IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Northmont Resort Properties Ltd. v. Golberg,* 2018 BCSC 151

Date: 20180131
Docket: S159447
Registry: Vancouver

Between:

Northmont Resort Properties Ltd.

Plaintiff

And

Brian Golberg and Collette Golberg

Defendants

Before: The Honourable Mr. Justice Branch

Supplementary Reasons for Judgment

Counsel for the Plaintiff:	F. Sauvageau
Counsel for the Defendants:	B. King
Written Submissions of the Plaintiff Received:	October 18, November 15 & December 21, 2017
Written Submissions of the Defendants Received:	November 3, December 19, 2017
Place and Date of Supplementary Judgment:	Vancouver, B.C. January 31, 2018

I. INTRODUCTION

[1] These are reasons for judgment supplemental to the court's reasons at 2017 BCSC 1680, striking the liability defences on the basis of abuse of process concerns (the "Golberg Decision"). An appeal from this decision was quashed at 2017 BCCA 404 (the "Golberg Appeal Decision").

[2] I will not repeat the facts set out in these earlier judgments, except as necessary to adjudicate on the remaining matters. I use the same defined terms.

[3] There are two remaining issues: quantum and costs. The parties agreed that these issues could be resolved following the submission of further written argument. The arguments have now been received and considered.

II. QUANTUM

[4] The defendants generally agree that judgment is appropriate for the principal amount of the renovation project maintenance fee invoice and the other outstanding notices of assessment. They do however seek to raise certain additional issues, being whether:

a) the contractual interest rate in the vacation interval agreements ("VIAs") violates the *Interest Act*, R.S.C. 1985, c. I-15;

b) Northmont can obtain judgment against defendants who were not served within one year of the claims being issued; and

c) the Golberg Decision is limited to those claims listed in Schedule "A" of Northmont's proposal prepared for a case planning conference before Master Tokarek.

a) The Interest Rate Issue

[5] In the defendants' written argument, they submit that the plaintiff should not be given judgment for the amount set out in the VIAs on the basis that the rate of interest does not comply with s. 4 of the *Interest Act*. The VIAs provide for interest at

2% per month. After 2004, the VIAs apparently expressly indicated that this equated to 26.824% per year (which the defendant does not contest). Prior to 2004, that express statement of the annual rate was not present. The defendants argue that this does not comply with the *Interest Act*, and should have the effect of reducing the interest rate claimed to a maximum of 5% per annum.

[6] For the reasons that follow, I decline to entertain the argument that the interest provisions of the VIAs violate the *Interest Act*. Given that this decision is based on abuse of process principles only, I make no finding on the merits of the argument *per se*, or its potential applicability in relation to any claims under the VIAs beyond those that arise in this litigation.

[7] Specifically, the defendants' problem is that there is nothing in their original response, or their Amended Response to Civil Claim ("ARCC") filed on June 22, 2017, that would suggest the defendants were intending to advance this new substantive argument about the validity of a term in the agreements. There is no mention of the *Interest Act* at all in the ARCC, even though the plaintiff's Notice of Civil Claim ("NOCC"), filed November 16, 2015, explicitly states that they seek judgment for interest "at a rate of 26.824% per annum, as per the Agreement between the parties". The first notice of the defendants' argument was in written submissions received on November 3, 2017, following issuance of the Golberg Appeal Decision.

[8] A defendant is required to plead the defences it intends to argue.

[9] If the defendants intended to raise the fundamental and substantive issue of the VIAs' compliance with the *Interest Act*, at the very least this should have been pleaded in their latest ARCC. No such pleading was made. No application was made to amend the ARCC, which would presumably have been supported by an affidavit explaining why the statutory defence was not raised earlier. Nor was any explanation provided in the written arguments explaining why the substantive defence was not raised earlier.

[10] The function of pleadings was described by Justice Smith in *Homalco Indian Band v. British Columbia* (1998), 25 C.P.C. (4th) 107 at 109 (B.C.S.C.):

> [5] The ultimate function of pleadings is to clearly define the issues of fact and law to be determined by the court. The issues must be defined for each cause of action relied upon by the plaintiff. That process is begun by the plaintiff stating, for each cause, the material facts, that is, those facts necessary for the purpose of formulating a complete cause of action: *Troup v. McPherson* (1965), 53 W.W.R. 37 (B.C.S.C.) at 39. The defendant, upon seeing the case to be met, must then respond to the plaintiff's allegations in such a way that the court will understand from the pleadings what issues of fact and law it will be called upon to decide. [Emphasis added.]

[11] Rule 3-7(12) of the *Supreme Court Civil Rules*, also specifies that:

> (12) In a pleading subsequent to a notice of civil claim, a party must plead specifically any matter of fact or point of law that
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> > (a) the party alleges makes a claim or defence of the opposite party not maintainable,
> >
> > (b) if not specifically pleaded, might take the other party by surprise, or
> >
> > (c) raises issues of fact not arising out of the preceding pleading.

[12] Rule 3-7(12), in its essence, outlines a particular application of the court's inherent power to prevent abuse of the court's process. This doctrine confers the court with the power to prevent the misuse of its procedure in a way that would be manifestly unfair to a party to the litigation before it, or would otherwise bring the administration of justice into disrepute: *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at para. 37 [*C.U.P.E.*].

[13] Case law provides examples of the need to properly plead defences, particularly those that are based on statute. In *JJM Construction Ltd. v. Sandspit Harbour Society*, 2000 BCCA 208 at paras. 25-26, the Court of Appeal stated that a simple denial of damages does not include an allegation of failure to mitigate, which must be specifically plead. In *Ponti v. Marathon Motors Ltd*. (1978), 9 B.C.L.R. 46 (Co. Ct.), at p. 47, the court held that the defendant must plead the specific statute when it says that an action is statute-barred.

[14] The Court of Appeal in *Canada Trustco Mortgage Co. v. Renard*, 2008 BCCA 343, noted that even where a party is attempting to raise the illegality of a contract, the court may enforce the contract if the other party has been prejudiced in the presentation of its case by the failure of the party to plead the illegality. Each party is entitled to know and respond to the case against it (paras. 37, 39).

[15] The ARCC did attack the VIAs on a number of bases, including that it was misleading, that the plaintiff had not fulfilled their duty of good faith, and that the plaintiff had misrepresented the terms of the agreement. In the Golberg Decision, I struck these new defences from the ARCC on the basis that they amounted to an abuse of process. At para. 74, I summarized my reasons for doing so:

> The defendants have taken and are taking too many inconsistent positions over too long a period of time. They had a full opportunity to air out issues in a case they themselves described as a "test case". If they believed aspects needed to be held in reserve, they could and should have said so. Their last ditch effort to save themselves through these late arriving amendments is too little, too late, particularly given the weakness in these new defences. I rely on concerns about relitigation, but my concerns are broader. This Court has already found the defendants' conduct in these various interrelated matters to be highly problematic, meriting a special costs award. I conclude that we have reached a stage where continued efforts to keep the analysis of the enforceability of the VIAs alive for another round of litigation would indeed bring the administration of justice into disrepute.

[16] The same concerns expressed in that passage are equally applicable to the present issue, with the added elements that (1) the litigation has now progressed even further down the track, and (2) this defence was not even pleaded in the latest ARCC. To allow the defendants to now bring new attacks on the VIAs, which have been the subject of litigation for many years, would be to allow a misuse of this Court's procedure.

[17] Furthermore, the defendants' counsel made representations before the Alberta Provincial Court judge, hearing a battery of parallel matters, that they were not concerned with a pure breach of the *Interest Act*. Before Alberta Associate Chief Judge Young on May 1, 2017, the following exchange occurred:

> The COURT: But are you saying the interest rate — it doesn't matter whether it breaches the federal Interest Act or not; its just onerous because it's too much?
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> Mr. KING: Correct.

[18] Such inconsistency magnifies my abuse of process concerns.

[19] Additionally, I note that the question of the validity of the interest provision could also have been raised at the time of the Vesting Order. The failure to raise substantive defences at that time is discussed at paras. 64-71 of the Golberg Decision, and para. 20 of the Golberg Appeal Decision. This earlier opportunity to raise the issue further heightens my abuse of process concerns.

[20] Finally, the timing of this argument also raises concerns of unfairness to the plaintiff: *C.U.P.E.* at para. 37. Although the pre-2004 VIAs do not expressly state an annual rate of interest, the case law demonstrates that the strict wording of the contract is not necessarily the only factor to be considered. In *Strother v. Darc*, 2016 BCCA 297, our Court of Appeal construed an interest provision in a contract as an annual rate, despite the fact that the wording of the contract did not expressly specify such. The court stated:

> [37] On its face the promissory note does not set out an interest rate payable per day, week, or month. Rather, the rate is expressed simply as "5.5%" with no period indicated. In my view, the first step for the trial judge was to interpret the contract to determine what the parties intended with respect to the applicable interest period. Her reasons on this point were brief. She accepted Mr. Strother's affidavit evidence that the rate agreed to was 5.5% per annum. His evidence consisted of a bare statement to that effect, and indeed had to be implied from a reference to his evidence about the rate applicable to the Second and Third Loan being consistent with the rate agreed to for the First Loan. Nonetheless, the trial judge was entitled to assess that evidence in all of the circumstances which included the commercial sophistication of the parties.
>
> [38] In my view, the judge's interpretation was a reasonable one open to her on the evidence and does not amount to a palpable and overriding error. Having found that the parties intended to be bound by an interest rate of 5.5% per annum, the trial judge correctly concluded that s. 4 of the *Interest Act* did not apply to the agreement.

[21] *Strother* suggests that the resolution of this issue is not as always as simple as a straightforward reading of the words themselves in isolation. If the defence now sought to be advanced was brought forward earlier in these proceedings, or at least in their ARCC, the plaintiffs may have had the opportunity to adduce more evidence or make more fulsome pleadings in reply regarding the interest issues. For example, I note that the statements dated September 30, 2017, provided by Northmont in support of the quantum award on this application, do state expressly that “Interest is charged at 26.82% (2% per month) per annum”. Had this issue been identified earlier, perhaps Northmont would have been in a position to detail when the statements first provided this disclosure, and argue that these statements were somehow incorporated or adopted into the contract, or that some type of estoppel has arisen. In *Creston Moly Corp. v. Sattva Capital Corp*, 2014 SCC 53 at para. 47, the court stated that the factual matrix should be considered in the interpretation of any contract.

[22] In summary, I decline to decide the issue of the agreement’s compliance with the *Interest Act*, which the defendants attempt to raise at this late date. We are at a point in this litigation where final resolution is needed. To allow a fresh attack on the VIAs, raising new issues of contractual interpretation and statutory construction, would be a further abuse of process and would bring the administration of justice into disrepute. The timing of this argument simply continues the pattern of problematic conduct by the defendants.

[23] As such, I find that the quantum of the claims should be as set out in the September 30, 2017 statements filed at Exhibit B to the Wankel Affidavit #3, plus interest at the contracted rate.

b) The Service Issue

[24] I reject the service argument. Service was not previously contested. The defendants allowed the hearing before me to proceed through the determination of their abuse of process, as well as advancing their appeal, without raising a preliminary service issue. I conclude that seeking to raise this issue now is a further

abuse of process. I have no doubt that had the ruling gone the other way, they would have happily relied upon the outcome for those clients whom they suggest were not properly served.

c) The Client Scope Issue

[25] The defendants argue that the judgment should be limited only to those defendants listed in Schedule “A” of the Case Plan Proposal filed by the plaintiff in advance of the case planning conference held before Master Tokarek. This conference eventually led to this Court’s decision on abuse of process.

[26] The plaintiff has produced invoices for 370 claims filed in the Supreme Court of British Columbia in which the Geldert Group is counsel. By my count, 392 actions were listed on the Schedule “A”. Unhelpfully, the defendants fail to rationalize the two lists in order to confirm who was on the list of 392 who is not on the list of 370. However, for the reasons below, I find it unnecessary to resolve that gap in the evidence.

[27] I note that Schedule “A” of the Case Plan Proposal is not a document of particular legal force or formality. It is clear from the plaintiff’s Case Plan Proposal that the plaintiff was simply seeking as much help from the court as possible to rationalize the mass of proceedings. Their Case Plan Proposal says “Northmont seeks the Court’s assistance in establishing consolidation of all the matters noted in Schedule ‘A’ to this Case Plan Proposal; and Northmont seeks the court’s assistance in determining the proper method of service of our Notice of Application for Striking Pleadings and Summary Judgment and the application material on the Defendants listed in Schedule ‘A’ to this Case Plan Proposal.”

[28] Case Planning Conferences and the orders that follow often deviate from the suggestions or issues raised by either side in their respective Proposals. In this case, the Case Plan Proposal was technically only filed in the Golberg proceeding, so any consolidation order that issued was always necessarily going to extend beyond the four corners of the proceeding in which the Proposal was filed.

[29] The plaintiff says Master Tokarek's consolidation order arising from the conference is clear that the consolidation affected all Geldert Group clients in British Columbia Supreme Court actions. The defendant raised certain deficiencies in Schedule "A" at the conference. Given that challenge, the order understandably framed consolidation based on the client relationship rather than Schedule "A". Specifically, the case planning order provided as follows: "There shall be a consolidation for the purposes of a hearing under 9-5, with respect only to the Defendant's [sic] that Mr. Tong's firm represents". This language is consistent with the plaintiff's position.

[30] The plaintiff says that if some or all of the Geldert Group clients wished to contest the terms of consolidation, they could have and should have done so either by raising a concern with Master Tokarek, or by subsequently pursuing an appeal of his order. I agree. I find that it is reasonable to attribute knowledge of the terms of the consolidation order to all of the Geldert Group clients, given the participation of their counsel at the conference, and the fact that all of these matters have been pursued as "test case"-like proceedings.

[31] The plaintiff also notes that declining to grant judgment against some of the Geldert Group clients would lead to one or more additional and unnecessary applications for judgment against additional client defendants, and this would constitute an improper and unnecessary use of the court's resources. I agree.

[32] Finally, there was no suggestion in the hearing before me that defendants' counsel was not representing all of their clients. Again, I am confident that if they had been successful on their application, they would have happily taken the benefit for all of their clients.

III. COSTS

[33] The plaintiff requests special costs at an amount equivalent to Northmont's counsel's contingency fee of 25% in the 370 files, plus taxes and disbursements. Very unhelpfully, Northmont never provide the total amount that such an order would

yield, but by reviewing each of the draft accounts, I have determined that the fees across all actions total approximately $1,668,195.35.

[34] As to the disbursements related to their consolidated Rule 9-5 application, Northmont seeks an order that they be payable in full, jointly and severally, by all individual members of the Geldert Group before the Supreme Court of British Columbia.

[35] I note that the court found that special costs were justified in the JEKE Action, under which the defendants' original defences were litigated. The court in the JEKE Costs Decision provided a helpful summary of the test for awarding special costs at paras. 55-60. The court then concluded:

> [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.
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> [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.
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> …
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> [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.

[36] In *Glover v. Leakey*, 2017 BCSC 1287, the court provided the following analysis of the effect of a finding of abuse of process on a request for special costs:

> [27] I summarized the principles in the consideration of special costs at para. 73 [of *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1252]:
>
>> 73 I have undertaken a thorough review of the cases involving special costs. Having examined the authorities provided by both sides, it is apparent to me that the courts have been somewhat inconsistent in their determination of what amounts to reprehensible conduct and that those authorities must be reconciled. Based upon my review of the authorities, I have derived the following principles for awarding special costs:
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>>> a) the court must exercise restraint in awarding specials costs;
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>>> b) the party seeking special costs must demonstrate exceptional circumstances to justify a special costs order;
>>>
>>> c) simply because the legal concept of "reprehensibility" captures different kinds of misconduct does not mean that all forms of misconduct are encompassed by this term;
>>>
>>> d) reprehensibility will likely be found in circumstances where there is evidence of improper motive, abuse of the court's process, misleading the court and persistent breaches of the

> rules of professional conduct and the rules of court that prejudice the applicant;
>
> e) special costs can be ordered against parties and non-parties alike; and
>
> f) the successful litigant is entitled to costs in accordance with the general rule that costs follow the event. Special costs are not awarded to a successful party as a "bonus" or further compensation for that success.
>
> [underlining added]

> [28] In *Hollander v. Mooney*, 2017 BCCA 238, Madam Justice MacKenzie, for the court, stated at para. 79: “Conduct that is an abuse of process is, by its nature, reprehensible and deserving of rebuke.”
>
> [29] However, whether conduct of a party is deserving of rebuke by an award of special costs depends upon the particular facts of each case, even where an abuse of process is found. It is up to the court's discretion to award special costs; it is not automatic.
>
> [Emphasis in original.]

[37] The defendants’ conduct in raising new issues has only continued since the JEKE Costs Decision, and this conduct has now resulted in a formal abuse of process finding. My concerns about the defendants’ conduct are summarized in detail in the Golberg Decision. An appeal of that decision was launched which was quashed. I also raise further concerns about the defendants’ litigation conduct earlier in these reasons. Subject to the special considerations that arise in the context of a contingency fee structure, discussed below, I find that the test for an award for special costs is met on the facts of this case.

[38] I am reinforced in my conclusion that the defendants’ approach is deserving of rebuke, and assisted in establishing the amount of the special costs award below, by efforts the plaintiff made to resolve this matter short of a hearing. Those efforts were rejected or repudiated by the defendant, thereby unnecessarily lengthening the proceeding and making resolution more difficult than it should have been: Rule 14-1(3)(b)(v); Rule 9-1(4); *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914 at para. 11. Implementation of the termination alternatives proposed by the plaintiff would have put the defendants in a better position than that in which they now find themselves. One or more of the offers should reasonably have been accepted, and hence their rejection supports “some sanction in costs”: *Maras v. Seemore*

Entertainment Ltd., 2014 BCSC 1842 at paras. 31-32; *Wafler v. Trinh*, 2014 BCCA 95 at para. 82. I have reviewed the suggestion in *Elsen v. Elsen,* 2011 BCSC 1011 at para. 11, that the question of whether the plaintiffs' offer to settle should reasonably have been accepted by the defendants is properly considered with regard to double costs under Rule 9-1, not with regard to special costs, but:

a) in that case, unlike the present matter, the plaintiff was making a request for both special and double costs, which may have created the need to make the noted comment in order to ensure that there was no "double counting" of the same factor. Here, unless the offers to settle are considered as part of the special costs analysis, there is the opposite risk i.e. that the offers will not be considered in the costs analysis at all;

b) with respect, I do not see why the breadth of factors that can be considered in determining special costs should be so constrained, particularly in light of the broad language of Rules 14-1 and 9-1(4); and

c) I would have found that this case merited a special costs award even absent consideration of this factor.

[39] What effect does the contingency fee structure have on the analysis? Rule 14-1(3) refers to "special costs" as "those fees that were proper or reasonably necessary to conduct the proceeding". The usual baseline framework for an assessment of special costs, being the client fees paid to the solicitor, is complicated by a contingency arrangement. The leading case on this issue is the recent decision in *Norris v. Burgess*, 2016 BCSC 1451. There, the court found that special costs could be awarded in the amount equivalent to the contingency fee payable to the plaintiff's lawyer. Justice Funt stated:

> [84] The 30% contingency fee is less than the maximum allowable of 33 1/3% for personal injury arising from the use of a motor vehicle: *Legal Profession Act*, S.B.C. 1998, c. 9, s. 65 and British Columbia, The Law Society of British Columbia, *Law Society Rules 2015*, r. 8-2.
>
> [85] Many plaintiffs injured in a motor vehicle accident rely on contingency fee arrangements in order to fund a claim. Accordingly, the use of a

contingency fee arrangement in the case at bar would have been contemplated by ICBC.

[86] I am satisfied that the fees and taxes are “proper” and were also “reasonably necessary” within the meaning of R. 14-1(3)(a). The contingency fee agreement is representative of such agreements and is accordingly “objectively reasonable in the circumstances” and will serve to provide “an indemnity to the [plaintiff], not a windfall”: see *Girchuru* at para. 155.

[87] In making the assessment, I have considered the circumstances set forth in R. 14-1(3)(b).

[88] With respect to R. 14-1(3)(b)(i), the trial had significant complexity as a result of the plaintiff’s complex pre-accident medical history, which in turn necessitated a number of experts. The plaintiff called twelve experts to give expert testimony, seven of whom are medical doctors. As noted, ICBC recognizes the complexity in that, it sought, on an alternative basis, costs at Scale C for the 20-day trial.

[89] The trial was also a jury trial, which commonly requires greater organization than a judge-alone trial. As noted, ICBC requested the trial by jury.

[90] With respect to R. 14-1(3)(b)(ii), plaintiff’s counsel exhibited the necessary skill and specialized knowledge to represent a plaintiff with respect to a significant personal injury claim. In particular, counsel exhibited the necessary medical knowledge required to converse with various experts and to make clear the relevant aspects for the jury.

[91] With respect to R. 14-1(3)(b)(iii), the amount involved was significant. The jury awarded $462,374.

[92] With respect to R. 14-1(3)(b)(iv), considerable time was reasonably spent in conducting the proceeding. The trial was 20 days and required plaintiff’s counsel, among other things, to retain a number of experts, review their respective reports, and prepare for the cross-examination of the defendants’ experts.

[93] ICBC also did not admit liability for the June 2, 2010 accident until the eve of trial.

[94] With respect to R. 14-1(3)(b)(v), ICBC’s late disclosure of the 2015 Video required the jury to stand down for approximately one-and-a-half hours. The presentation of the surveillance video evidence was disjointed and not as efficient as it could have been with timely disclosure. Also, the timely disclosure of the 2015 Video may have facilitated a higher settlement offer, made on a fully-informed basis with counsel’s advice, which may have led to settlement, avoiding the trial altogether.

[95] With respect to R. 14-1(3)(b)(vi), the litigation was of obvious importance to the plaintiff. She had been injured and could not return to her job. Although the result obtained was less than the plaintiff sought, it was a significant result.

[96] With respect to R. 14-1(3)(b)(vii), the contingency fee agreement was of benefit to the plaintiff. It allowed her to bring the litigation, without funds, and to achieve a significant result.

> [97] With respect to R. 14-1(3)(b)(viii), the contingency fee agreement falls within the objects of the *Rules of Court*. It helped to secure the determination of the matter. It also reflected the principle of proportionality, having regard to the potential quantum involved, and the complexity of the matter and its importance to the plaintiff.
>
> [98] In sum, I will assess the special costs based on the contingency fee agreement….

[40] I accept the reasonableness of this analysis. Applying the analysis to the present case:

a) There is no prescribed maximum percentage in this context, but the 25% fee charged by the plaintiff's solicitor is below the maximum level prescribed for even motor vehicle claims. This action was more complex than a motor vehicle claim.

b) There is nothing particularly unusual or unexpected about using a contingency fee arrangement for a debt collection proceeding.

c) Plaintiff's counsel exhibited the necessary skill to keep the matter moving forward against very vigorous opposition.

d) The amount involved was significant, and the claim was significant to the plaintiff.

e) The result was all the plaintiff could reasonably have expected, even though it took more work than they reasonably would have expected, as a result of the defendants' conduct.

f) Considerable time would have been required to manage all the procedural twists and turns created by the defendants' conduct.

g) The defendants' positions only narrowed and simplified somewhat as the matter progressed towards a final determination.

h) The contingency fee agreement was of real benefit to the plaintiff, in that it could well have been very difficult to sustain the out of pocket costs of pursuing so many individual actions in any other way.

i) From the perspective of the plaintiff, the contingency fee agreement certainly helped to secure the determination of the matter.

[41] The defendants relied upon the decision in *Dawson v. Gee*, 2000 BCSC 1515, where the court declined to award special costs based on a contingency fee amount, instead referring the matter to consideration by the registrar. Costs determinations are always highly discretionary, and dependent on the particular facts before the court. Furthermore, the court in *Dawson* did not say that a costs award could never be based on a contingency fee. Rather, the court stated only that "A contingency fee does not necessarily bear any relation to special costs under the tariff" (para.11). However, to the extent that any legal finding in *Dawson* differs from the approach adopted in *Norris*, I choose to follow the more recent statement of principles expressed in *Norris*.

[42] That said, I have three concerns that prevent me from awarding the full contingency amount, even based on the analysis in *Norris*.

[43] First, I am concerned whether an award equivalent to the full total contingency fee, projected at $1,668,195.35, is objectively reasonable. While perhaps reasonable from the perspective of the plaintiff alone, there are additional considerations that go into the analysis from the perspective of a costs award, including fairness to the defendant, and the establishment of precedent for other costs cases.

[44] The contingency fee proposed to be charged obviously incorporates a large element of risk premium. As between plaintiff's counsel and the plaintiff, that may be completely reasonable. However, it is less applicable to a situation where the court is trying to establish a costs award for the defendants to pay.

[45] I note that although the plaintiff provided statements of account, the plaintiff declined to provide a statement of the total hours incurred in prosecuting these matters, or their normal hourly rate. This information would have facilitated a more precise assessment of the "objective reasonableness" of the contingency fee, and the extent to which the fee reflected a risk reward beyond what would have been the usual compensation for more traditional hourly rate work: *Gichuru v. Smith*, 2014 BCCA 414 at paras. 155-156, leave to appeal ref'd [2014] S.C.C.A. No. 547.

[46] Further, as the defendant points out:

a) the reasonableness assessment should include a consideration of the efficiencies gained through the consolidation order (although plaintiff's counsel deserves credit for having pursued this efficiency). The contingency agreement amount does not have a mechanism to reflect that efficiency. Rather, the 25% is simply applied directly to each action, irrespective of any consolidation efficiencies gained after the contingency fee agreement was negotiated;

b) within the consolidated proceeding, there were no discoveries conducted, and the core issue was resolved in a motion heard in one day, although admittedly after a series of preliminaries.

[47] Second, I have a concern that, in the normal course, I would have required that the special costs award be granted on a time-limited approach: *Gichuru* at para. 91. There was nothing particularly objectionable about the defendants' conduct within these proceedings until the point where the plaintiff was compelled to spend time and effort moving forward with liability and quantum determinations notwithstanding the final outcome of the JEKE Appeal Decision. It was only then that the defendants refused to surrender in the face of their loss in the "test case" proceeding, and started raising a series of additional "last ditch" arguments. Hence, in the normal case, I would have constrained the special costs award to the fees incurred following the filing of the ARCC, and provided that, up to that date, the plaintiff would only have its costs at Scale B.

[48] Such an approach would also have ensured that there would be no concern about “double-counting” the rebuke already reflected in the JEKE Costs Decision, or double-counting any work that had already been the subject of the costs award in that decision. However, in a situation where there is a contingency fee arrangement in place, the situation is complicated because under such an arrangement solicitor-client legal costs are not allocated to specific time periods.

[49] Third, I have a related concern that any contingency fee would also be designed to cover future work involved in enforcing and collecting upon any judgment. Again, this flows from the fact that a contingency fee is not tied to any particular phase of the litigation. Given the conduct of the parties to date, there may be a material risk of execution issues arising, and that may reasonably have been in the contemplation of the plaintiff and their counsel when the contingency agreement was entered into.

[50] I conclude that a reasonable method of accommodating these three concerns is to constrain the global special costs award to a fixed $333,000 for all 370 actions, or approximately 20% of the total estimated contingency fee payable. I cross-check the reasonableness of this global amount by noting that it equates to an average of approximately $900 per action, which I find is “objectively reasonable,” after incorporating all the concerns and considerations noted above. It is reasonable to assume that at least $900 in costs could be awarded following the successful pursuit of debts of this type and amount, particularly where part of the conduct in the defence of the action was deserving of a special costs award, even where much of the work would be shared across 369 similar files.

[51] As in *Norris*, I assess the special costs amount directly rather than referring this aspect to a registrar, given that:

a) I am intimately familiar with the matter, in light of the need to review the entire history of the proceeding in order to consider the abuse of process allegations;

b) the plaintiff has already provided draft statements of account; and

c) this case requires as much assistance as possible to reach closure given proportionality concerns and the fact that the degree of court involvement with these parties has already been disproportionate.

[52] I appreciate that the court should exercise its power under Rule 14-1(15) sparingly, but the unique factors noted above support the exercise of this limited discretion in this case.

[53] This total fixed global amount will be applied pro rata and severally to each of the various actions based on the ratio of contingency fees for each action proposed in Exhibit "C" to the Wankel Affidavit #3. I do not make the order joint and several as to do so would create "an unfairly disproportionate burden": *Amacon Property Management Services Inc. v. Dutt*, 2011 BCSC 181 at para. 10. If it were made joint and several, the plaintiff could "pick and choose" the defendant with the highest asset base and enforce against them exclusively. This would expose such a defendant to a costs award that is many multiples of the amount actually at issue in their own single action. It would also likely in turn create the need for further proceedings as between defendants.

[54] In this context, where the consolidated proceeding was akin to a class proceeding, and the case calls out for closure, it is more equitable and efficient for the class of defendants to incur their burden proportionately without creating a need for further proceedings as between members of the class. As the court stated in *Empire Life Insurance Co. v. Krystal Holdings Inc.*, [2009] O.J. No. 1095 (S.C):

> [42] In my view, the Court of Appeal has clearly signalled that applications for joint and several orders of costs in cases such as the one before me should be carefully scrutinized because they may well cause unfairness and impose an onerous burden on individual defendants. I also note the case of *Martens v. Acheson*, [1999] B.C.J. No. 2968 (B.C.S.C.) a similar situation to the one before me. In *Martens v. Acheson*, the plaintiffs sued the defendants as purchasers of certain units in a real estate venture. The cause of action was the same against all of the defendants, but for varying amounts, as some of the defendants had purchased more units than other defendants. It was argued that costs should be awarded on a joint and several basis. With

> reference to *Alberta Opportunity Co. v. Schinnour* (1991), 84 Alta. L.R. (2d) 198 (C.A.) Justice Skipp concluded that the costs should be apportioned severally and pro rata amongst the defendants.
>
> [43] I find that to award costs on a joint and several basis would create an unfair, disproportionate burden on the defendants, in contravention of the principle of proportionality. Rule 57.01(1)(0.b) and (a) together with *Boucher*, *supra*, make it clear that proportionality is a key principle in the awarding of costs. The average deficiency claim against a limited partner is approximately $25,000 plus accrued interest. If the costs award were awarded on a joint and several basis, each of the defendant's liability for costs could be roughly 20 times greater.
>
> [44] Finally, I emphasize that to award costs on a joint and several basis could create a significant impediment to the consolidation of proceedings with common issues. The plaintiff originally commenced 147 different claims. The statements of claim were later consolidated to avoid a multiplicity of proceedings on common issues in accordance with s. 138 of the *Courts of Justice Act*. One goal of consolidation is to reduce the overall legal costs of an action for all parties. If costs are awarded on a joint and several liability when proceedings are consolidated in circumstances such as these, individual defendants would resist the efficacy of consolidation to avoid the risk of disproportionate cost liability. Clearly, the principle is to reduce overall legal costs, not to cause individuals to risk excessive liability for legal costs, completely disproportionate to their own potential liability. I realize the burden that this result will place on the plaintiff; however, the unfairness that would be caused by the alternative is substantial and far outweighs the factors in favour of a joint and several costs award.
>
> [45] The costs, as they are common to all of the defendants, will be apportioned severally amongst the defendants on a pro rata basis upon the completion of the final accounting.

[55] In *Westsea*, the court ordered several liability in a debt proceeding against multiple defendants stating:

> [137] Even if joint and several liability is the usual rule in these circumstances, I find it is just and reasonable to exercise my discretion and order several liability in accordance with the majority defendants' respective lease obligations. I exercise this discretion for the following reasons.
>
> [138] This is a matter of debt arising pursuant to the lease obligations of the majority defendants. Ordering several liability is a practical form of relief for that type of claim.
>
> [139] It would be an onerous burden upon the majority defendants to be held jointly liable for the entirety of the debt claim. I do not need evidence of impecuniosity to draw that inference in view of the size of the debt claim.
>
> [140] Furthermore, I find that the whole purpose of bringing together the defendants in this claim was to make the proceeding more efficient for all parties involved. I am particularly persuaded by the reasoning in *Empire* at

> para. 44 that joint and several liability may become a deterrent for consolidation in similar circumstances where the risk of liability is too great and disproportionate to a singular defendant's liability. Similar principles underpin British Columbia's *Rules*.
>
> [141] There will be several liability for costs, calculated at a pro rata share in accordance with the leasehold obligations of each majority defendant.

[56] As to the request for a joint and several disbursement costs order in relation to a Rule 9-5 application, I reject that request for the same reasons expressed above, and declare that responsibility for these disbursements should be divided severally on the same basis as the special costs award.

IV. CONCLUSION

[57] I make the following orders:

a) the plaintiff is entitled to judgment for the amounts set out in Exhibit "B" of the Wankel Affidavit #3, plus interest;

b) the plaintiff is entitled to special costs in a total fixed amount of $333,000 to be divided severally across the defendant actions in proportion to the interim statements of account for fees set out in Exhibit "C" to the Wankel Affidavit #3; and

c) the plaintiff is entitled to disbursements in the amounts set out in Exhibit "C" to the Wankel Affidavit #3, save that any disbursements attributable to the Rule 9-5 application shall be divided severally and in the same manner as the special costs award.

"Branch J."

The Honourable Mr. Justice Branch