – All rights and remedies of the Sublessor in this Sublease shall be cumulative and not alternative.

4. <u>Non-Waiver</u> – No condoning, excusing or overlooking by the Sublessor or the Sublessee of any default breach or non-observance by the other … shall operate as a waiver of the … rights hereunder in respect of any continuing or subsequent default, breach or non-observance …

…

31. NOTICE

1. <u>Notice</u> – Any notice, demand, consent or objection to be given hereunder shall be given in writing and either delivered or sent by registered mail, postage prepaid, addressed to the parties … To the Sublessee, addressed to the Sublessee at the Subleased Premises; … or to such other address which the Sublessor and Sublessee or the Approved Mortgagee may from time to time notify the other in writing. …

Legal Framework

[22] The issue of whether there has been a fundamental breach of a contract is a question of mixed fact and law (*Mantar Holdings Ltd. v. 0858370 B.C. Ltd.*, 2014 BCCA 361 at para. 12). Thus, the judge must have made a palpable and overriding error or an error of law that can be extricated from the question of mixed fact and law: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 36.

[23] Parker Cove submits with respect to the first issue, that a legal error arises because the judge misapplied the legal test and ignored the widespread consequences of Mr. Gerow's defiance of the mandatory Evacuation Order, which it contends, resulted in a "radical departure of contractual obligations" and thus, a fundamental breach. On the second issue, Parker Cove submits the judge's finding that fundamental breach had to be specifically pleaded amounted to an error of law.

[24] The Gerows contend that Parker Cove has not identified a question of law with respect to its first ground of appeal. It agrees that the question of pleadings raises a question of law alone.

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[25] A fundamental breach is a breach that goes to the very root of the contract such that it substantially deprives the other party of the whole benefit of the contract: *Spirent Communications of Ottawa Ltd. v. Quake Technologies (Canada) Inc.,* 2008 ONCA 92, leave to appeal to SCC ref'd [2008] S.C.C.A No. 151; *Doman Forest Products Ltd. v. GMAC Commercial Credit Corp. – Canada,* 2007 BCCA 88 at para. 109 [*Doman*]; *Kuo v. Kuo,* 2017 BCCA 245 at para. 39.

[26] The legal test for fundamental breach was considered by this Court in *Ballantyne v. Grone* (1989), 22 R.F.L. (3d) 217, 1989 CanLII 2969 (B.C.C.A.) at para. 11, where Hinkson J.A. adopted the summary of the law stated in *Borg-Warner Acceptance Canada Ltd. v. Wyonzek* (1981), 122 D.L.R. (3d) 737, 1981 CanLII 2480 (Sask. K.B.) at 744–45:

> Whatever its limitations or the subtle shades of its essence the doctrine with all its imperfections is embedded in Canadian law and at least for the purposes at hand may be sufficiently if not exhaustively nor perfectly stated thus: a fundamental breach is one going to the very root of the contract; where one party fails to perform the very purpose for which the contract is designed so as to deprive the other of the whole or substantially the whole of the benefit which the parties intended should be conferred and obtained, such breach goes to the very root of the contract, and the party not in default is absolved from performing his end of the contract.
>
> [Emphasis added.]

[27] Where one party to a contract commits a fundamental breach of its terms, the contract is repudiated, and this amounts to a refusal to perform. This may be evinced by words or conduct, but regardless of how it manifests, the refusal to perform must be clear and unequivocal to amount to a repudiation: *Doman* at para. 109; *Kuo* at paras. 39–40.

[28] In *Potter v. New Brunswick Legal Aid Services Commission,* 2015 SCC 10, Justice Cromwell, writing for himself and Chief Justice McLachlin in a concurring judgment, discussed the broader contract law principles relating to the repudiation of a contract. He said, at paras. 144–148:

> [144] The term repudiation refers to the situation in which a breach of contract by one party gives rise to the right of the other party to terminate the contract and pursue the available remedies for the breach: J. D.

McCamus, *The Law of Contracts* (2nd ed. 2012), at pp. 676-78. This occurs when one party actually breaches the contract in some very important respect and is said to thereby repudiate the contract. If the other party "accepts" the repudiation, the contract is over. If the other party does not accept the repudiation, the contract continues (subject to various other doctrines). In either case, the non-breaching party can pursue the available remedies which may vary depending on whether that party has accepted the repudiation or affirmed the contract.

[145] There is a wealth of learning about the types of breach that constitute repudiation. Without getting into the details, we may say in brief that a breach is a repudiation of the contract if it is a breach of a contractual condition or of some other sufficiently important term of the contract so that there is a substantial failure of performance: S. M. Waddams, *The Law of Contracts* (6th ed. 2010), at ¶590; McCamus, at pp. 676-77.

[146] I pause here to deal with three problems of terminology that can cause confusion.

[147] The first relates to the word "repudiation"; it is used in at least two different senses. Sometimes it refers to the conduct of the breaching party in committing a breach that is sufficiently serious to give the non-breaching party the right to treat the contract as over. At other times the term is used to refer to the choice of the non-breaching party, faced with this sort of serious breach, to treat the contract as over. I will use the word "repudiation" to refer to the acts of the party alleged to be in breach. I will refer to the choice of the non-breaching party to treat the contract as over as "acceptance" of the repudiation.

[148] The second terminological clarification deals with the term "fundamental breach". The types of breach that are sufficiently serious to constitute repudiation are often referred to as "fundamental" breaches. However, use of the term "fundamental breach" can cause confusion because it is also used in the distinct context of deciding whether a contractual provision excluding or limiting liability is effective in the face of a radical departure from the contractual obligations: see, e.g., *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 104-23. To avoid that confusion, I prefer to refer to breaches of this nature as breaches of "sufficiently important terms" or "repudiatory" breaches: see, e.g., McCamus, at p. 651.

[29] The test involves a question of mixed fact and law because the determination of whether there was a fundamental, or repudiatory breach, depends on the facts. As noted by the chambers judge at para. 34:

Professor G.H.L. Fridman in *The Law of Contract in Canada*, 6th ed. (Toronto: Thomson Carswell, 2011), at 582, after reviewing a multitude of authorities holding various circumstances to be, or not to be, fundamental breaches, summarizes the application of the basic legal test as follows:

> In the final analysis, however, much depends upon the facts of a particular instance. The basic test comes down to the simple, if not

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> obvious one of deciding what is the real purpose of the contract, the true benefit intended to be obtained by the injured party, the extent to which the misperformance by the defendant goes beyond falling short of what was desired by the victim of the breach and involves the complete denial to him of any benefit from the performance that was provided.
>
> *Doman*, at para. 90, (citing 3rd ed.)

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Position of the Parties

[30] Parker Cove submits that the chambers judge erred in law by misapplying the legal test. It argues that she ignored the "very significant and widespread consequences" of Mr. Gerow's defiance of the Evacuation Order. It notes that the judge failed to refer to the fact "that all of the 350 homes in the Parker Cove Development were at an elevated risk because fire retardant and water could not be applied by water bombers".

[31] As an additional factor in support of its fundamental breach submissions, Parker Cove raises its contractual obligation to contain the risks to the investments made by other Parker Cove homeowners by ensuring compliance with the Sublease. Parker Cove also notes how Mr. Gerow's failure to comply with the Evacuation Order caused concern for the Band.

[32] Parker Cove contends that the chambers judge erred by not finding that Mr. Gerow's actions constituted "a radical departure from the contractual obligations" resulting in a fundamental breach, citing Justice Cromwell in *Potter* at para. 148. It argues that the chambers judge's conclusion failed to recognize the "immense risk" caused by the respondents.

[33] The Gerows contend that Parker Cove has failed to identify an extricable error of law in the chambers judge's reasons. They argue that the appellant is inviting the Court to reach a different conclusion on the same facts and law and submit that the chambers judge correctly found that a failure to immediately evacuate does not deprive the appellant of substantially the whole benefit of the Subleases.

[34] The Gerows take issue with how this issue was raised by Parker Cove in the court below, and submit that a party who wishes to rely on fundamental breach, must elect to affirm the breach and accept it as such, thereby terminating the contract, without delay, citing *Morrison-Knudsen Co. Inc. v. British Columbia Hydro & Power Authority* (1978), 85 D.L.R. (3d) 186 at 224, 1978 CanLII 1977 (B.C.C.A.). Instead, Parker Cove affirmed the Subleases, and only attempted to resile from that position at the summary trial hearing, after it recognized it had not first complied with the Subleases' procedure in default (ss. 21 and 31 of the Subleases).

[35] The Gerows argue that Parker Cove has erroneously relied on the notion of a "radical departure from the contractual obligations" as the basis for fundamental breach. In *Potter,* Justice Cromwell was using this language in the distinct context of an exclusion or limitation of liability clause within a contract and it is not the test applicable to fundamental breaches that are the subject of this appeal.

[36] The Gerows submit that the chambers judge did not fail to address the risk Mr. Gerow's defiance of the Evacuation Order posed to the Parker Cove Development. The judge found, at para. 50 of the summary trial reasons, that the Band was rightly concerned about this risk, but that Mr. Gerow's conduct did not go to the purpose of the Subleases in a manner that deprived Parker Cove of the entire benefit of the agreement.

[37] According to the Gerows, the fact that the Subleases contemplate a breach of s. 13 and provides a remedy for such a breach under the default provisions in ss. 21 and 31 of the Subleases also weighs against finding a fundamental breach.

Analysis

[38] In my view, the chambers judge did not err in concluding that a fundamental breach of the Subleases did not occur.

[39] Parker Cove has not identified an extricable error of law in relation to the judge's application of the law of fundamental breach to the factual matrix. Although the chambers judge did not explicitly state that all of the 350 homes in Parker Cove

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were at an elevated risk because fire retardant and water could not be applied by water bombers while Mr. Gerow was present, her reasons for judgment are to be read in their entirety, in the context of the evidence, the submissions and the trial as a whole: *R. v. R.E.M.*, 2008 SCC 51 at para. 16, citing *R. v. Morrissey*, 22 O.R. (3d) 514 at 525, 1995 CanLII 3498 (C.A.).

[40] The evidence of the risk to the Band and to the Parker Cove Development that Mr. Gerow created when he defied the Evacuation Order was properly before the chambers judge. She emphasized the fact that the Gerows were warned by Parker Cove and the band to comply with the Evacuation Order, and that the Band was rightly concerned about "holdouts": at paras. 46, 50. The chambers judge did not ignore these concerns, rather, she recognized that they did not go directly to the commercial purpose of the Subleases.

[41] Furthermore, Parker Cove misstates the law when it says that the test involves "a radical departure from the contractual obligations". This language applies to "the distinct context of deciding whether a contractual provision excluding or limiting liability is effective in the face of a radical departure from the contractual obligations": *Potter* at para. 148.

[42] Accordingly, the test must focus on a breach that goes to the very root of the Subleases. Mr. Gerow's conduct in disobeying the Evacuation Order was blameworthy and offensive. Fortunately, none of the homes or belongings in Parker Cove were impacted by the White Rock Lake fire. However, the chambers judge correctly set out the correct legal principles in relation to fundamental breach, made findings of fact that are supported by the evidence, and found that his failure to obey the Evacuation Order did not deprive Parker Cove of a substantial benefit of the Sublease.

[43] In my view, there is no error in her conclusion. I would dismiss the appeal on that basis.

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[44] Given that finding, I do not need to address the issue of whether the failure to plead fundamental breach defeats the claim. In addition, the evidence suggests that Parker Cove affirmed the Subleases in subsequent conduct, however, those matters also do not need to be addressed.

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Costs Reasons: 2023 BCSC 2275

[45] The issue of costs was also litigated. The judge dismissed the claim by the Gerows for special costs and increased costs, but granted them costs on Scale C.

[46] Parker Cove sought indemnity for costs in the court below, however, the chambers judge concluded that she did not need to address that issue, and it is not raised in this appeal. The Gerows sought special costs, or alternatively, increased costs at Scale C.

[47] The first issue addressed by the judge was whether she should postpone the costs hearing until after the conclusion of this appeal. She, correctly in my view, decided the costs issue and did not postpone the hearing.

[48] The judge set out the tests for ordering special costs. She set out the points raised by the Gerows that they said entitled them to special costs at para. 18:

> [18] The Gerow Defendants' counsel submits that they are entitled to special costs as a result of the following circumstances:
>
> > a) The conduct of the plaintiff in bringing a clearly unmeritorious claim alleging breaches, or fundamental breaches, of the sublease, such as non-payment of common costs and annual rents, impermissible renovations and failure to evacuate.
> >
> > b) The conduct of the plaintiff of seeking termination of the sublease without providing the requisite notice of the alleged breaches to the Gerow Defendants.
> >
> > c) The conduct of the plaintiff in making resolution of issues in the proceeding unnecessarily difficult by, for example, refusing to accept amounts of allegedly unpaid rent up to the date of the summary trial hearing.
> >
> > d) The conduct of the plaintiff in resisting timely adjudication of the claim on its merits by, for example, seeking to avoid summary trial due to the Okanagan Indian Band's wish to intervene.

> e) The conduct of the plaintiff in bringing the proceeding to impose a burden on the Gerow Defendants as retribution for criticizing the plaintiff's management of Parker Cove.

[49] The Gerows claimed that the action was initiated against them for an improper purpose, contending that there was a personal *animus* between the person who operates Parker Cove and Mr. Gerow (para. 19).

[50] In dismissing the application, the judge concluded that most of the grounds put forward by the Gerows for the award of special costs related to pre-litigation conduct, and thereby could not be considered based on *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177 at paras. 17, 20. She found no improper conduct or bad faith that would call for special costs based on either allegations of resisting timely adjudication of the claim, or the opposition to a summary trial proceeding by Parker Cove: para. 22.

[51] Importantly, the judge found that the claim was not brought for an entirely ulterior purpose, that is retribution to Mr. Gerow for his criticisms of the management of Parker Cove, nor was the claim frivolous. Indeed, she concluded that there was a breach of the lease that spoke against a frivolous claim: para. 24.

[52] Next, the chambers judge addressed the Gerows request for costs at Scale C. The judge cited the relevant factors from *Slocan Forest Products Ltd. v. Trapper Enterprises Ltd.,* 2010 BCSC 1494 at para. 6 for deciding whether a matter is of "more than ordinary difficulty" to be appropriate for an award of costs at Scale C.

[53] After citing *Slocan*, the judge said the following at paras. 33–35:

> While not submitting that the matter was appropriate for Scale C, counsel for the plaintiff did make submissions to the effect that the matter was complex. The plaintiff's counsel said the matter raised questions of broader social importance, especially in an age of increasing wild-fire risk, and where the decision of one individual could place an entire neighbourhood at risk of catastrophic loss. I agree that this added complexity to what might otherwise be regarded as a straight-forward dispute concerning the application of a sublease.

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> I also find that the matter was hard fought with little or nothing conceded along the way, especially by the plaintiff. While the Gerow Defendants conceded, for example, that Mr. Gerow failed to evacuate on August 1, 2021, the plaintiff made no concession concerning whether the sublease required notice to the Gerow Defendants for *any* of the various breaches alleged. In my view, the plaintiff's "new" submission in response to the summary trial application alleging that the Gerow Defendants had fundamentally breached the sublease is another example of the hard-fought nature of the application.
>
> Given that the issues in this proceeding were complex, including because of the broad implications alleged by the plaintiff, and the hard-fought nature of the application, I find that this is an appropriate case for Scale C costs.

[54] The chambers judge granted the request for costs at Scale C but denied the request for increased costs at Scale C: para. 40.

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Costs

[55] An award of costs is a discretionary decision, and this Court will not interfere with a costs order unless the judge made an error in principle or the costs award is plainly wrong: *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9 at para. 27.

[56] In relation to the issues on appeal and cross-appeal regarding costs, I will first address the appeal by the Gerows with respect to the refusal of the judge to order special costs. Finally, I will address the issue raised by Parker Cove on appeal regarding whether Scale C costs were appropriate.

Special Costs

[57] The test for granting special costs is set out in *Smithies* 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. Leungin* 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.

[58] In *Smithies*, this Court found that pre-litigation conduct should not be considered in determining whether an order for special costs is appropriate, as special costs should be reserved to punish and deter reprehensible conduct that occurs during the course of litigation: at paras. 128–134.

[59] The Gerows (as appellants on this issue) submit that the judge erred in her application of the brightline rule by failing to appreciate that the pre-litigation conduct relied on was in support of drawing the inference that Parker Cove had acted with an improper motive. The Gerows position is that the action should never have been commenced, given the absence of evidence of breach, and in the absence of the notices of default or opportunities to remedy the default. They argue that Parker Cove commenced an action knowing that it did not have the evidence to establish breaches of the Subleases, except for the claim asserting defiance of the Evacuation Order.

[60] Parker Cove submits that there has been no palpable and overriding error identified by the Gerows that would justify setting aside the judge's order on special costs. It points to the seriousness of Mr. Gerow's conduct by his refusal to evacuate.

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It notes that the judge turned her mind to the fact that the Gerows were singled out for litigation.

[61] The decision to award special costs is discretionary in nature. The judge, in my view, properly excluded the pre-litigation conduct as grounds for special costs. Her reasons do not suggest that she was excluding those matters from her assessment of whether there was an ulterior or improper purpose in bringing the litigation against the Gerows. She was well-aware of the evidence. In dismissing the argument the action had been brought for an ulterior purpose, the judge emphasized that Parker Cove was successful in asserting that the Gerows breached the Sublease in relation to the Evacuation Order. The Gerows downplay the Evacuation Order breach in their submissions to this Court. In my view, the judge was correct to find that the conduct of Mr. Gerow in purposefully disobeying an Evacuation Order, thus putting significant property at risk, provided important context in assessing Parker Cove's purpose in bringing the action. Her conclusion that the action was not brought for an improper purpose is well supported by the record.

[62] Therefore, there is no basis on which to find that the judge erred in refusing to award special costs.

Scale C Costs

[63] Next is the issue of whether Scale C costs were appropriate. Here, Parker Cove is the appellant. The Gerows say that if their special costs award appeal is dismissed, the judge's Scale C award should be maintained.

[64] According to the *Supreme Court Civil Rules*, costs are awarded to the successful party unless the court orders otherwise (Rule 14-1(9)). Unless ordered otherwise, costs are assessed as party and party costs in accordance with Appendix B (Rule 14-1(1)). Appendix B is set out below:

> Scale of costs
>
> 2 (1) If a court has made an order for costs, it may fix the scale, from Scale A to Scale C in subsection (2), under which the costs will be assessed, and may order that one or more steps in the proceeding be assessed under a different scale from that fixed for other steps.

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

[65] In the oft cited *Slocan* case at paras. 5–7 (also cited by the chambers judge), Justice McEwan set out the relevant factors for considering the appropriate scale of costs:

> [5] Recent changes to the scale of costs has not rendered past decisions obsolete. Under the previous scale the court had developed a series of seven considerations to guide its discretion. (See *566935 B.C. Ltd. v. Alliance Insurance Co. of Canada,* 2005 BCSC 1759). These were adopted in *Lewis v. Abel*, 2008 BCSC 149, and *Malik v. State Petroleum Corp.,* 2009 BCSC 132 as applicable to the new scale. The material difference between the two is that scales 4 and 5 have been merged in Scale C. "Matters of more than ordinary difficulty" now includes the old Scale 4, which was previously described in precisely those terms, and Scale 5, which was previously reserved for a higher category of "matters of unusual difficulty." The change eliminates a subtlety that, like the distinction between "unreasonable" and "patently unreasonable", sometimes encountered in another context, may be more metaphysical than practical.
>
> [6] Applying *Lewis* and *Malik,* the following factors continue to be relevant:
>
> (a) Length of trial;
>
> (b) Complexity of issues;
>
> (c) Number and complexity of pre-trial applications;
>
> (d) Whether or not the action was hard-fought with little or nothing conceded along the way;
>
> (e) The number and length of examinations for discovery;
>
> (f) The number and complexity of expert reports;

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> (g) The extent of the effort required in the collection of and proof of the facts.
>
> [7] In *566935 B.C. Ltd.* the Court had summarized the principle relevant to the higher scale as follows:
>
>> To justify an award of costs on Scale 4, the trial judge must find either that the action involves legal issues of more than ordinary importance, or that the gathering of the facts and the relevant law involved more than ordinary difficulty. Either finding may support such an award… .

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[66] While the judge cited *Slocan*, she focused on only two factors that she considered relevant: the complexity of the matter, and that it was hard-fought. In my view, she erred in her approach to both of these factors.

[67] To put the matter of complexity in perspective, this was a summary trial that occurred April 26–27, 2023. The parties proceeded by way of affidavit and submissions. Although most of the trial record was not filed in this Court, it appears from the transcript that no witnesses testified. It also does not appear that any expert evidence was tendered. Jimmy Bonneau, a representative of Parker Cove, and James Boschman, the Parker Cove Development property manager, were examined for discovery. Mr. Gerow was also examined for discovery.

[68] A useful comparison may be drawn with Justice McEwan's discussion of complexity in *Slocan*, which involved a propane explosion at a logging camp that was so destructive that causation was difficult to establish from the remaining evidence. That trial involved: expert evidence as to the cause of the explosion and failure to detect odorant; interpreting the scope of a contract between various parties; interpreting the scope of an employment contract; contributory negligence issues; determining compliance with Building Code provisions; the quantum to be awarded for various losses and damages; breach of the *Gas Safety Act,* R.S.B.C. 1996, c. 169; and estoppel arguments: at para. 10.

[69] The present action had no such exceptional features. The fact that Parker Cove argued at the hearing that there were broad consequences to the court's adjudication of the issue of fundamental breach did not, in itself, make this case one of unusual difficulty.

[70] The second factor cited by the chambers judge in awarding Scale C costs was her conclusion that the case was "hard fought". As noted by Justice McEwan in *Slocan*, the consideration of whether a matter is hard fought must be approached with caution, given counsel's duty to vigorously defend a client's interests: at para. 14. On occasion, the description of "hard fought" might be intended to refer to an unusual number of pre-hearing motions or an unusual number of novel issues being litigated. But that was not the case here. There is nothing before us to suggest that there were numerous or complex pre-trial applications. Absent some finding of unreasonable conduct by a party, and there is not such finding here, a vigorous defence of a client's interests should not elevate the scale of costs: *Howell v. Witt*, 2016 BCSC 913 at para. 23.

[71] Furthermore, in her reasons the chambers judge failed to address at all the remaining factors cited in *Slocan*. While I appreciate that the list of factors is not intended to operate as a checklist, the list does provide guidance to the court as to the type of considerations that are generally relevant to a holistic analysis of whether the case is one of unusual difficulty. The present case was a two-day summary trial involving the relatively routine question of whether a party had breached the terms of a contract. The summary trial proceeded by way of affidavit and submissions. There were three examinations for discovery of ordinary length conducted in advance. It does not appear that any expert evidence was tendered, or that there were pre-trial applications. The record does not reflect that the parties faced any unusual difficulty in gathering evidence. The case took only a year to get to a summary trial from the time the notice of civil claim was filed.

[72] The chambers judge did not carry out the analysis reflected in the preceding paragraph, and did not reference the factors listed in *Slocan* other than two I have noted. She failed to consider the cumulative effect of the factors that come into play when assessing whether a case is of more than ordinary difficulty. In my view, this amounts to an error in principle. While the case has significance for leaseholders in the face of a wildfire, and their obligation to evacuate, and may encourage drafters of such leases to specifically identify such a breach as one that can result in

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termination, overall, there is nothing in the record that supports a finding that this was a case of more than ordinary difficulty.

Conclusion

[73] In summary, I would dismiss the appeal by Parker Cove from the dismissal of the action. I would allow the appeal by Parker Cove to the extent that I would reduce the costs from Scale C to Scale B. I would dismiss the cross-appeal by the Gerows from the refusal to award them special costs.

[74] As the Gerows have been substantially successful on the main appeal, I would grant them the costs of the appeal. The Gerows were unsuccessful on the cross-appeal, and therefore I would grant Parker Cove the costs of the cross-appeal.

"The Honourable Madam Justice Bennett"

I AGREE:

"The Honourable Justice Griffin"

I AGREE:

"The Honourable Madam Justice Horsman"

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