IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *JEKE Enterprises Ltd. v. Northmont Resort Properties Ltd.*, 2016 BCSC 1578

Date: 20160826
Docket: S154134
Registry: Vancouver

Between:

JEKE Enterprises Ltd.

Plaintiff

And

Northmont Resort Properties Ltd.

Defendant

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment (Costs)

Counsel for Plaintiff:	L. John Alexander
Counsel for Defendant:	Judson E. Virtue
Counsel for James Belfry:	Stanley W.S. Martin Rebecca Coad
Place and Date of Hearing:	Vancouver, B.C. June 15, 17, 2016
Place and Date of Judgment:	Vancouver, B.C. August 26, 2016

INTRODUCTION

[1] The trial of this matter took place in January 2016. In substance, the plaintiff, JEKE Enterprises Ltd., asserted that the defendant, Northmont Resort Properties Ltd., was in breach of certain vacation interval agreements ("VIAs"), by which JEKE held interests in the Sunchaser timeshare resort. JEKE sought to repudiate those agreements. The principal issues involved an interpretation of the VIAs.

[2] I issued reasons on March 8, 2016: *JEKE Enterprises Ltd. v. Northmont Resort Properties Ltd.,* 2016 BCSC 401 (the "Reasons"). The action was dismissed in its entirety.

[3] The matter of costs remains to be addressed. In the Reasons, at paras. 463-464, I preliminarily awarded party and party Scale B costs against JEKE in favour of Northmont. However, I gave leave to either party to seek a different costs award. While the Reasons indicated that there may be other issues to be considered beyond what had been raised at the trial, I certainly also considered that there may be an application for a different costs award based on my findings in the Reasons.

[4] Northmont now seeks a higher level of costs against JEKE after December 14, 2015, being the period immediately preceding the trial and including the trial itself. This date, December 14, 2015, was when JEKE filed its last amendment to its notice of civil claim. In addition, Northmont seeks an award of costs against a non-party, James Belfry, the principal of JEKE.

BACKGROUND FACTS

[5] The genesis of the action is somewhat convoluted and is set out in some detail in the Reasons. For the purposes of this application, I will briefly summarize how this action came to be filed.

[6] JEKE acquired its interests in the VIAs in April 2004.

[7] Issues arose between JEKE and Northmont arising from Northmont's notice to the timeshare owners in late 2012 that it intended to complete a major

realignment and renovation of the resort, the cost of which was to be billed to the owners, including JEKE. Renovations began and in April 2013, Northmont billed all the timeshare owners for what is defined in the Reasons as the "Renovation Project Fee". In addition, Northmont began taking steps toward what was defined in the Reasons as the "Resort Realignment Plan".

[8] Mr. Belfry, on behalf of JEKE, expressed his disapproval of Northmont's plans early in 2013. He began communicating with other timeshare owners who were similarly dissatisfied with the Resort Realignment Plan and the imposition of the Renovation Project Fee. In April 2013, numerous timeshare owners, including JEKE, retained Michael Geldert, of the law firm of Geldert Law, in relation to issues arising with Northmont. Mr. Belfry was aware that other timeshare owners had retained counsel in various law firms.

[9] Later still, Mr. Belfry would remain very much involved as the titular head and organizer of a large dissenting group of timeshare owners. He was also instrumental in collecting retainer monies for Geldert Law from the timeshare group that he had organized.

[10] On April 17, 2013, JEKE sent correspondence to Northmont setting out its formal objections to the Resort Realignment Plan and the Renovation Project Fee. JEKE alleged various breaches under the VIAs. This letter also contained a "without prejudice" offer, by which JEKE sought a full release of its obligations under the VIAs. Mr. Belfry was the self-described "lead writer" of this letter. He also provided the draft of this letter to numerous other timeshare owners and many such letters, some 200, were sent to Northmont.

[11] All these offers were, of course, rejected by Northmont.

[12] Prior to embarking upon his campaign against Northmont's plans, Mr. Belfry made sure that neither he nor his wife had any personal responsibility for any obligations under the VIAs. In early March 2013, Mr. Belfry had a specific

discussion with a Northmont employee to confirm that the responsibility under the JEKE VIAs lay only with JEKE.

[13] This conflict resulted in JEKE and other dissenting timeshare owners defaulting on their payments to Northmont, including the Renovation Project Fee. In response, Northmont commenced actions against timeshare owners in British Columbia and Alberta. Thousands of actions were commenced in the Court of Queen's Bench of Alberta, the Alberta Provincial Court, the Supreme Court of British Columbia and the B.C. Provincial Court. Mr. Belfry's group organized many of the defences that were filed by the timeshare owners in all these actions, which were substantially the same as the defences filed in this litigation.

[14] In April 2013, and in response to its proposed role in the Resort Realignment Plan, the Trustee, Philip K. Matkin Professional Corp., who held certain interests in the resort, commenced a petition proceeding in this Court: Reasons at paras. 87-90. Responses filed by certain timeshare owners in that petition proceeding, including JEKE, raised many common issues with respect to the validity of the Renovation Project Fee and the ability of Northmont to proceed with the Resort Realignment Plan.

[15] What next followed was an application by Northmont before Justice Loo to determine certain interpretation issues arising under the VIAs, in what has been called the "Special Case". The issues that were determined included whether Northmont was entitled to charge a cancellation fee as part of the Resort Realignment Plan and whether Northmont was entitled to levy the Renovation Project Fee. Loo J. issued her reasons in November 2013 and answered both questions in the affirmative: *Philip K. Matkin Professional Corp. v. Northmont Resort Properties Ltd.*, 2013 BCSC 2071. Certain of the timeshare owners successfully appealed that decision in June 2014, which put the parties back to square one in terms of a resolution of the issues: Reasons at para. 5.

[16] It is not surprising that Mr. Geldert formed the view that it would be difficult for everyone concerned, including Northmont, the VIA owners (including JEKE) and the

courts, to resolve the thousands of disputes that had then been crystallized through Northmont's actions against the timeshare owners. Accordingly, Mr. Geldert says that his client group agreed that one of its members would be the plaintiff in a "test case". By all accounts, this made some sense since most, if not all, of these actions raised similar issues.

[17] Mr. Geldert states that JEKE agreed to be the plaintiff in the test case. Mr. Geldert states that JEKE was chosen as a "convenient" plaintiff because its president, Mr. Belfry, resided in Victoria. The law firm Mr. Geldert had retained to litigate the test case, Cox Taylor, was located in Victoria, and the action was originally filed there (it was later moved to the Vancouver Registry).

[18] On October 8, 2014, JEKE filed this action against Northmont. Almost concurrently, on October 20, 2014, Northmont filed a notice of claim in the B.C. Provincial Court against JEKE, seeking recovery of fees in the amount of $24,519.26.

[19] In October 2014, JEKE filed an application in this action seeking to stay the hundreds of other actions commenced in the B.C. Supreme Court by Northmont or enjoining Northmont from proceeding with those actions. JEKE asserted that its "test case" was the most convenient way to proceed, as it raised issues common to all the other actions.

[20] The hearing of that application before Loo J. did not proceed, due to a discussion between Loo J. and Associate Chief Justice Rooke of the Court of Queen's Bench of Alberta. Notwithstanding, Mr. Geldert and Cox Taylor filing what was described as a "test case" and proposing a stay of certain of the other actions, the fact that Northmont's thousands of actions remained extant in the four courts in Alberta and British Columbia was of considerable concern to the courts themselves.

[21] On January 27, 2015, a court conference, also described by the parties as the "Super Conference", was convened by A.C.J. Rooke in an Edmonton Queen's Bench action, *Edwards v. Resort Villa Management Ltd.* This was an action by

various timeshare owners who also similarly challenged Northmont's plans. In addition to A.C.J. Rooke, Loo J. of this Court, Assistant Chief Judge Young of the Alberta Provincial Court and Judge Webb of the B.C. Provincial Court participated in the conference. Counsel present included those representing Northmont and Resort Villa Management Ltd., the plaintiffs in the *Edwards* action and certain other timeshare defendants, including Mr. Geldert and lawyers from Cox Taylor.

[22] The purpose of the court conference was obvious - to discuss the most expedient way to resolve all of the Northmont actions, the *Edwards* action and the JEKE "test" case". During the conference, Mr. Alexander, a lawyer from Cox Taylor, confirmed that the responses or defences that had been filed on behalf of the various timeshare owners in the Northmont actions essentially raised the same issues. Only two actions had been filed by timeshare owners, being the *Edwards* action and this action. The remedy sought in the *Edwards* action was somewhat different than that sought by JEKE. Mr. Alexander confirmed at the time that some consideration had been given to filing a class action against Northmont to determine the issues, but this strategy had been rejected.

[23] Arising from the conference, Northmont agreed to hold all of its actions in abeyance. It was intended that the parties would proceed to a determination of the issues in the JEKE and *Edwards* actions.

ELEVATED COSTS AS AGAINST JEKE

[24] Despite the unusual circumstances leading to the filing of this action, the course of this litigation has been what I would describe as typical.

[25] After the initial filing of pleadings in October 2014, various applications were brought.

[26] A summary trial application was brought by Northmont in March 2015, which JEKE sought to adjourn. I heard the matter but Northmont ultimately abandoned its pursuit of the matter. The matter of costs of the summary trial was discussed by me in *JEKE Enterprises Ltd. v. Northmont Resort Properties Ltd.*, 2015 BCSC 1202. My

decision was that they were to be addressed by the trial judge, which was me, and resulted in the preliminary award of Scale B costs per the Reasons.

[27] JEKE amended its pleading in May 2015. The normal discovery of documents took place and examinations for discovery were held of Mr. Belfry and two of Northmont's representatives. Three applications relating to discovery issues were brought by JEKE in April, July and September 2015, with mixed results for both parties.

[28] In advance of the trial, JEKE delivered one expert report. Northmont did not seek to rely on any expert evidence. In addition, the parties worked on a document agreement, and each party agreed to a substantial number of documents being produced for trial in a joint book of documents.

[29] Northmont agrees with my order of Scale B costs to December 14, 2015. However, it says that thereafter further costs should be awarded in its favour, either on: Scale C; Scale B with an uplift pursuant to s. 2(5) of Appendix B of the *Supreme Court Civil Rules* (the "*Rules*"); or special costs in relation to the number of issues JEKE abandoned at the end of trial.

[30] Before turning to the specific issues, it is helpful to restate the well-known functions that cost awards are intended to serve. In *Skidmore v. Blackmore* (1995), 2 B.C.L.R. (3d) 201 at para. 37 (C.A.), the court stated that costs "deter frivolous actions … and discourage improper and unnecessary steps in the litigation".

(1) Scale C Costs

[31] Different scales of party and party costs are allowed under Appendix B of the *Rules*. The relevant provisions are:

> 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;
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> (b) Scale B is for matters of ordinary difficulty;
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> (c) Scale C is for matters of more than ordinary difficulty.
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> (3) In fixing the appropriate scale under which costs will be assessed, the court may take into account the following:
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> (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.

[32] Factors to be considered in deciding the appropriate scale were listed in *Mort v. Br. of Sch. Trustees of Sch. Bd. No. 63 (Saanich)*, 2001 BCSC 1473 at para. 6. Those include: length of trial; complexity of issues; number and complexity of pre-trial applications; whether or not the action was hard-fought with little or nothing conceded along the way; the number and length of examinations for discovery; the number and complexity of expert reports; and the extent of the effort required in the collection of and proof of the facts.

[33] Northmont relies principally on the factors relating to complexity of the issues and the general importance of the determination of the issues to the other timeshare owners. Northmont further argues that while it considers that Scale C would be justified for the entire proceeding, it only seeks Scale C for matters post-December 14, 2015.

[34] In my view, Northmont's concession regarding Scale B costs to at least December 14, 2015 makes eminent sense. There were many, varied issues discussed at trial, but they did not rise to the level of "more than ordinary difficulty" sufficient to justify a higher scale. Northmont itself concedes that the essential nature of the dispute was one of contractual interpretation.

[35] Further, the issues were not made more complex by the relatively long trial of 15 days. This was a time estimate that was agreed to fairly early in the action (May 2015) and both parties worked hard to see the evidence introduced in an efficient

manner. In reality, Northmont complains that the trial was too long because JEKE advanced claims that it should not have, an argument that I will address below. Indeed, the completion of this trial within 15 months of filing is a testament to the diligent work of both counsel, although their efforts in moving so quickly were aided by substantial trial management.

[36] The factor of the importance of the issues to others also does not support a higher award. This was brought as a "test case" and it is clear enough that JEKE brought this action not only for its benefit, but also the benefit of other timeshare owners.

[37] In addition, the decision in this action was equally important to Northmont in relation to the other actions. Northmont also benefited from the practical solution of proceeding in this fashion. This was the goal arising from the court conference in January 2015.

[38] Ultimately, the *Edwards* action went to trial in May 2015. After some unsuccessful 11th-hour adjournment applications by the plaintiffs, the claims were withdrawn and Northmont obtained judgment. The matter of costs was argued before Justice Moreau: *Edwards v. Resort Villa Management Ltd.*, 2015 ABQB 424. Some of her comments are relevant here:

> [82] I find that, following the Super Conference, the Defendants were highly motivated to proceed to trial in order to secure a precedent of those legal issues that might overlap with a great number of small claims action being held in abeyance and some guidance in the JEKE action in British Columbia.
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> …
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> [93] In this case, the Defendants' preparation for trial was not solely focussed on succeeding on its $24,000 Counterclaim. It was also focussed on creating a precedent for thousands of other claims they (and not the Plaintiffs) are litigating in Alberta and B.C. …

[39] Accordingly, the results of this action will likely benefit Northmont in relation to other timeshare owners who face similar circumstances. In that event, in my view, it would not be fair to consider that factor to the prejudice of JEKE here.

[40] The essence of Northmont's argument in favour of increased costs post-December 2015 is based on the contention that JEKE should have accurately assessed the lack of substance in many of its claims before trial, so as to narrow the issues and reduce trial preparation and time. Northmont argues that by the time of JEKE's last amendment of its pleading on December 14, 2015, there was ample opportunity to realistically assess the facts and issues to come to a conclusion as to what issues should have been reasonably advanced at trial.

[41] Northmont says that JEKE failed to do this and, as a result, numerous allegations were advanced at trial that had no evidentiary basis and were doomed to fail. Northmont's frustration with what it describes as the "shifting nature" of JEKE's allegations is understandable. This frustration continued through to the trial and, indeed, JEKE's litigation strategy on many issues was equally frustrating to the Court.

[42] I agree that by December 14, 2015, JEKE did have, or should have had, a complete grasp of its case and the evidence it could hope to introduce at trial. All document discovery and examinations for discovery had been completed. JEKE had obtained an expert report from an accountant; it had also obtained expert advice from a construction person, although JEKE would later decide that no expert report on the construction issues would be delivered.

[43] The trial management conference (the "TMC"), was held on December 2, 2015, and I granted an order giving JEKE leave to file a further amended notice of civil claim. This arose at least, in part, as a result of Northmont's comments at the time that there were inconsistencies between JEKE's pleading and the issues noted in JEKE's trial brief. To some extent, issues were raised in each of them that were not duplicated in the other.

[44] Northmont's counsel stated that he had no difficulty addressing all of these issues at trial, but that it was appropriate that the pleading accurately set out the issues. This was a completely reasonable and proper approach. As such, the further amended pleading that was anticipated from JEKE was to clarify the issues

which would be advanced. I specifically advised JEKE's counsel at the TMC that if any issues were abandoned at trial, there may be costs consequences.

[45] Given some comments by JEKE's counsel at the TMC, on December 7, 2015, Northmont sent over a consent partial judgment to dismiss allegations that the renovation plan included unauthorized repairs or upgrades and that the failure to conduct repairs in a timely fashion had caused additional damage. JEKE rejected this offer, confirming that its current pleading "accurately establishes the allegations and claims which [JEKE] will advance at the trial".

[46] It was manifestly apparent after the trial that JEKE had no evidence in support of many of its allegations, including that a lack of repairs had caused damage to the resort: Reasons at paras. 340-350. Northmont's witnesses certainly did not support such a claim. Mr. Alexander suggests that JEKE's witness, the resort's previous manager, Chris Van der Deen, may have changed his evidence concerning how the resort was run for certain years. Even accepting this to be the case, there was no evidence about any damages that could be said to have resulted from the lack of repairs, including from Northmont's witnesses, such as Douglas Frey. It is trite that there is no cause of action from simple negligence alone; damages must be proven.

[47] Some arguments were abandoned in the middle of JEKE's argument, after counsel conceded to the Court that no evidence had been produced on these issues. Others were abandoned after JEKE's counsel had finished presenting an extensive written and oral argument, and only after I questioned counsel on either the lack of evidence or the less than explicit inference that JEKE was not pursuing certain allegations since no mention was made of them in argument.

[48] A summary of many of these arguments of JEKE and their disposition is:

1. Para. 97: that JEKE's interest was akin to a commercial tenancy with Fairmont. Para. 99: "absolutely no support of JEKE's argument beyond the common fact that both types of relationship are governed by contract."

2. Paras. 180-182: that Fairmont, not Northmont, was in breach of its obligations under the VIA, and Northmont was liable for related losses. Para. 185: JEKE failed to muster any evidence; Para. 187: JEKE abandoned position after two days of argument.

3. Para. 189: that there was a breach of the duty of good faith contract performance (per *Bhasin*) in written argument. Para. 189: Abandoned when asked for an explanation as to relevance.

4. Para. 190: that Fairmont Foreclosed Assets "were clearly in a breach state". Para. 190: "this is anything but evident".

5. Para. 192: that Northmont accepted liability for "capital costs" in the course of the *CCAA* proceedings. Para. 198: failed to see how the evidence on this point, even if accepted, supported the proposition; Para. 218, 219: nothing in the agreements to support this position, it "defies commercial logic"; see also para. 227.

6. Para. 235: that Northmont failed to provide audited financial statements. Para. 235: Not pursued in argument and abandoned at only when JEKE's counsel was asked by court if they were pursuing.

7. Para. 253: that Northmont failed to assist the owners in creation of a homeowners' association. Para. 235: Not pursued in argument and abandoned at only when JEKE's counsel was asked by court if they were pursuing.

8. Para. 255: that Northmont was not entitled to charge certain "capital costs" to the owners. Paras. 262, 263, 266: insufficient evidence, no evidence, did not provide any analysis, JEKE chose not to spend time and effort to prove its case on this point.

9. Para. 340: that Northmont breached its obligation to manage by its failure to deal with deferred maintenance, building failures and a recovery of delinquencies. Para. 340: "Another example of JEKE's vague and contradictory arguments"; Para. 348 "meritless argument".

10. Para. 351: that Northmont failed to take aggressive action to collect delinquent accounts. Para. 352: No facts in evidence to support.

11. Para. 355: that Northmont incurred excessive expenses for the Resort for its own benefit. Para. 360: No evidentiary basis.

12. Para. 371: that the closure of the sales office breached the JEKE VIAs. Para. 372: No merit.

13. Para. 382: that Northmont was in breach of its obligation to pay its portion of the Renovation Project Fee. Para. 381: No merit.

14. Para. 410: that Northmont failed to apply the Renovation Project Free to the work under the Resort Realignment Plan. Para. 381: No merit; Para. 413: No evidence.

15. Para. 414: that Northmont charged excess management fees Para. 381: No merit; Para. 415: Abandoned.

16. Para. 417: that the Resort Realignment Plan is a "sham" designed to steal value. Para. 422: No basis in the evidence before the Court.

[49] Many of the claims advanced by JEKE were described by me as "meritless" or having "no merit": see Reasons at paras. 348 and 372. As an overarching comment, I stated in the Reasons:

> [188] Unfortunately, the advancement of vague allegations and the lack of any, let alone compelling, evidence in support, coupled at times with an abandonment of certain allegations only after the conclusion of JEKE's argument, was a recurring theme in this trial.

[50] Another frustrating aspect of JEKE's approach at trial concerned an interpretation issue arising under the VIAs. As stated above, a major issue before Loo J. in the Special Case was whether Northmont was able to impose the Renovation Project Fee under the VIAs and, in particular, require the owners to pay for "capital costs". She decided yes. The Court of Appeal overturned that decision based in part on JEKE's (and other timeshare owners') assertions that they wished to have the case decided on "disputed evidence", including expert evidence: *JEKE Enterprises Ltd. v. Philip K. Matkin Professional Corp.*, 2014 BCCA 227. Yet, at trial, no such evidence was presented. To the contrary, JEKE took the position that this issue could be decided based on the four corners of the VIAs themselves: Reasons at 255-256.

[51] Despite the merit of Northmont's arguments, I do not consider that they are appropriately addressed by an award of Scale C costs. JEKE's approach did lengthen the trial somewhat, but it did not increase the complexity of the issues involved. There were just more issues to be addressed, albeit mostly meritless.

[52] In addition, this approach did not magnify the importance of the issues in terms of other timeshare owners. JEKE argues, somewhat disingenuously in my view, that it was Northmont that wanted JEKE to amend its pleading so as to include all possible issues for precedential value. This is belied by Northmont's efforts after the TMC to winnow the issues for consideration at trial. Further, it is plain enough that any decent precedent would arise from a consideration of a valid legal argument crafted around relevant evidence. On many issues, JEKE utterly failed in that respect and other timeshare owners may quite legitimately argue that the Reasons did not consider the matter on the merits. In other words, the presentation of these meritless arguments was, indeed, a waste of time for all concerned, including the Court.

[53] In all the circumstances, I decline to award Scale C costs as proposed by Northmont.

(2) Elevated Costs / Special Costs

[54] In the alternative, Northmont asserts that I should award costs post-December 14, 2015 on an elevated basis. It appears that an award of such costs would, in fact, be similar to that of Scale C costs in any event. In the further alternative, Northmont seeks special costs for those claims which were abandoned at the trial.

[55] The leading authority on special costs is *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 (C.A.), which sets out that they should not be awarded unless there is some form of "reprehensible conduct". The court further commented on the meaning of "reprehensible" at para. 17:

> … 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. …

[56] I recently discussed special costs awards in the context of a party advancing a meritless claim or a manifestly deficient claim in *Yukon Zinc Corporation (Re)*, 2015 BCSC 1991, and *Inwest Investments Ltd. v. Canada (National Revenue)*, 2015

BCSC 2170. I will not reproduce those discussions here, save than to note that some claims may be so deficient they will attract an award of special costs. Generally speaking, however, even weak claims will not attract this punishment. As Justice Grauer said in *American Creek Resources Ltd. v. Teuton Resources Corp.*, 2014 BCSC 2214 at para. 62, the "penalty for being wrong is losing the lawsuit".

[57] After fixing the scale of the party and party costs under Appendix B of the *Rules*, the court may consider the adequacy of the costs recovery. Section 2(5) and (6) further provide:

> 2(5) If, after it fixes the scale of costs applicable to a proceeding under subsection (1) or (4), the court finds that, as a result of unusual circumstances, an award of costs on that scale would be grossly inadequate or unjust, the court may order that the value for each unit allowed for that proceeding, or for any step in that proceeding, be 1.5 times the value that would otherwise apply to a unit in that scale under section 3 (1).
>
> (6) For the purposes of subsection (5) of this section, an award of costs is not grossly inadequate or unjust merely because there is a difference between the actual legal expenses of a party and the costs to which that party would be entitled under the scale of costs fixed under subsection (1) or (4).
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> [Emphasis added]

[58] Circumstances relevant to an award of special costs have also been found to constitute "unusual circumstances" for the purpose of elevated costs. In *National Hockey League v. Pepsi-Cola Canada Ltd.* (1995), 122 D.L.R. (4th) 421 (C.A.), the Court stated:

> [32] Misconduct may lead either to an award of increased costs or, where increased costs would in any event be appropriate, to an award amounting to a higher proportion of special costs than would otherwise have been the case. In neither case is the result intended to punish the offending party. Punishment is a primary function of the discretion to award special costs, a discretion which may only be exercised when the conduct in question can properly be regarded as at least reprehensible. Increased party and party costs are intended as an indemnity: *Bradshaw Construction Ltd. v. Bank of Nova Scotia*, *supra*.
>
> [33] But where one party to an action is guilty of misconduct in the litigation, and the innocent party is required to spend time and effort responding to such conduct, in most cases it would be unjust if the latter was not adequately indemnified for the costs associated with defending against

> that which should never have happened. It is in that sense that, whether reprehensible or not, the misconduct of one party is relevant when a court is considering or exercising the discretion to award increased costs to the other.
>
> [34] As a result of the misconduct of the plaintiff … the [defendant] was required to take proceedings which would otherwise have been unnecessary and the trial was both lengthened and delayed. All of this resulted in the expense of extra time and effort by counsel which in turn led to extra costs for the [defendant].

[59] In *On Call Internet Services Ltd. v. TELUS Communications Co.*, 2010 BCSC 1031, the Court rejected an award of special costs, but found unusual circumstances to exist. This was, in part arising, from On Call having advanced a number of meritless issues, which made for a much more complex proceeding: para. 11.

[60] A similar result is found in *Wong v. Rashidi*, 2011 BCSC 66 at paras. 35-38, where increased costs were awarded where the conduct of the plaintiffs was stated to be:

> [31] … open to criticism and rebuke for their carelessness with the evidence and their blindness to some of the facts …
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> …
>
> [37] … When parties are caught up in a matter such as this, and are frustrated by conduct that is worthy of rebuke in their legitimate attempts to resolve it inexpensively, then I consider that the prerequisites of section 2(5) of Appendix B are established.

See also *Walker v. John Doe*, 2014 BCSC 294 at paras. 59-64, where misconduct of counsel at a jury trial attracted an award of elevated costs, but not special costs.

[61] Northmont alleges that there are “unusual circumstances” here that justify elevated costs or, in the alternative, that JEKE’s abandonment of issues at the end of the trial constitutes misconduct deserving of rebuke.

[62] On the matter of special costs, I conclude that the actions of JEKE in advancing issues that were ultimately abandoned only during or after its argument is deserving of rebuke. JEKE as a litigant was required to carefully consider its case in terms of what evidence and arguments it wished to present at the trial. That requirement was heightened following the TMC when concerns were expressed

about the evident vagueness and inconsistencies of JEKE's argument. The whole purpose of allowing the last amendment of JEKE's pleading was to ensure that this assessment would be made. JEKE states that Northmont wanted all issues included, suggesting that it simply accommodated that request, whether there was merit to the claims or not. I reject this as a ludicrous suggestion, particularly given the efforts Northmont made both at and after the TMC to narrow the issues to be raised at trial.

[63] In my view, JEKE's failure to narrow the issues resulted in Northmont wondering, as did I, about what arguments were being advanced at the trial and what evidence was being relied on. The claims that were abandoned were manifestly deficient, something that should have been recognized (or was and was recklessly disregarded) well before trial.

[64] I reject JEKE's position that it acted appropriately in abandoning some of its arguments. Rather than limiting its argument to advance claims supported by the evidence, JEKE's counsel only abandoned such claims when I specifically asked about the evidence in support of their argument. Further, other arguments were not abandoned until I specifically asked about them after counsel had "finished" making JEKE's arguments and failed to raise these additional arguments entirely.

[65] The only conclusion I can draw is that JEKE intended to throw the kitchen sink at the matter and hope that something stuck. JEKE also simply wanted a reconsideration of the interpretation issue before Loo J., without providing any "new" evidence than what was previously before the court. Such a haphazard and reckless strategy resulted in wasted time and resources on both Northmont's part and that of the Court. At bottom, it appears that JEKE's strategy was to leave Northmont (and the Court) to "figure out" exactly what issues were being advanced and attempt to respond or deal with the allegations.

[66] In my view, such an approach can hardly be endorsed as a proper litigation strategy and a costs award serves a useful function in discouraging such behaviour

in the future. I find, in all the circumstances, an award of special costs regarding the issues abandoned by JEKE is appropriate.

[67] JEKE also argues that any costs award should be considered in light of its contention that this was "akin" to a class action proceeding. The relevant legislation provides that, generally speaking, no costs are to be awarded against a party participating in such a proceeding: *Class Proceedings Act*, R.S.B.C. 1996, c. 50, s. 37. There is no merit to this argument. I agree with Northmont that JEKE and the other timeshare owners, having considered and rejected bringing a class proceeding, cannot now indirectly claim the benefit of it. Having elected this type of proceeding, JEKE would have been aware of the court's jurisdiction in relation to costs awards.

[68] Having said that, a special costs award here will inevitably result in a fairly complex exercise in teasing out the actual costs arising from the time spent in dealing with the abandoned issues. The cost of that exercise before the Registrar may well exceed the benefit achieved. I would have been inclined to award a lump sum based on my case management and my involvement in the trial, having in mind the objective of proportionality stated in Rule 1-3(2) of the *Rules*. However, the Court of Appeal has cautioned that the discretion to award such lump sum costs should be "exercised sparingly": *Gichuru v. Smith*, 2014 BCCA 414 at para. 106. More relevant here, I have no information as to what fees were incurred by Northmont in that respect, and proceeding to a "rough and ready" approach in such an evidentiary vacuum has been described by the Court of Appeal as "capricious": *Gichuru,* at paras. 151-153.

[69] In addition, I am satisfied that the unusual circumstances asserted by Northmont, as above, are such that an award of Scale B costs would be grossly inadequate and unjust. However, many of the claims advanced by JEKE were legitimate issues, and there is no doubt that some trial preparation and attendance was directed to those issues. In that circumstance, it would be unfair to award increased costs for all of the post-December 14, 2015 steps by Northmont. I

conclude that one-half of each of the tariff items in that time frame will be subject to the elevated costs award.

[70] It is not my intention that these costs be doubly imposed on JEKE. It will be obvious that there is duplication as between the special costs award and the elevated costs award. In that event, Northmont may have one, but not both. It will be entitled to choose which costs recovery it wishes to pursue, and will elect within 30 days of these reasons.

[71] In light of my decision, as above, if Northmont elects to pursue the elevated costs (not special) award, I agree with JEKE that the fees of two counsel for those tariff items, as claimed by Northmont in its draft bill of costs, is not appropriate: *Thom v. Canada Safeway Limited*, 2015 BCSC 2026 at para. 46. However, reasonable disbursements for both of Northmont's counsel are allowed in relation to both increased and special costs assessments.

COSTS AS AGAINST MR. BELFRY

[72] Northmont also seeks an order that Mr. Belfry, as a director and officer of JEKE, be jointly and severally liable for the costs award after trial.

(a) Background Facts

[73] JEKE was established in April 1997. The shareholders include Mr. Belfry and his wife, Elsie, who each own 16% of the shares. Their two daughters each own 34%. Since that time, Mr. Belfry has served as either president or vice-president. Mr. and Mrs. Belfry are currently directors and officers of JEKE, along with their daughters. Its registered offices are the residence of Mr. and Mrs. Belfry.

[74] From 1997 to 2004, JEKE was used as a holding company. It has never had employees. It was, at some point, active in real estate construction (presumably through a subsidiary company), although that activity ceased around 2000 and the subsidiary company was wound up in 2009. Afterward, JEKE acquired various assets, such as real estate, for rental income or leasing.

[75] The VIAs were acquired by JEKE in 2004. The intention was that the Belfry family, through JEKE, would acquire interests in the resort for their personal use, a decision made, in part, relating to Mr. Belfry's approaching retirement. Part of the incentive to purchase the VIA interests was that the timeshare could be traded for use at other resorts, through Interval International ("Interval"). The Interval membership was put in the name of Mr. and Mrs. Belfry personally because Interval did not allow corporations to hold these memberships. Ultimately, it was only the Interval membership that was used by the Belfry family and family friends.

[76] Mr. Belfry asserts that JEKE was reimbursed by the parties who used the timeshare weeks for all costs, including maintenance costs, lock-off fees and a prorated portion of the pre-paid lease amount.

[77] When issues with Northmont arose in late December 2012, Mr. Belfry was specifically empowered by JEKE's board of directors (then comprised of all four Belfry family members) to address issues relating to the VIAs.

[78] Mr. Belfry confirms his consent that JEKE would act as the plaintiff in the "test case" strategy formulated by Mr. Geldert. Mr. Belfry also states that from the time of the filing of the action, Mr. Geldert, not him, directed the litigation strategy. Mr. Belfry refers to himself as a "resource person for legal counsel"; he denies that he directed which arguments were to be pursued or abandoned. This evidence is confirmed by Mr. Geldert, who says that he took instructions from his client group and directed Cox Taylor's efforts in this litigation. It is apparent that Mr. Belfry remained very much involved in the organization and activities of his group and the dissemination of information through social media and the like.

[79] In addition, both Mr. Belfry and Mr. Geldert confirm that funding for the legal fees for this litigation came from the client group organized by Mr. Belfry and Geldert Law which, of course, included JEKE.

(b) Northmont's Argument

[80] Mr. Belfry is not, of course, a party to these proceedings. As such, Northmont is required to show that it is appropriate to impose costs on Mr. Belfry in these circumstances.

[81] The leading case of *Anchorage v. 465404 B.C. Inc.*, 1999 BCCA 771, provides a useful discussion of what the court describes as "special circumstances", where the court may exercise its discretion to award costs against a non-party. In *Anchorage*, the trial judge had awarded costs against the principal of the unsuccessful corporate litigant, having described the corporation as a "shell company" and stating that it was doubtful the company would pay the costs: para. 17. That approach was rejected by the Court of Appeal: para. 27.

[82] In *Anchorage*, the Court described general categories where costs may be awarded against a principal of a company. This is not an exhaustive list of circumstances. In addition, these are not even "water tight" categories and relevant facts may be such that one or many categories may be engaged:

a) where there is fraudulent conduct, a finding of abuse of process, or gross misconduct in the commencement and/or conduct of the litigation, citing *Re Sturmer and Town of Beaverton* (1912), 2 D.L.R. 501 (Ont. Div. Ct.), and *Oasis Hotel Ltd. v. Zurich Insurance Company* (1981), 124 D.L.R. (3d) 455 (B.C.C.A.);

b) where the non-party has been responsible for the "maintenance" of the litigation, citing *Lawson v. British Columbia (Solicitor General)* (1992), 63 B.C.L.R. (2d) 334 (C.A.); and

c) where the "real litigant" offers up a "man of straw" to prosecute the claim in order to avoid liability for costs, citing *Rockwell Developments Ltd. v. Newtonbrook Plaza Ltd.* (1972), 3 O.R. 199 (C.A.), *Sturmer* and other cases I will cite below.

[83] Northmont accepts that a costs award against a non-party is an exceptional remedy. I agree that the court has a wide discretion when awarding costs in order to achieve justice between the parties: *Anchorage* at para. 21.

[84] It must also be emphasized that Northmont does not seek to pierce JEKE's corporate veil in relation to fixing Mr. Belfry with a costs award. In the leading authority in British Columbia, *B.G. Preeco I (Pac. Coast) Ltd. v. Bon Street Hldg. Ltd.* (1989), 37 B.C.L.R. (2d) 258 at 286 (C.A.), the Court noted that "the cases in which the corporate veil is pierced on the ground of "fraud or improper conduct" deal with instances where a corporation is used to effect a purpose or commit an act which the shareholder could not effect or commit".

[85] Other Court of Appeal cases cited to me that discuss the lifting of the corporate veil include *Edgington v. Mulek Estate*, 2008 BCCA 505 at paras. 20-26, *XY, LLC v. Zhu*, 2013 BCCA 352 at paras. 86-90, and *Politeknik Metal San ve Tic A.S. v. AAE Holdings Ltd.*, 2015 BCCA 318 at para. 36. Other cases of this ilk that have been cited to me include *SPC Holdings and Construction Ltd. v. Gabriel*, 2013 BCPC 31, which was considered by this Court in *848 Courtney Street Holdings Inc. v. JED Enterprises Ltd.*, 2014 BCSC 2301.

[86] Northmont does not assert that Mr. Belfry used JEKE in this fashion so as to justify the lifting the corporate veil. There is no allegation that as a director, officer or shareholder of JEKE, Mr. Belfry committed any "wrongful acts" sufficient to lift the corporate veil.

[87] Northmont submits that costs are properly awardable against Mr. Belfry on three bases: firstly, that JEKE, a judgment-proof corporation, was put forward as a "company of straw" with no real interest in the litigation; secondly, that Mr. Belfry is guilty of the tort of maintenance; and, thirdly, that Mr. Belfry directed gross misconduct in the conduct of this litigation.

(c) Company of Straw

[88] Northmont makes two related submissions in support of its argument that JEKE is merely a "company of straw":

a) that Mr. Belfry used JEKE as an empty corporate shell to further his own personal interests. As the directing mind of this corporate shell, Mr. Belfry was the "real litigant" who directed JEKE to breach its obligations under the VIAs and prosecute the action; and

b) that Mr. Belfry advanced JEKE's claim knowing that JEKE has no interests other than the VIAs, and that Northmont will be unable to collect on any costs award against JEKE.

[89] Turning to the first submission, Northmont argues that while JEKE was the named party in this litigation, its interest in the action was eclipsed by Mr. Belfry's interest.

[90] In *Lawson*, the B.C. Court of Appeal held that a non-party providing financial support is liable for costs when the non-party's interests become the motivating force of the litigation which extend beyond the interests of the named litigant. Northmont submits that this is what occurred here. Similarly, in *Interclaim Holdings Limited v. Down*, 2002 BCCA 632 at para. 46, costs were awarded against the party's parent company, which was found to be a "promoter" of the litigation and having a direct interest in the litigation, since it was due to receive 50% of funds recovered.

[91] Finally, in *Truong v. Kha*, 2010 BCSC 1329, the husband was found to be liable for costs as having been the true instigator in advancing unsuccessful allegations of fraudulent misrepresentation.

[92] The Court, in *Anchorage,* stated that, generally speaking, the use of a corporation by its principals will not result in costs being awarded against those principals who have directed the corporation's efforts in the litigation:

[22] In the case of *Rockwell Developments Ltd. v. Newton Brook Plaza Ltd.* (1972), 3 OR. 199 (C.A.), the court was dealing with a case that had features perhaps generally comparable to the facts of the case at bar. A solicitor K., who was interested in real estate development, incorporated the plaintiff company to undertake a real estate development. He beneficially controlled all the shares of the company. The plaintiff company sued another party arising out of a transaction of purchase and sale of land. K financed the action and instructed the solicitors. The action failed. The plaintiff company was in insolvent circumstances and could not pay costs and the trial judge on application ordered K. to pay the costs of the successful defendant. An appeal to the Ontario Court of Appeal from this order was allowed. After noting that the trial judge had found that K. was the person who set the process in action and was the actual litigant and that Rockwell was only a nominee to hold title, Arnup J.A. said this concerning those conclusions of the trial judge at p. 212:

> With great respect, I am unable to agree with these conclusions. The use of a 'one man company' for the carrying on of business transactions, authoritatively recognized and expressed in *Salomon v. Salomon & Co.*, [1897] A.C. 22, and the correlative propositions that the property of the company is distinct from that of its members, and its transactions create legal rights and obligations vested in the company itself as opposed to its members, continue today. The subject is discussed in Gower, *Modern Company Law*, 2nd ed. (1957), at pp. 62-6.
>
> I can find no basis for the finding that Mr. Kelner was the 'actual contracting party'. He was undoubtedly the individual who would ultimately benefit, in whole or in part, from the contract, but the contract was made with the company alone. Mr. Kelner could not have sued upon it, nor could he himself have been sued. Both he and Mr. Parsham were pursuing the same course of action; they were quite content to enter into contracts made by the companies which they respectively controlled.
>
> It was undoubtedly the fact that Kelner was 'the person who set this process in action', in the sense that he was the individual who, on behalf of the company, gave instructions to its solicitors, but this does not, in my view, justify a finding that he was 'the actual litigant'. Nor can I find justification for the finding that 'Rockwell was only a nominee to hold title'. This seems to imply that Rockwell was a trustee for Kelner, but it is contrary to all established principles of company law to suggest that a corporation is a trustee for its shareholders, or even for its single shareholder.

[23] A similar result was reached by McKeown J. of the Ontario High Court of Justice in a subsequent case, *R.L. Wilson Engineering & Construction Ltd. v. Metropolitan Life Insurance Co. et al.* (1988), 32 C.P.C. (2d) 76. There again, on facts somewhat similar to the case at bar, it was held that the principal of a company was not to be held liable for costs, although the corporate plaintiff was unable to satisfy the costs of unsuccessful litigation. Indeed, the facts in *Wilson* were perhaps somewhat more aggravated than the facts of the case at bar in that it was alleged that the individual there

sought to be made liable for costs well knew that the plaintiff company was insolvent and as well certain ill founded allegations of misconduct had been made against members of the bar in the course of the litigation. I believe certain comments of Veit J. (as she then was), in the case of *Kerr & Richard Sports Inc. v. M.J. Geoffrey Fulton and Gerald Pulak* (1992), 10 C.P.C. (3d) 382 are helpful to an understanding of the principles that have guided courts in the exercise of what is agreed to be a broad discretion. …

[24] At p. 386, Veit J. said this:

> The court has a broad discretion in imposing costs. A court could, in exceptional circumstances, order costs against a person who is not a litigant. Of such orders, some are made against lawyers; that is an exercise of the court's jurisdiction over officers of the court. Some such orders are made against the real litigants, even though such persons are not named parties; courts of equity recognized a court's jurisdiction over those persons who put up "men of straw". The jurisdiction, as broad as it is, does not extend to making orders for costs against principals of incorporated companies if the principals have not done something equivalent to fraud. The defendants rely on *269335 Alberta Ltd.* The trial judge there had much information about the actions of the principals of a corporation; presumably, not all of the facts are reported in the case. On the facts, the resulting order of costs in a personal capacity was doubtless correct. In particular, it will be noted that in that case the plaintiffs had pleaded fraud and had been unable to prove it; therefore, according to traditional costs case law, it is understandable that an order for costs went against the principals of the company rather than against the company itself. The reasoning in that case should not be expanded to stand for the principle that a court may, in the absence of a fraud-related fact base, order the principals of companies to pay costs in their personal capacities. In this context, it may be noted that s. 82 of the *Judicature Act*, R.S.O. 1970, c. 228, in force in Ontario at the time of the *Rockwell Developments* case, which section of the *Judicature Act* was referred to in *269335 Alberta Ltd.*, did not include the phrase "strangers to litigation"; the text of s. 82 is reproduced in *Rockwell Developments* at p. 655 [D.L.R.]. This misunderstanding about the content of s. 82 of the Ontario *Judicature Act* may have affected some of the comments made by the trial judge about the extended use of *Rockwell Developments*. The Ontario Court of Appeal carefully reviewed the decisions of British courts of equity and brought those concepts forward into this age of single-person corporations. I accept their analysis of the way in which the broad equitable powers of the court may be exercised today. <u>In my view, the result is that orders for costs may not be made against the principals of corporations if the only evidence is that those principals directed the operations of the corporation. Our system recognizes the legitimacy of corporations as legal entities; one legitimate purpose of such vehicles is to shield its principals from personal liability.</u>

I note of course that this case was one dealing with a corporation and its officers. It is quite distinct from a case such as ***Lawson***, *supra*, which had to

> consider the costs consequences when a third party was found to have effectively "taken over" the litigation.
>
> [Emphasis added]

[93] Here, there is no doubt that JEKE was the party who had contracted under the VIAs. I reject Northmont's submissions that JEKE has no interest in the VIAs other than as a "nominal owner". I also reject Northmont's submissions that there was never a legitimate corporate reason for JEKE to hold the VIAs. The use of holding companies to hold assets is a common practice and there is no requirement that the company use those assets for a business purpose.

[94] Further, the use of a corporation to avoid personal liability arising from the holding of assets or business operations is entirely proper. In *B.G. Preeco*, the Court stated:

> [49] In this case the plaintiff knew it was dealing with a company. The fraud found by the trial judge caused the plaintiff to believe that the company had assets that it, in fact, did not have. That has nothing to do with the corporate veil. The use of a company as a means of avoiding bearing business losses is neither unusual nor a basis for lifting the veil.
>
> [Emphasis added]

[95] I accept that the assets of JEKE, namely the interest in the VIAs, were used by the Belfry family for their personal use. Much was made of the financial circumstances between JEKE and the Belfry family relating to the costs of the timeshare. Mr. Belfry said that JEKE was reimbursed by the family or their friends for such use. Accepting that to be the case, I fail to see how that translates into Mr. Belfry having the "real" interest in the VIAs or being the beneficial owner of the VIA interests. At best, persons using the timeshare either were gifted the use of the company's asset or owed money to JEKE for such use.

[96] The comments of the Court in *Anchorage* support that, in the corporate realm, the distinction between a company and its officers and shareholders is to be respected, even where a principal personally benefits in some way by the use of corporate assets (including under contracts held by the company which are the subject matter of the dispute). A clear example is where a company owns a vehicle

and the principal uses that vehicle, to some extent, for personal use. While there may be income tax implications from such use, it does not mean that the company's interest in the vehicle is diminished and the principal's interest in the vehicle is created.

[97] This is not a situation, for example, where JEKE was created by Mr. Belfry for the purposes of commencing this litigation. This is also not a situation where Mr. Belfry held the VIA interests initially and only transferred them into JEKE's name for the purposes of this litigation to avoid any personal liability. JEKE acquired the VIA interests in 2004 and had held them for almost a decade before these issues arose.

[98] When the issues with Northmont arose, it was only JEKE who could have initiated this action. Mr. Belfry could not have done so. Northmont acknowledged this itself by commencing its own action against JEKE in the Provincial Court to collect the outstanding fees.

[99] This is not a situation such as in *Sturmer*, where the action was commenced in the name of Sturmer, a pauper, as a means of escaping liability for costs. In *Sturmer*, the action was initiated by two other individuals who could equally have brought the action themselves. The Ontario High Court of Justice in *Sturmer* upheld the imposition of costs against the non-parties who had promoted the litigation. Justice Middleton commented:

> …And the Court always had power to award costs against the real applicant when the motion was made by him in the name of a man of straw for the purpose of avoiding liability. The Courts were never so blind as to be unable to see through the flimsy device nor so impotent as to be unable to act.

[100] With the litigation underway, I also see nothing nefarious with Mr. Belfry directing the actions of JEKE. By all accounts, JEKE was acting to protect its interests in the VIAs in terms of attempting to prevent the imposition of these extra costs. In doing so, JEKE undertook a legitimate corporate purpose.

[101] In *Kerr & Richard Sports Inc. v. M.J. Geoffrey Fulton and Gerald Pulak* (1992), 133 A.R. 382, cited in *Anchorage* extensively above, Justice Veit (as she

then was) also stated at para. 14 "[i]n order to fix principals with liability, a court is required to find much more than the usual and necessary pattern of principals who direct the affairs of the corporation".

[102] I accept that Mr. Belfry would have indirectly benefitted if JEKE was successful in this litigation but, again, I fail to see how that transforms Mr. Belfry into the "real litigant". Contrary to Northmont's argument that there was a divergence of interests as between Mr. Belfry and JEKE, I consider that their interests were essentially aligned. The fact that Mr. Belfry's personal interests may have converged with JEKE's (and the other timeshare owners), such that there was a "commonality of interest", does not amount to Mr. Belfry being the "real litigant" so as to expose him to an award of costs: *Perez v. Galambos*, 2008 BCCA 382 at para. 27.

[103] Northmont's other main submission is that Mr. Belfry advanced JEKE's claim knowing that JEKE has no exigible assets, other than the VIA interests and, therefore, Northmont will be unable to collect on any costs award against JEKE.

[104] Northmont argues that Mr. Belfry was alert to JEKE's inability to satisfy any debts from the outset of this dispute and that he pursued the claim in JEKE's name trusting that he could evade any costs consequences. Northmont says that it is no accident that JEKE was put forward as the representative plaintiff, instead of countless other potential plaintiffs that stood in no better position than JEKE and would have had assets to satisfy a costs judgment.

[105] I agree that JEKE's financial status no doubt made it an attractive candidate for the test case. I suspect that many individuals in the Geldert Law group holding timeshare interests would have been reluctant to have been the test case plaintiff unless they were properly indemnified in respect of any costs award. Nevertheless, there is no evidence that JEKE was purposefully chosen to avoid any costs award. As stated above, Mr. Geldert says that JEKE was chosen based on Mr. Belfry's previous extensive involvement in the issues and his availability to counsel in Victoria.

[106] Even so, the matter of assets held by JEKE has been the subject of investigation by Northmont from time to time, starting before this action was even filed. In an examination of Mr. Belfry in September 2013 in the Special Case, Mr. Belfry confirmed that JEKE was a family-owned company. He also confirmed at that time that, aside from the VIA interests, JEKE's only other asset was a company that one of his daughters operated.

[107] At present, Northmont is not aware of any assets now held by JEKE, save for the VIA interests. For obvious reasons, neither party places much value on those interests given the substantial amount owing to Northmont under the VIAs. JEKE also owes $1,000 to Northmont arising from a previous costs award in this action.

[108] Northmont says that if it cannot recover the costs from either JEKE, which seems unlikely, or Mr. Belfry, it will have no choice but to visit its actual legal costs on the other timeshare owners who remain within the resort in accordance with the VIAs (which includes JEKE).

[109] I agree with the comment in *Animal Welfare International Inc. v. W3 International Media Ltd.*, 2015 BCSC 1580 at para. 34(d), citing *Anchorage*, that "[t]he solvency of the party to the litigation is a factor which can be considered, but standing alone it is not a basis for an award of costs against a non-party".

[110] By the time this litigation began in October 2014, Northmont was, or should have been, well-aware that JEKE had, at best, limited assets.

[111] In those circumstances, Northmont, not unexpectedly, considered the matter of seeking security for costs pursuant to the *Business Corporations Act*, S.B.C. 2002, c. 57, s. 236. On at least one occasion in April 2015, Northmont indicated an intention to apply for security for costs as against JEKE. No such application was brought. If that had occurred, and been successful, Northmont would have anticipated that either JEKE (or more likely the Geldert Law group funding the litigation), would have been put to the decision of either posting the security or abandoning the litigation.

[112] As Northmont's counsel candidly admits, there may have been any number of reasons not to apply for security for costs, including possible delays in the trial or even an abandonment of this action. Neither of those options would have been beneficial to Northmont in obtaining a resolution of the issues in the JEKE action which could be used as a precedent in the other actions.

[113] I accept Northmont's submission that failure to apply for security for costs does not necessarily preclude an award of costs against the principal of a company party in appropriate circumstances: *Oasis Hotel* at 463. In *Oasis Hotel*, the failure to make such an application did not prevent costs being awarded against the principal. However, the facts of the case were unusual and, in my opinion, distinguishable from the case at bar; the principal in *Oasis Hotel* committed arson and then caused his insolvent company to fraudulently advance an indemnity claim against the insurer.

[114] However, in this case, the failure to make such an application, in the face of Northmont's knowledge concerning the financial circumstances of JEKE, must have some relevance. There was no mystery concerning the circumstances under which this action was brought and JEKE's financial circumstances.

[115] In fact, on June 1, 2016, on Northmont's application, the Court of Appeal ordered that JEKE pay $15,000 into court as security for costs in relation to the appeal being undertaken from the Reasons.

[116] In that event, I fail to see how Mr. Belfry should be shouldered with a costs award when he fully disclosed JEKE's asset position before October 2014, and it was well-known to Northmont how Geldert Law was funding the litigation from its client group.

[117] In addition, Northmont points to the fairly recent evidence that JEKE may have disposed of assets. In May 2015, Mr. Belfry confirmed that JEKE no longer owned the company operated by his daughter. There is no evidence when JEKE transferred that interest, nor under what circumstances or for what value. It may be

that Northmont can take advantage of remedies under the fraudulent conveyance legislation if any such issues arise. Obviously, that matter is not before me.

[118] In conclusion, I do not accept that Northmont has established that JEKE is merely a "company of straw" put forward in this litigation as a front for Mr. Belfry so as to justify an award of costs against him.

(d) Maintenance

[119] There is also no basis for Mr. Belfry's liability on the basis that he promoted the litigation improperly so as to be guilty of the tort of maintenance.

[120] Northmont argues that Mr. Belfry stirred up litigation by actively soliciting participants in his dissent; he encouraged other timeshare owners to default in their obligations; he drafted and circulated letters to other timeshare owners accusing Northmont's conduct of being unlawful and threatening legal action; he asked to be forwarded any correspondence from Northmont so that he could "suggest further action''; he retained Geldert Law and collected cheques from other timeshare owners on Geldert Law's behalf; he posted disparaging comments about Northmont on various social media sites and created a website to aid in his efforts of recruitment.

[121] I accept that Mr. Belfry was the lead organizer of the group of timeshare owners who retained Geldert Law to bring forward this action. In addition, I accept that he was active in discussing matters with Geldert Law in relation to the conduct of the litigation and the trial itself.

[122] However, his participation must be considered in context. That context is that everyone, including Northmont, knew that this group had been organized to bring forward the issues with Northmont. Northmont was well-aware that JEKE was the plaintiff in this action which was being put forward as a "test case". Implicitly, everyone knew that in addition to JEKE, many other timeshare owners were behind this litigation, not only in terms of strategy, but also in terms of funding. Many other

owners would have had similar VIAs to that of JEKE, and they would have forwarded a repudiation letter similar to that forwarded by JEKE in April 2013.

[123] None of these timeshare owners were challenging a substantial amount. With fairly nominal amounts involved, it makes little sense that JEKE would undertake this action to the point of participating in a three-week trial. This decision only makes sense in the context of the collective efforts of the timeshare owners, an approach that was, in fact, endorsed by Northmont.

[124] Of course, JEKE remained part of that group and it no doubt contributed to ongoing strategy and funding. However, by no measure was Mr. Belfry the only "motivating force" behind this litigation, as asserted by Northmont. He was but one of many.

[125] I accept that JEKE would have made some contribution to the Geldert Law group's retainer, likely financed by Mr. Belfry, but this would no doubt have been a small contribution in the overall funding that was sought and obtained in order to bring this litigation forward. In that event, the circumstances in *Lawson* and *Down* are entirely distinguishable.

(e) Is Mr. Belfry guilty of gross misconduct?

[126] In the alternative, Northmont submits that JEKE's conduct of the litigation, as directed by Mr. Belfry, amounts to gross misconduct within the meaning of *Anchorage*. Northmont says that this conduct rendered the litigation unnecessarily protracted and resulted in Northmont incurring excessive legal costs so that it could defend JEKE's "moving target" claim.

[127] I have referred to *Animal Welfare*, where costs were awarded against the defendants' principal, who had advanced unsuccessful fraud claims against the plaintiff. This principal was found to be the perpetrator of "reprehensible conduct": paras. 34-46. There is no suggestion here that Mr. Belfry has acted in any such extreme manner.

[128] Northmont argues many of the same points discussed above in relation to the level of costs, and others, as follows:

a) by the time the exchange of expert evidence was complete, on October 12, 2015, JEKE had a clear grasp of the evidentiary foundation of its case and knew what claims it could substantiate based on the evidence it had. JEKE knew that it had no better evidence, and therefore no better case, than what was before the court in the Special Case. When given the opportunity to amend its claim and particularize its allegations in advance of trial, instead of narrowing the issues, JEKE expanded the scope of its allegations at this late stage;

b) Mr. Belfry insisted on the inclusion of various documents that Northmont advised were redundant or irrelevant;

c) JEKE failed to produce documents in a timely fashion;

d) JEKE insisted that it would pursue specific causes of action and heads of damages at trial, forcing Northmont to prepare a response to the allegations, and then abandoned them during closing submissions;

e) financial information specifically requested during the discovery process was never provided; and

f) JEKE failed to pay the previous costs award of $1,000.

[129] I have already discussed the most significant circumstances above ((a) and (d)) at length and do not propose to duplicate that again. Suffice to say, I accept that there is room for criticism in how the evidence was evaluated for the purpose of deciding which issues had a prospect of success at trial.

[130] Mr. Geldert confirms that he took instructions from his client group and thereafter directed Cox Taylor in the litigation strategy. There is no evidence that Mr. Belfry was responsible for any particular litigation strategies, including those that

I have expressly disapproved of, as above. Therefore, there is no basis upon which these misconceived litigation strategies can be laid at Mr. Belfry's feet. Other actions taken or not taken in the litigation ((b), (c) and (e)) would presumably have been similarly made by counsel, not Mr. Belfry.

[131] The circumstance in (f) in failing to pay a costs award is not misconduct. Further, Mr. Belfry was not responsible for JEKE's solvency. He was not a guarantor for JEKE's obligation to pay a costs award.

[132] Even had I found that Mr. Belfry was involved in the decisions to undertake these particular strategies, I would not have considered Mr. Belfry's actions to be the type of "gross misconduct in the conduct of the litigation" contemplated in *Anchorage*.

[133] I decline to order costs against Mr. Belfry on any of the grounds advanced by Northmont.

CONCLUSION

[134] An order is granted confirming the costs awarded in favour of Northmont against JEKE pursuant to the Reasons, save as amended in accordance with these reasons. Northmont is entitled to its costs of this application in paragraph 1 of its notice of application as against JEKE on a party and party basis on Scale B.

[135] The application in paragraph 2 of Northmont's notice of application in relation to Mr. Belfry is dismissed with costs in favour of Mr. Belfry.

"Fitzpatrick J."