

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Lucky Eight Enterprises Ltd. v. Ma*,
2024 BCSC 2129

Date: 20241122
Docket: S179087
Registry: Vancouver

Between:

Lucky Eight Enterprises Ltd.

Plaintiff

And

**Haosong Ma, also known as Hao Song Ma, also known as Tito Ma, and
Wenjie Yuan, also known as Wen Jie Yuan, also known as Jessica Yuan**

Defendants

Before: Registrar Gaily

Reasons for Judgment

Counsel for the Plaintiff:

V.S. Chahal

Counsel for the Defendants:

J. Trueman

Place and Dates of Hearing:

Vancouver, B.C.
October 22 & 23, 2024

Place and Date of Judgment:

Vancouver, B.C.
November 22, 2024

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Introduction

[1] This is an assessment of the special costs Justice Sewell awarded to the defendants, Haosang Ma and Wenjie Yuan, when he dismissed the claim against them brought by the plaintiff, Lucky Eight Enterprises Ltd. (“Lucky Eight”). Lucky Eight had claimed (among other things), that Mr. Ma was an employee who breached his fiduciary duties, misappropriated funds and committed fraud. It had registered a certificate of pending litigation (“CPL”) over Mr. Ma’s property. Lucky Eight agreed to cancel the CPL the day before an application seeking that relief was scheduled on the condition Mr. Ma provided security of \$30,000. In addition to their response, the defendants filed a counterclaim to Lucky Eight’s claim seeking damages for Mr. Ma’s wrongful dismissal, as well as certain declarations, and Sewell J. also ordered that Lucky Eight’s response to the counterclaim be struck. He directed the \$30,000 returned to Mr. Ma. Sewell J.’s order was pronounced on October 4, 2019 and entered on December 5, 2019 (the “Order”). The Order expressly provides that Lucky Eight “shall pay to the defendants special costs of this proceeding, including special costs of this application” (para. 5).

[2] Once the Order was entered, the defendants obtained default judgment on their counterclaim in early 2020. After preparing to respond to an application to strike the default judgment, which was never filed, the defendants set down an application to determine the quantum of the damages. In April 2021, two days before that application was to be heard, the parties settled for \$15,000 plus transfer of a vehicle.

[3] The defendants filed an appointment to assess their bill of special costs on July 19, 2021, and the parties appeared before Registrar Nielsen (as he then was) for a pre-hearing conference (“PHC”) on August 27, 2021. At the PHC, Registrar Nielsen made a series of orders, including that Lucky Eight particularize its objections to the bill of special costs no later than September 24, 2021 (the “PHC Order”). At the time of the PHC, the defendants claimed approximately \$75,000 as their special costs. In a letter generally agreed to have been sent to counsel for the defendants in early October 2021, Lucky Eight’s counsel set out some general objections to the bill of special costs. In a response to a request for particularized

objections, Lucky Eight’s counsel wrote in a letter dated November 12, 2021, “we are disputing the whole amount of the combined billings based on the principle that the fees were not all proper or reasonably necessary to conduct the proceeding” and “there is not a single piece of accounting that [Lucky Eight is] not disputing”. Despite further requests for particularized objections, none were provided.

[4] At the assessment, which was held more than three years after the PHC, the defendants seek approximately \$139,000 as their special costs (the bill seeks \$124,202.44 in special costs up to October 21, 2024, the day before the assessment, and counsel estimated an additional \$15,000 as their special costs of the two-day assessment hearing). This is an increase of nearly \$64,000 from the bill of special costs attached to the appointment at the PHC in 2021, which the defendants attribute to Lucky Eight’s failure to communicate its objections to their bill, and the extra work that resulted in preparing comprehensive affidavits of justification.

[5] As detailed below, I have allowed the special costs claimed by the defendants at \$92,687.20, which includes the costs of the assessment, as well as the disbursements, and applicable taxes.

Background

[6] Justice Sewell’s oral reasons for judgment *Lucky Eight Enterprises Ltd. v. Ma & Yuan* (October 4, 2019), Vancouver 179087 (B.C.S.C.) (the “Reasons”) set out the history of these proceedings to October 2019, and Mr. Allen testified about the proceedings up to the assessment, both in his first affidavit, filed October 13, 2023 (“Allen Affidavit #1”), and orally. Because the bill of special costs covers the entirety of the proceeding as contemplated by the Order, the following overview provides the relevant context, divided into the litigation proceedings and the assessment.

Litigation Proceedings

[7] On September 28, 2017, Lucky Eight, represented by counsel, filed its notice of civil claim (the “Claim”), commencing the action against Mr. Ma and Ms. Yuan.

Lucky Eight is a motor vehicle dealer. Mr. Ma worked for Lucky Eight. Ms. Yuan was Mr. Ma's girlfriend at the time. In the Claim, among other things, Lucky Eight alleged that Mr. Ma worked for it as a car salesman, that he breached his duty of loyalty to Lucky Eight as well as his employment contract, that he misappropriated funds from Lucky Eight, which Mr. Ma used to increase the equity in a property he owned, and that he had improperly taken an Audi belonging to Lucky Eight and given it to Ms. Yuan. Sewell J. found that Lucky Eight made serious allegations against the defendants, in particular Mr. Ma, including claims of theft, misappropriation of property and deceit (Reasons, para. 2).

[8] Lucky Eight had also registered a CPL over Mr. Ma's residence, on the basis of an alleged constructive trust (Reasons, para. 4). At the time Lucky Eight registered the CPL, Mr. Ma had entered into an agreement with a third party for the sale of his property, as well as an agreement to purchase another property. Both of these transactions were scheduled to close in the following months (late December 2017 and late January 2018). Mr. Ma was notified about the CPL by the Land Title Office in October 2017, before he was served with the Claim on November 1, 2017.

[9] On October 20, 2017, the defendants retained counsel at Hunter Litigation Chambers ("HLC"). Greg Allen testified that he was the billing lawyer at HLC on the defendants' file, but that he shared responsibilities with his colleague, Brian Duong. At the time HLC was retained, Mr. Allen and Mr. Duong were senior associates, both called to the bar in 2009 (although Mr. Duong's hourly rate was lower than Mr. Allen's because he had taken time away from practice to obtain an LLM). Mr. Allen testified that given the nature of the allegations in the Claim, coupled with the urgency of removing the CPL from Mr. Ma's property, it was necessary to have two fairly senior associates working on the file together to address what he described as the many moving parts.

[10] Mr. Allen said that Mr. Duong took the lead on drafting the pleadings and on November 20, 2017, the defendants filed their response denying Lucky Eight's claims. They also filed a counterclaim seeking damages for Lucky Eight's alleged

wrongful dismissal of Mr. Ma, as well as declarations regarding the ownership of the Audi (see also Reasons, para. 5).

[11] Mr. Allen testified that it was important to Mr. Ma to obtain particulars of the claims of dishonesty and fraud made by Lucky Eight so that he could defend himself, which allegations Sewell J. accepted “were not properly particularized”, as required under the *Supreme Court Civil Rules* [SCCR] (para. 9). The defendants’ first demand for particulars of the alleged fraud and misappropriation was issued to Lucky Eight on November 30, 2017.

[12] Mr. Allen testified that it was also very important to Mr. Ma that the CPL be removed from his property, given the implications if he was unable to comply with the terms of the purchase and sale agreements he had entered into. Given this urgency, Mr. Allen pursued an application to cancel the CPL (the “CPL Removal Application”), which included preparing and filing five affidavits in support. The notice of application was filed on December 7, 2017, setting the hearing for December 20.

[13] Two days before the CPL Removal Application was scheduled, on December 18, 2017, Lucky Eight filed its response to the counterclaim, as well as its response opposing the CPL Removal Application. In the response to the counterclaim (the “CC Response”), Lucky Eight alleged that Mr. Ma “appears to be self-employed as a ‘curber’” and it denied that it agreed to pay Mr. Ma \$3,500 per month salary because its salespeople were paid on commission. As Mr. Allen testified, the allegations in the CC Response seemed to contradict the allegations in the Claim.

[14] Lucky Eight’s response to the CPL Removal Application also referred to an investigation of Mr. Ma by the regulatory agency, the Motor Vehicle Sales Authority of B.C. (the “MVSA”) (now known as the Vehicle Sales Authority of B.C.). In this pleading, Lucky Eight indicated that “the full particulars of [Mr.] Ma’s activities will not be available until the conclusion of an investigation by the MVSA.” Mr. Allen testified that the MVSA complaint against Mr. Ma was initiated by Lucky Eight in what Mr. Allen characterized as an attempt to gain traction in the litigation. Mr. Allen and Mr. Duong provided Mr. Ma legal advice and representation regarding the MVSA

investigation, including corresponding with MVSA staff, filing freedom of information requests, and strategically assisting Mr. Ma respond to the complaint (Allen Affidavit #1, paras. 57–60). At the assessment, Mr. Allen conceded that fees attributable to the parallel regulatory proceedings before the MVSA should be removed from the bill of special costs.

[15] On December 19, 2017, the day before the CPL Removal Application was to be heard, Lucky Eight agreed to cancel the CPL in exchange for Mr. Ma providing \$30,000 to be held in trust by HLC until the matter was determined at trial. Mr. Allen testified that after Mr. Ma provided \$30,000 security to cancel the CPL, Lucky Eight took no steps to advance the Claim as required under the SCCR. However, given the nature of the allegations in the Claim, which affected Mr. Ma’s professional reputation, Mr. Allen testified that he and Mr. Duong continued to pursue the defence of the Claim.

[16] On May 9, 2018, HLC booked a five-day trial starting on February 25, 2019. Mr. Allen testified that the first trial date was adjourned by consent because Lucky Eight still had not provided documents or particulars of the Claim (and it was still represented by counsel at that time).

[17] In June 2018, Mr. Allen left HLC to start his own firm, Allen / McMillan Litigation Counsel (“AMLC”). Mr. Allen testified that when he advised the defendants that he was leaving HLC and presented them with options for their ongoing representation, the defendants chose to continue to be represented by both Mr. Allen at AMLC and Mr. Duong at HLC. Mr. Allen said that the defendants’ file stayed at HLC and AMLC would invoice HLC for its time and disbursements, which would then be billed to the defendants as a disbursement on the HLC bill. This billing process continued from June 2018 through September 2020, when AMLC took sole conduct of the file. The evidence before me included the bills rendered by AMLC that HLC billed as disbursements during the relevant period.

[18] The HLC bill dated February 7, 2019 includes entries by Mr. Duong regarding a potential conflict, including time he spent consulting with Ms. Yuan’s family lawyer

(Allen Affidavit #1, Ex. U). Mr. Allen testified that Mr. Ma and Ms. Yuan's relationship had ended by January 2019 and he and Mr. Duong had to determine whether their continued representation of both defendants would present conflicts, admitting that the potential conflict issue was not raised by Lucky Eight or its counsel.

[19] Lucky Eight "failed to provide a list of documents until May 13, 2019, despite at least four demands having been made to it for such a list" (Reasons, para. 7). Mr. Allen also testified that between December 12, 2017 and June 20, 2019, the defendants made seven further requests for a response to their demand for particulars, but Lucky Eight never provided any particulars. Lucky Eight's counsel indicated they would provide particulars on two separate occasions in May 2019, but they were never provided (see Reasons, paras. 10 and 11).

[20] In October 2018, the defendants booked a second five-day trial starting October 7, 2019. In February 2019, the defendants made a formal offer to settle, but Lucky Eight rejected it. At that time, the defendants advised Lucky Eight that they would seek special costs of the proceedings. On April 1 and May 2, 2019, the defendants notified Lucky Eight's counsel that they intended to apply to dismiss the claim for failure to comply with the *SCCR* (Reasons, para. 13). Mr. Allen testified that he and Mr. Duong continued to prepare for the trial through the spring and summer of 2019, but they were also preparing to bring the application to strike the Claim.

[21] In late June 2019, Lucky Eight's then counsel advised Mr. Allen that they were formally withdrawing. On July 8, 2019, Lucky Eight filed a notice of intention to act in person and its representative, Ralph Lanzel, took conduct of the proceedings (Reasons, para. 12). The notice of intention to act in person provided only a street address for Lucky Eight, and did not include an email or fax address to which documents could be sent (Reasons, para. 13). Mr. Allen testified about the frustration he experienced dealing with Lucky Eight once it was no longer represented by counsel, for example, the defendants were required to serve all the documents to the street address provided, as opposed by email, and Mr. Allen described Mr. Lanzel as "intermittently responsive" (Allen Affidavit #1, para. 70).

[22] On July 17, 2019, counsel wrote to Lucky Eight (Mr. Lanzel), advising that a trial management conference (“TMC”) was booked for August 28, 2019, and they delivered the notice and requisition setting down the TMC to the street address on August 6, 2019 (Reasons, para. 14). Mr. Duong attended the TMC conducted by Associate Judge Keim (then referred to as Master Keim), but Lucky Eight did not attend. Sewell J. was satisfied that Keim A.J. had jurisdiction to make the orders she did at the TMC to “secure the just, speedy and inexpensive determination of this case on the merits” (Reasons, para. 15). Sewell J. noted that Keim A.J.’s TMC orders included the following:

- The parties must exchange updated lists of documents if further documents were to be listed by September 9, 2019;
- Lucky Eight must provide a response to the defendants’ request for particulars by September 9, 2019;
- Lucky Eight must provide copies of all documents on its list of documents to the defendants by September 5, 2019; and
- Lucky Eight must produce either Tony Guo or Ralph Lanzel for an examination for discovery on or before October 2, 2019.

[23] Sewell J. found that he was satisfied that Lucky Eight did not comply with any of the directions or orders made by Keim A.J. at the TMC, in particular, that Lucky Eight “did not provide in a comprehensible way copies of the documents listed on its list of documents by September 5th or at all” and “did not comply with the obligation to produce either Mr. Guo or Mr. Lanzel for an examination for discovery in a way in which that examination for discovery could have taken place effectively” before the trial scheduled to start on October 7, 2019 (Reasons, para. 17).

[24] Despite Lucky Eight’s failure to comply with Keim A.J.’s TMC orders or its obligations under the *SCCR*, Mr. Allen testified that he and Mr. Duong continued to prepare for the upcoming trial, taking the following steps: preparing and filing an updated witness list on September 16, 2019 (listing four witnesses); preparing will

say statements for two of their witnesses; preparing a brief of authorities, listing 18 cases; filing a trial certificate on September 16, 2019, although no examinations had been conducted of Lucky Eight’s representatives (as permitted by Keim A.J. in the TMC orders); and filing a trial record on September 17, 2019.

[25] Mr. Allen testified that it was difficult to prepare for a trial without examinations for discovery, document disclosure and particulars, and that, in his opinion, if Lucky Eight had complied with its obligations set out in the TMC order and under the *SCCR*, the defendants could have avoided some unnecessary trial preparation.

[26] On July 26, 2019, Mr. Allen filed the defendants’ application to dismiss Lucky Eight’s Claim, and strike its response to the counterclaim (the “Dismissal Application”), together with an affidavit of a legal assistant at HLC exhibiting all of the correspondence to support the Dismissal Application (that is, showing Lucky Eight’s failure to comply with the *SCCR*). In the Dismissal Application, the defendants sought special costs of “this proceeding, including special costs of this application”. The Dismissal Application was originally set for August 9, 2019, prior to the TMC held August 28, but Mr. Allen testified that it was adjourned at least twice (once because Mr. Lanzel was unavailable, and again because no justices were available).

[27] On September 4, 2019, Mr. Lanzel provided the defendants’ counsel a package of documents (purportedly those on Lucky Eight’s list of documents), which Mr. Allen described as disorganized and held together with twine. Mr. Allen said on reviewing these documents, some were not listed on Lucky Eight’s list of documents, and some listed documents were not included. Sewell J. accepted that it “was impossible to cross-reference [the documents provided by Lucky Eight] to the list of documents that had been previously provided” and that some of the documents provided were not on Lucky Eight’s list (Reasons, para. 8).

[28] On September 5 and 11, 2019, Mr. Allen filed two further affidavits in support of the Dismissal Application, exhibiting correspondence to demonstrate Lucky Eight’s failure to comply with the *SCCR*, as well as the entire bundle of documents Mr. Lanzel had provided.

[29] Sewell J. heard the Dismissal Application on October 3, 2019, the Thursday before the trial was to begin on Monday, October 7. Mr. Allen and Mr. Lanzel attended the hearing, which took approximately 90 minutes. Sewell J. advised that he would give oral reasons the following day, Friday, October 4. Both Mr. Allen and Mr. Duong attended to hear Sewell J. give his reasons. Mr. Allen admitted that it was not necessary for both counsel to attend, but that they both needed to know the outcome because the trial was scheduled to start on the following Monday.

[30] Sewell J. dismissed Lucky Eight’s Claim and struck its response to the defendants’ counterclaim and he ordered that the funds held by HLC (the security for the cancellation of the CPL) be released to Mr. Ma. In ordering the Claim struck, which is as Sewell J. noted, a remedy that is “draconian in nature”, he stated:

[25] ... [Lucky Eight] has failed to provide any reasonable explanation for its persistent failure to comply with the requirements of the *Supreme Court Civil Rules*. ...

...

[27] The failure to comply with the *Supreme Court Civil Rules* has been persistent and has prevented the resolution of the issues raised in this case on the merits. In addition, [Lucky Eight] in this case has made very serious allegations against the defendants, and in particular Mr. Ma. In my view there is an onus on parties who made such allegations to cooperate in bringing those allegations before the court for determination as soon as possible. Allegations such as those made in this case go beyond the amount of money involved in this case, they also cast aspersions on the character of the defendant. The defendant in such a case is entitled to have those allegations determined at the earliest possible opportunity.

...

[29] ... Mr. Lanzel admitted that [Lucky Eight] had decided not to spend any more money on this case, or words to that effect. In my view this is tantamount to an admission that [Lucky Eight] has not shown a genuine intention to bring this case to trial. In this regard, I repeat what I said earlier, that it was the defendants who obtained two trial dates in this case, neither of which could proceed because of [Lucky Eight’s] failure to comply with its obligations under the *Supreme Court Civil Rules*.

[30] ... the interests of justice require that an order be made that [Lucky Eight’s] action be dismissed because its conduct has frustrated a timely resolution of its claim on the merits.

...

[31] Sewell J. ordered the trial adjourned generally, but he did not grant judgment on the counterclaim. He noted that the defendants could make a further application for judgment at which Lucky Eight could “attempt to persuade the court that it does have a defence worthy of being investigated” (Reasons, paras. 32 and 33).

[32] In ordering Lucky Eight to pay special costs of the proceedings, including of the Dismissal Application, Sewell J. found that Lucky Eight had engaged in reprehensible conduct because it “... has virtually completely failed to meet its obligations under the [SCCR], and its conduct has frustrated the administration of justice in this case” and it “has made allegations of dishonesty against the defendants but has not presented any evidence to this court on this application to show that there is some reasonable basis for such allegations” (Reasons, para. 36). He also noted the inconsistency in Lucky Eight’s pleadings regarding Mr. Ma’s status (which were prepared and filed by Lucky Eight’s former counsel) and its relevance to the special costs order, stating:

[37] I also consider it relevant that as I read the notice of civil claim, it is premised to a great extent on an allegation that the defendant Mr. Ma was an employee of [Lucky Eight] and accordingly owed special duties, including fiduciary duties with respect to handling of [Lucky Eight’s] money. However, Mr. Lanzel in his submissions told me that it was [Lucky Eight’s] position that Mr. Ma was never its employee.

[38] Therefore, much of the underpinning and assumptions on which the notice of civil claim is based are seriously undermined. This consideration is relevant because in considering whether an award for special costs should be made for unsubstantiated allegations of dishonesty, all of the allegations in the notice of civil claim can be considered. I consider this conduct, that is the making of allegations of dishonesty and fraudulent conduct and the inconsistent positions taken by [Lucky Eight] with respect to the status of Mr. Ma, to be further conduct supporting an award of special costs in this case.

[33] After the Reasons were released, as directed by Sewell J., Mr. Allen drafted the Order, which was entered on December 5, 2019. Mr. Allen said that, at that point, Mr. Duong and HLC stopped representing the defendants and he and AMLC were responsible for pursuing judgment on the counterclaim, as well as the assessment of special costs. Mr. Allen filed a notice of change of solicitor for the

defendants on September 25, 2020, confirming that HLC was no longer on the record.

[34] Given that Sewell J. ordered Lucky Eight’s response to the counterclaim struck, the defendants were entitled to proceed to default judgment under the *SCCR*. Mr. Allen said that Mr. Ma wanted to have the damages on the counterclaim assessed, even though Mr. Allen had advised that there would be costs associated with it. Mr. Allen testified that he delegated responsibility for obtaining default judgment and having Mr. Ma’s damages assessed to a newly called associate at AMLC, Liam Babbitt. Mr. Babbitt drafted a requisition, supporting affidavit and application for default judgment, and filed them on February 24, 2020. Default judgment was granted on February 28 and entered on March 17, 2020.

[35] At some point in the spring or summer of 2020, Lucky Eight retained new counsel, Amandeep Singh of Singh Thind & Associates (“ST”). Mr. Allen testified that in response to their offer to settle the damages, on June 29, 2020, in an email to Mr. Babbitt, Mr. Singh advised that they intended to apply to set aside the default judgment (Allen Affidavit #2, Ex. A, p. 9). One month later, on July 28, 2020, Mr. Singh advised Mr. Babbitt that “we are preparing materials and should have them for you next week” (Allen Affidavit #2, Ex. A, pp. 2–3). Although time was spent (and fees incurred) preparing to respond to the anticipated application, Lucky Eight never filed an application to set aside the default judgment.

[36] Mr. Babbitt advised Mr. Singh in the summer of 2020 that his instructions were to apply to assess the damages sought on the counterclaim and that he would be preparing an application (Allen Affidavit #2, Ex. A, p. 3). Mr. Allen testified that Mr. Babbitt prepared an affidavit of Mr. Ma to support the application in October 2020 and prepared an application to assess damages, which was filed and served on Lucky Eight on February 25, 2021 (Allen Affidavit #2, Ex. B). The application was scheduled for March 12, 2021, but was adjourned to April 8, 2021 (Allen Affidavit #2, Ex. C).

[37] On April 6, 2021, two days before the application to assess damages was to be heard, the parties settled the damages claimed by Mr. Ma at \$15,000, and Lucky Eight agreed to transfer the Audi to Mr. Ma (Allen Affidavit #2, para. 13, Ex. C). A term of the settlement agreement was that it was without prejudice to the defendants' entitlement to special costs of the action (Allen Affidavit #2, para. 13). Mr. Babbitt filed a requisition on April 7, 2021 adjourning the application generally by consent. The settlement was finalized on April 21, 2021.

Special Costs Assessment Proceedings

[38] The evidence before me included emails exchanged between Mr. Babbitt and Mr. Singh from the summer of 2020 regarding the special costs, in which Mr. Babbitt indicates that he had attached the legal bills on which the defendants' bill of special costs was to be based in an email (Allen Affidavit #2, Ex. A, pp. 7–8). Counsel for Lucky Eight did not dispute that they had received the legal bills in summer 2020.

[39] On July 19, 2021, Mr. Babbitt filed the appointment to assess the defendants' bill of special costs, setting the PHC for August 27, 2021. At that time, the defendants claimed \$75,743.85 as their special costs, which included disbursements and applicable taxes.

[40] Both Mr. Babbitt and Mr. Singh attended the PHC before Registrar Nielsen. In early October 2021, Mr. Singh provided Lucky Eight's objections to the defendants' bill of special costs pursuant to the PHC Order. These objections included that Lucky Eight represented itself "throughout the majority of this matter's history", that Lucky Eight disputed "the overall amount of the bills rendered given the fairly simple nature of the matters and the reasonable amount of time it should have taken". Mr. Singh wrote that his clients "state that the fees were not all proper or reasonably necessary to conduct the proceeding, considering" the first four factors under R. 14-1(3) ((a), (b), (c), and (d)). He stated that there was "a large discrepancy between the amount involved and the amount billed" and that the defendants "are only entitled to their objective reasonable costs." Mr. Singh objected to the fees incurred after the Order on the basis that it was time "that should not be counted."

[41] In response to a request for further particularized objections, Mr. Singh wrote in a letter dated November 12, 2021, “we are disputing the whole amount of the combined billings based on the principle that the fees were not all proper or reasonably necessary to conduct the proceeding”, listing again the first four factors set out under R. 14-3(1), and stating, “there is not a single piece of accounting that [Lucky Eight is] not disputing”. The letter also states that “the fact that [Lucky Eight was] unrepresented and that [the defendants] had essentially control of the litigation is a factor in this matter.”

[42] The assessment was initially scheduled for two days on December 7 and 8, 2023. The bill of special costs attached to the appointment filed September 8, 2023 claims \$82,546.45 in special costs (an increase of approximately \$7,000 from the appointment filed in 2021).

[43] Mr. Allen testified that Lucky Eight’s “refusal to provide proper particulars” of its objections to the bill of special costs prolonged the time to prepare for the assessment and increased the costs associated with it because he had to prepare an affidavit of justification addressing all of the bills issued to the defendants over the life of the proceedings. Allen Affidavit #1 was filed on October 13, 2023. It is 18 pages long (133 paragraphs) and the exhibits run to 1283 pages. Mr. Allen testified that the fees for the work involved in drafting this affidavit between August 1 and October 30, 2023 totalled \$26,281.90 (Allen Affidavit #2, para. 20). Lucky Eight was served with Allen Affidavit #1 in early October 2023.

[44] Unfortunately, the assessment did not go ahead in December 2023 and it was rescheduled by consent to May 16 and 17, 2024. In early May 2024, Lucky Eight’s counsel had a family emergency and counsel agreed to adjourn the assessment on the conditions it be set peremptory and Lucky Eight agree not to seek any further adjournments. On May 8, 2024, AMLC filed a requisition setting the assessment for October 22 and 23, 2024. On October 2 and 11, 2024, AMLC counsel sought further particularized objections of the bill of special costs, but none were provided. At the

assessment, the defendants sought \$124,202.44 in special costs, plus an estimated additional \$15,000 in special costs for the assessment, totalling \$139,202.44.

[45] On the morning of the hearing, I advised counsel that I was concerned the assessment would not conclude in two days, given Lucky Eight's stated objection to every "single piece of accounting" in the bill of special costs. I directed Lucky Eight's counsel, Vin Chahal of ST, to articulate particularized objections over an extended morning break so that the assessment could conclude in two days. Mr. Chahal reiterated the objections in Mr. Singh's letters and submitted that, in proportion to the amount Mr. Ma received in damages for the counterclaim, the amount sought in special costs is excessive and unreasonable. He advised that Lucky Eight was objecting to several of the legal bills on which the special costs were based because the time billed was not reasonably spent on the steps in the litigation. In particular, he identified bills on which both Mr. Allen and Mr. Duong charged for their time, as well as bills issued after the Order was pronounced reflecting the time spent to obtain the default judgment, settle the amount of damages on the counterclaim, and prepare for the special costs assessment. Mr. Chahal identified 22 legal bills (out of the total of 59 on which the special costs are based) to which Lucky Eight was objecting.

[46] The evidence before me included Allen Affidavit #1, Mr. Allen's second affidavit filed October 18, 2024 ("Allen Affidavit #2"), as well as four affidavits of Naomi Baker, a paralegal working with Mr. Allen, filed December 5 and 7, 2023, February 14, and May 1, 2024 ("Baker Affidavits #1-4" respectively). The hearing record also included the affidavits of Jennifer Kocurek filed October 9, 2024, and of Michelle Hashimoto filed October 18, 2024, both of whom are legal assistants working with Mr. Allen. Mr. Allen spoke to his affidavits and was cross-examined by Vin Chahal, counsel for Lucky Eight at the assessment. There was no evidence from Mr. Duong.

[47] At the assessment, the defendants also provided a condensed book, which included a list of the invoices on which the bill of special costs is based, as well as a

table showing the chronology of work performed and invoices rendered, cross-referenced to Mr. Allen's affidavits and exhibits (which include the pleadings and court documents, as well as correspondence and invoices).

Discussion

Applicable Principles

[48] The Court of Appeal has stated that special costs are not compensatory, they are punitive; the purpose of special costs is to censure and deter litigation misconduct, not to compensate the plaintiff: *567 Hornby Apartment Ltd. v. Le Soleil Restaurant Inc.*, 2020 BCCA 69 at para. 42 [*567 Hornby*].

[49] Pursuant to Rule 14-1(3), on an assessment of special costs, the registrar must allow fees that were properly or reasonably necessary to the conduct of the proceeding, having regard to the following factors:

- a. the complexity of the proceeding and the difficulty/novelty of the issues involved;
- b. the skill, specialized knowledge and responsibility required of the lawyer;
- c. the amount involved in the proceeding;
- d. the time reasonably spent in conducting the proceeding;
- e. conduct that tended to shorten or unnecessarily lengthen the proceeding;
- f. the importance of the proceeding to the party whose bill is being assessed, and the result obtained;
- g. the benefit to the party whose bill is being assessed of the services rendered by the lawyer; and
- h. Rule 1-3 (*i.e.* proportionality) and any case plan order.

[50] With respect to disbursements, R. 14-1(5) directs that when assessing costs under R. 14-1(3), "a registrar must determine which disbursements have been necessarily or properly incurred in the conduct of the proceeding, and allow a reasonable amount for those disbursements."

[51] The authorities establish that whether work for which fees are claimed should be allowed must be determined objectively. A step was necessary if it was indispensable to the conduct of the proceeding. A step was proper if it was not necessary, but was nevertheless reasonably taken or incurred for the purpose of the proceeding: see *Chao Yin Canada Group Inc. v. Xenova Property Development Ltd.*, 2023 BCSC 390, at para. 19 [*Chao Yin*], citing *Brown v. Goodacre*, 2019 BCSC 1008.

[52] Special costs are frequently analogized to legal fees (see, for example, *Gichuru v. Smith*, 2014 BCCA 414, at para. 122 [*Gichuru*]), but an assessment of special costs “is not an exercise in determining [the party’s] actual legal costs and then deducting some artificial percentage”, but is an assessment of the objectively reasonable legal costs: *Chao Yin* at para. 23, citing *Canadian National Railway Co. v. ABC Recycling Ltd.*, 2005 BCSC 1559 at para. 15. Special costs are usually intended to indemnify a successful litigant, fully or at least substantially, but they are not a windfall to the successful party.

[53] In *567 Hornby*, the Court of Appeal confirmed that when a judge orders that the costs “of the proceedings” are to be assessed as special costs, this scale applies through the assessment, because the word “proceeding” “refers to the whole event from the commencement of action by the issuance of the writ to the continuation of the trial and beyond” (paras. 138 and 139).

[54] Because the registrar is required to consider the factors listed in R. 14-1(3), I will address them each in turn below, after I address the issue of whether Lucky Eight’s self-representation and the fact the defendants had to pursue the litigation should reduce the special costs sought.

[55] In Mr. Singh’s two letters setting out Lucky Eight’s objections to the bill of special costs, he noted that Lucky Eight wished “to point out that they were unrepresented by legal counsel throughout the majority of this matter’s history” (the October 12, 2021 letter) and that “the factor that [Lucky Eight] were unrepresented and that your client had essentially control of the litigation is a factor in this matter”

(November 12, 2021 letter). Mr. Chahal reiterated this submission at the assessment.

[56] In determining whether to dismiss the Claim and strike the CC Response, Sewell J. noted that Lucky Eight’s representative, Mr. Lanzel, asserted he could not understand or manage the logistics of the case, but Sewell J. found that there was no evidence before him “to explain why [Lucky Eight] is not prepared to devote the resources necessary to prosecute this case in a timely way” (Reasons, para. 26).

[57] As detailed above in the background, it is inaccurate to state that Lucky Eight was unrepresented “throughout the majority of this matter’s history”, but rather, the evidence before me establishes that, other than for approximately one year from July 2019 to summer 2020, Lucky Eight was represented by legal counsel throughout this seven-year proceeding. It is established law in this province that self-represented parties are not exempt from special costs orders if their conduct warrants sanction (see, for example, *Strata Plan LMS3259 v. Sze Hang Holding Inc.*, 2015 BCCA 424). In the context of this proceeding, the fact that Lucky Eight was without legal representation for approximately one year out of seven is not in and of itself, in my view, an overarching factor favouring reduction of the special costs sought.

The complexity of the proceeding and the difficulty/novelty of the issues involved

[58] Mr. Allen described the Claim as somewhat complex, because it involved allegations of fraud and misappropriation (although they were never particularized), of a constructive trust to justify the registration of the CPL, of ownership of the Audi (which required consideration of whether it was beneficial or legal), and that Mr. Ma was a “curber” (which Mr. Allen said was a term unknown to him and Mr. Duong). However, he agreed that the wrongful dismissal aspect of the Claim was straight-forward. Mr. Allen testified that what made the proceeding more complex was dealing with Lucky Eight, including when it was represented by counsel, and Lucky

Eight's ongoing refusal to comply with the requirements under the SCCR in a timely or meaningful way.

[59] Mr. Chahal submitted that the proceeding was straight-forward and simple and did not involve any novel or difficult issues.

[60] I am satisfied that the legal issues involved in the proceeding were not particularly difficult or complex. However, I find that because particulars of the alleged fraud were never provided, the defence of these allegations was made more difficult and time-consuming. In particular, I find that Lucky Eight through its actions, or inactions (or as Sewell J. determined, its failure to show "a genuine intention to bring this case to trial"), made the defence of the Claim and pursuit of the counterclaim more difficult than it otherwise should have been and increased the legal costs incurred by the defendants.

The skill, specialized knowledge and responsibility required of the lawyer

[61] Mr. Allen and Mr. Duong were called to the bar in 2009 and have practiced civil litigation focusing on commercial matters since they started their careers. Mr. Allen testified that as much as he could, he delegated work to more junior lawyers to save the defendants money (particularly after the Order was pronounced), and he (or Mr. Duong) would supervise their work where necessary.

[62] I find that this was not a proceeding that required extensive or specialized legal experience and I am satisfied that Mr. Allen and Mr. Duong, as well as the junior lawyers who worked on various aspects of the file under the direction of Mr. Allen and/or Mr. Duong, had the required skill and knowledge to defend the Claim, pursue the applications and the counterclaim.

The amount involved in the proceeding

[63] At the assessment, Lucky Eight suggested that the amount involved was very low, pointing to the settlement of the counterclaim for \$15,000 and the fact that the \$30,000 Mr. Ma paid to secure the cancellation of the CPL was returned to him.

[64] In contrast, the defendants submit that because the particulars of the fraud and misappropriation were never particularized by Lucky Eight, it is not possible to quantify the amount involved, but it was much more than the amount for which the parties settled the counterclaim. The defendants rely on cases in which our court has commented that a party's reputation and character have intrinsic value and allegations of fraud and misappropriation increase the amount at issue (see *Price v. 481530 B.C. Ltd.*, 2020 BCSC 1806 at para. 27 [*Price*]).

[65] I agree with the defendants that the monetary amount for which Mr. Ma settled the counterclaim is not the determinative amount, but that given the serious allegations made against Mr. Ma and Ms. Yuan in Lucky Eight's Claim (as found by Sewell J.), the amount involved was higher given the allegations made against Mr. Ma's character and professional reputation.

The time reasonably spent in conducting the proceeding

[66] Lucky Eight submits that the time spent was unnecessary and unreasonable in conducting the proceeding. In particular, Mr. Chahal pointed to the bills issued between July and October 2019 on which both Mr. Allen and Mr. Duong billed time, some of it for "strategic meetings", and that this double-billing should not be passed on to Lucky Eight as special costs. He also pointed to the time spent preparing for the costs assessment, which he submits is unreasonable, relying on *Price* at paras. 48–49 in which Registrar Nielsen found the time recorded by the lawyers in that case for the assessment was too high in the circumstances.

[67] During his testimony, Mr. Allen reviewed the 22 invoices specifically identified by Mr. Chahal, discussing the work the lawyers were performing and the basis for it. Mr. Allen testified to the urgency the lawyers faced when they were first retained to have the CPL removed from Mr. Ma's property and obtain particulars of the alleged fraud as Mr. Ma was very concerned about the effect of the Claim on his professional reputation. Mr. Allen's evidence is that Mr. Ma sought his services when he retained HLC, but Mr. Allen was in a trial so that is why Mr. Duong was also

working on the file. The defendants submit that the work performed by both of these lawyers was necessary and proper at that time in the file.

[68] The defendants submit that the time they spent, with some exceptions noted in the background above, was necessary and proper to conduct this case, where Lucky Eight failed to comply with orders or the SCCR.

[69] Despite the assertion of Lucky Eight's counsel that there was "not a single piece of accounting" that it was not disputing, as I reminded counsel at the assessment, the authorities reiterate that the registrar is not expected to engage in a forensic audit of each and every entry appearing on each and every invoice when assessing a bill of special costs.

[70] The charts prepared by the defendants and included in the condensed book summarizing the work performed and the costs associated with the stages of the proceedings were most helpful in this respect and I reproduce the table here:

	Approximate Dates	Phase	Total Costs
A	Oct 2017 – Nov 2017	Pleadings	\$ 12,009.89
B	Dec 2017	Removal of certificate of pending litigation	6,445.95
C	Dec 2017 – Jan 2018	MVSA Complaint	1,590.40
D	Mar 2018 – Jun 2019	General litigation work	10,228.22
E	Jul 2019 – Dec 2019	Trial preparation and application to dismiss	29,090.59
F	Feb 2020 – Mar 2020	Default judgement on counterclaim	3,051.18
G	May 2020 – Apr 2021	Assessment of damages on	11,180.18
H	May 2021 – present	Special costs assessment	50,606.03
	Oct 2017 – present	Total	\$ 124,202.44

[71] I find on the evidence before me that the time spent on the steps taken in Rows A and B (preparing and filing pleadings, as well as preparing for the CPL Removal Application and obtaining the removal of the CPL through settlement) were reasonable. I do not reduce the amounts claimed in Rows A and B.

[72] As I noted above and as the defendants conceded, I find that it is inappropriate to include the fees associated with the parallel proceeding of the MVSA complaint as special costs, and I do not allow the \$1,590.40 claimed in Row C above. In reviewing bills issued in 2019, such as the HLC bill dated July 17, 2019 and the AMLC bill dated June 5, 2019, there are several entries by both Mr. Duong and Mr. Allen relating to the MVSA matter (Allen Affidavit #1, Ex. Y). I find that a further amount should be reduced from the bill of special costs for this work, which I find was related to the parallel proceeding involving the MVSA Complaint. Accordingly, I find that the special costs claimed should be reduced by \$3,500 to reflect the work performed on the MVSA proceedings. I do not allow the amount claimed in Row C, and I reduce the amount claimed in Row D by \$1,909.60 (the difference between \$3,500 and \$1,590.40) to \$8,318.62.

[73] I have also found that the special costs claimed for the twenty-two month period from March 2018 through December 2019, which encompasses both “general litigation work” (Row D, claimed at \$10,228.22, now reduced to \$8,318.62) as well as the “trial preparation and application to dismiss” (Row E, claimed at \$29,090.59), should be reduced.

[74] These fees include the time spent by Mr. Duong and Mr. Allen determining whether they had a conflict continuing to represent both Mr. Ma and Ms. Yuan, as reflected in the lawyers’ time entries on the HLC bill dated February 7, 2019 and the AMLC bill dated February 15, 2019 (Allen Affidavit #1, Ex. U (p. 315) and Ex. V (p. 326)). On reviewing these bills, I find that approximately \$2,500 in fees, taxes and disbursements can be attributed to this conflict issue. In my view, particularly as this issue was not raised by Lucky Eight or its counsel but by Mr. Duong and Mr. Allen

themselves, it is not reasonable to include these fees as special costs of the proceedings.

[75] Mr. Allen's evidence is that he and Mr. Duong (and their staff and junior lawyers) spent the most time during the period from July through December 2019, when he and Mr. Duong prepared for the trial, as well as the Dismissal Application, which is reflected in the amount claimed as special costs at Row E. During this period, Lucky Eight's original counsel withdrew and Mr. Lanzel took conduct of the matter, resulting in difficulties effecting service on Lucky Eight (among other things). The legal bills covering this period are exhibited to Allen Affidavit #1, and include the HLC bill dated October 8, 2019 (Ex. BB, pp. 360–364), as well as the AMLC bills dated July 4, August 2, September 10, and October 7, 2019 (Ex. BB, pp. 384–410).

[76] As set out in the background section above, the Dismissal Application was originally scheduled for August 9, 2019, but it did not go ahead due to a lack of presiders. Both Mr. Allen and his junior, Suzy Flader, billed time on August 9 to prepare for and attend court for the Dismissal Application. Mr. Allen recorded approximately 3 hours to prepare for and attend court and Ms. Flader recorded 2.5 hours for her attendance. Although it is not a great deal of money, I do not think it is reasonable to include Ms. Flader's time to attend court on August 9 as special costs and find that these fees of \$375 should not be allowed.

[77] The Dismissal Application was reset for September 12, 2019, but it did not go ahead. On the relevant bill, Mr. Allen recorded 4.40 hours to prepare for and attend court for this application. The Dismissal Application was heard on October 3, and on the relevant bill, Mr. Allen recorded a total of 7.60 hours on October 2 and 3 to prepare for and attend court for the hearing before Sewell J.

[78] During this period (July through early October 2019), Mr. Duong billed 30.50 hours preparing for the trial (an HLC assistant and student also recorded nominal time). The total fees on the relevant bill amount to \$12,205.50 (before taxes and disbursements), and HLC applied a courtesy discount so the amount billed for legal fees was \$10,640. The total billed by AMLC during this time is approximately

\$15,000 (as reflected on the HLC bill, where it is recorded as a disbursement, as well as on the AMLC bills). It is clear from the relevant bills that both Mr. Duong and Mr. Allen were in regular contact conferring with each other about both the trial and the Dismissal Application, as well as possible settlement, and both billed for the time they conferred together. Having reviewed the bills issued during this time, I find that it was not reasonable for both lawyers to bill for all of the time they were conferring during this time, and the amount should be reduced, although not extensively.

[79] Mr. Allen conceded that it was not necessary for both him and Mr. Duong to attend court to hear Sewell J. pronounce his Reasons and on the relevant bills, Mr. Duong billed \$513.50 and Mr. Allen billed \$855 for their time. Because I agree that it was not necessary for both of them to attend, I find it is reasonable to disallow the higher fees of \$855 for Mr. Allen's time.

[80] I find that considering whether the time was reasonably spent during the periods in Rows D and E above, it is appropriate in the circumstances to reduce the amount from \$39,318.81 claimed to \$30,000 (inclusive of applicable taxes and disbursements), which also encompasses the reductions for the MVSA work identified above.

[81] Lucky Eight objected to the fees claimed for the activities undertaken by the defendants after the Order was pronounced to obtain default judgment and seek quantification of the damages sought on the counterclaim, asserting that these activities should not "be counted". The amounts at Rows F and G above total \$14,231.36. As set out in *567 Hornby*, the proceedings in this case include the steps taken after Sewell J.'s Order was pronounced and attract special costs. On the evidence before me, I find that the steps taken after the Reasons were pronounced and the Order entered were necessary and proper, and that the time spent pursuing the default judgment and settling the counterclaim and the fees charged for this were reasonable and I allow the amounts claimed in Rows F and G.

Conduct that tended to shorten or unnecessarily lengthen the proceeding

[82] I set out above the history of the proceedings of this case, including the costs assessment.

[83] The defendants submit that through their success at the Dismissal Application, they avoided a lengthy trial and shortened the proceedings. They also submit that, despite the Order, the reason this matter has been before the courts for a further four plus years is the conduct of Lucky Eight.

[84] Mr. Chahal, like his colleague Mr. Singh, submits that the defendants “controlled the litigation”, that Lucky Eight really did not pursue its Claim, and that it was the defendants’ conduct, which unnecessarily lengthened the proceedings. I find this argument has no merit, particularly given that the express reason Sewell J. dismissed the Claim, struck the CC Response, and ordered special costs against Lucky Eight was because of its failure to pursue its Claim in accordance with the SCCR and to follow orders of the court.

[85] I find on the evidence before me that Lucky Eight’s conduct unnecessarily lengthened the proceeding because it required the defendants to pursue the resolution of the Claim, creating extra legal work.

The importance of the proceeding to the party whose bill is being assessed, and the result obtained

[86] At the assessment, Mr. Chahal conceded that having the Claim dismissed and the response to the counterclaim struck was very important to Mr. Ma, as well as to Ms. Yuan. Despite the assertions of Mr. Singh and Mr. Chahal that the defendants’ counsel “controlled the proceedings”, I am satisfied that given the importance to Mr. Ma of having the Claim against him dismissed and Lucky Eight paying him damages for his counterclaim it was appropriate and necessary for the defendants’ counsel to take the steps it did throughout the proceedings.

The benefit to the party whose bill is being assessed of the services rendered by the lawyer

[87] As Sewell J. noted in the Reasons, the allegations made by Lucky Eight in the Claim against Mr. Ma were serious. The counsel representing the defendants (both Mr. Allen and Mr. Duong and their juniors) were entirely successful in having Lucky Eight's claim dismissed and the response to the counterclaim struck, thereby avoiding a trial. They effected the removal of the CPL on Mr. Ma's property so that he did not face consequences and Sewell J. ordered the money he posted returned to him. In particular, the defendants' counsel were successful in obtaining an order that the costs of the proceeding be assessed as special costs, knowing that encompasses the entire proceeding (not just up to the point when Sewell J.'s Order was pronounced).

Rule 1-3 (i.e. proportionality) and any case plan order

[88] There was no case plan order in this proceeding. Rule 1-3 sets out the objects of the SCCR, which is to "secure the just, speedy and inexpensive determination of every proceeding on its merits", which includes, so far as is practicable, conducting the proceeding in ways that are proportionate to the amount involved in the proceeding, the importance of the issues in dispute and the complexity of the proceeding.

[89] Mr. Chahal submits that the amount claimed in special costs, which is approximately \$140,000, is not proportionate to the amount involved, even considering the value to Mr. Ma of his professional reputation. Mr. Chahal submits that a fair fee determined through a global assessment of the value of the services provided (citing *Price* at para. 73) should be \$70,000, broken down to \$50,000 for the proceedings up to the assessment, and \$20,000 for the assessment.

[90] I agree that the factor of proportionality is of importance when considering the amount claimed as special costs to pursue the assessment of the defendants' special costs.

[91] With respect to the special costs claimed for the assessment (which, as confirmed in *567 Hornby*, are to be assessed as special costs given the wording of the Order), the defendants claim a total of \$50,606.03 for the period from May 2021 to present, plus an additional \$15,000 for the two-day assessment itself. This amounts to over 40% of the entire bill of special costs.

[92] I appreciate the frustration experienced by counsel when presented by Lucky Eight’s counsel with the over-arching objection “to every piece of accounting” to the bill of special costs, which required Mr. Allen, his juniors and staff to spend more time than might otherwise have been necessary to prepare the affidavits of justification (Allen Affidavits #1 and #2), had particularized objections been provided. I also acknowledge that because the costs assessment was rescheduled, updated affidavits from the legal assistants exhibiting further invoices were required.

[93] However, Rule 14-1(3)(h) expressly requires me to consider proportionality and, on this basis, I find that the amount claimed for the costs assessment must be reduced. As the Court of Appeal stated in *Gichuru*, “the fact that a lawyer has billed a certain sum does not necessarily make the fee reasonable” (para. 105). In this case, I find that the \$65,000 in special costs claimed by the defendants in relation to the assessment are not reasonable in the circumstances.

[94] I appreciate the efforts and preparation of Mr. Allen and his AMLC colleagues on this assessment, and I acknowledge that Lucky Eight’s objections were broad and not particularized. However, I find that seeking special costs of \$65,000 to prepare for and run a two-day special costs assessment represents a windfall to the defendants and I repeat the Court of Appeal’s statement that “the purpose of a special costs award is to provide an indemnity to the successful party, not a windfall” (*Gichuru*, para. 155). I find that the special costs claimed by the defendants in relation to the assessment of special costs are not objectively reasonable in the circumstances of this case and must be reduced.

[95] I find that a reasonable fee for the preparation and assessment of the special costs claimed in this case, including applicable taxes, is \$30,000.

Disbursements

[96] Lucky Eight did not object to any of the disbursements claimed in either Mr. Singh’s letters or before me at the assessment. I reviewed the disbursements claimed by the defendants on the bill of special costs and I find that they were necessarily and properly incurred and that the amount claimed is reasonable.

Conclusion

[97] As I noted, the exercise in assessing special costs does not require a line-by-line audit or detailed accounting and I have set out above where I have determined the special costs claimed should be reduced.

[98] Accordingly, taking into account the factors set out in R. 14-1(3), considering the circumstances of this proceeding, including the assessment before me, I allow the special costs of the defendants at \$92,687.20, which includes disbursements and applicable taxes.

[99] I direct counsel for the defendants to prepare a certificate of costs in Form 64 showing that the amount of special costs allowed after assessment is \$92,687.20.

“Registrar Gaily”