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Docket: S042873
Registry: New Westminster

IN THE SUPREME COURT OF BRITISH COLUMBIA

Oral Reasons for Judgment
Mr. Justice Sigurdson
Pronounced in Chambers
December 11, 1998

BETWEEN:

**INSURANCE CORPORATION OF BRITISH COLUMBIA
and CLIVE WILSON**

PLAINTIFFS

AND:

**D. & R. SAND & GRAVEL LTD.,
DOUG ROBINSON and JOHN DOE**

DEFENDANTS

Counsel for the Plaintiffs: F. Potts
Counsel for the Defendants: W. Mazzei

[1] **THE COURT:** On August 14, 1998, I gave judgment in favour of the plaintiff, ICBC, and ruled that it was the owner of the transfer box. The transfer box had been stolen from the insured, Mr. Wilson, sold by a rogue on the cash market and, apart from the fact that the defendants ought to have been aware of the risks of dealing in that market, all parties were innocent and suffered from the acts of a rogue.

[2] The first issue is a question of damages. The plaintiffs seek damages totalling \$3,071.50 for conversion, a claim which is made up of storage charges and what I will call investigation fees.

[3] I will refer to the defendants in the singular as counsel takes no position as to whether the judgment should be against both D. & R. Sand & Gravel and Mr. Robinson. I have concluded that the defendant is liable in conversion notwithstanding its lack of knowledge that the plaintiff was the true owner of the transfer box.

[4] Part of the damage claim is for \$513 for out-of-pocket expenses paid to third parties for such things as towing, removal of the transfer box and moving it to ICBC's salvage yard.

[5] Included as well are costs incurred by ICBC for the time spent by Mr. Dunn and Jan Loos, which is detailed in Mr. Dunn's affidavit. There were 60 hours spent by Mr. Dunn and three hours by Jan Loos.

[6] Part of the time spent, by Mr. Dunn at least, appears to be simply time spent by a person engaged in litigation. For example, I refer to paragraph (m) of his summary of time where he refers to discussions with ICBC counsel concerning preparation of affidavit material for summary trial, meeting with counsel for review,

revision and swearing affidavit: 12 hours. Accordingly, only part of the amount claimed, in my view, is referable to the defendant's conversion.

[7] Assessing damages as best I can in the circumstances, I award the plaintiffs, for conversion, the amount of \$2,000.

[8] The plaintiff also seeks special costs or, in the alternative, increased costs. In connection with the claim for special costs, the conduct that the plaintiff points to is the defendant's conduct in the course of the litigation and the positions taken by the defendant that the plaintiff says bring that conduct within the scope of the rule justifying the court's sanction by ordering special costs.

[9] The conduct, I can summarize this way. The plaintiff says the defendant alleged that the plaintiffs' deponents were untruthful; the defendant alleged that Mr. Wilson, the original owner of the box, had fabricated his evidence or taken steps to put a wire on the chains of the box to bolster his identification; that Mr. Goyer of Langfab had, in fact, said there was no record of serial numbers when, in fact, there was; and by the reference to taking the matter up, in effect, with Mr. McKenzie, who installed the transfer box to the dump truck, the defendant was suggesting that he may be the person with the explanation of why there was a serial number on the

hoist.

[10] Several authorities were cited to me in support of the claim for special costs. The leading one appears to be *Garcia v. Crestbrook Forest Industries Ltd.*, 9 B.C.L.R. (3d) 242 at page 248. There, the Court of Appeal referred to the decision of Madam Justice McLachlin, as she then was, in *Young v. Young* (1993), 84 B.C.L.R. (2d) 1, where on the issue of costs she said:

Solicitor-client costs are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties.

In *Garcia*, the court also referred to the decision of Chief Justice Esson, as he then was, in *Leung v. Leung* (1993), 77 B.C.L.R. (2d) 314, where the Chief Justice appeared to lower the bar somewhat for what was necessary for an award of special costs when he said:

There is nothing in the conduct of Mr. Leung in relation to this matter which I would call "scandalous" or "outrageous". But "reprehensible" is a word of wide meaning. It can include conduct which is scandalous, outrageous or constitutes misbehaviour; but it also includes milder forms of misconduct. It simply means "deserving of reproof or rebuke".

[11] Counsel for the defendant referred me to a decision of Mr. Justice Owen-Flood, *Cook v. Bowen Island Realty*, where the summary

of the decision indicates that the purpose of special costs is to punish the unsuccessful party for reprehensible conduct during the course of litigation and not to achieve a greater indemnity for the successful party. The reference there is to *Fullerton v. Matsqui (District)* (1992), 74 B.C.L.R. (2d) 311. The headnote of the case also says that the court considered, but rejected the notion that special costs could be awarded for conduct which gave rise to the cause of action. Rather, the court held that only misconduct during the course of the litigation could be considered in determining whether an award of special costs was appropriate.

[12] In terms of special costs, I have concluded that the assertions made by Mr. Potts about the positions taken by the defendant, describes conduct that falls short of the standard justifying special costs. In these circumstances, the defendant was in the dark to some degree over facts relating to the issue of ownership.

[13] The factual assertions concerning the existence or non-existence of wires on the chains and the other comments to which I have referred, I would not characterize as reprehensible. I would not place the comment dealing with Mr. Goyer's evidence concerning the invoice in that category either.

[14] These comments may have been close to the line in terms of the

type of conduct justifying special costs. Perhaps it might even be said that the comments of counsel were far-reaching, but they were not improper and, on the whole, not justifying an order of special costs.

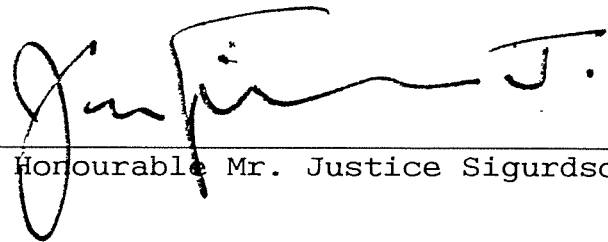
[15] What, however, of the application for increased costs? Counsel appear to agree that the law, as it presently stands, requires something more than the substantial disparity that exists in this case between costs as taxed on the ordinary scale and the solicitor's bill. In these circumstances, the legal fees with respect to this action, in which ICBC is the plaintiff, total in excess of \$16,000 and Mr. Potts tells me that according to the affidavit of his associate the anticipated recovery on scale 3 would be \$3,800. Accordingly, the costs recovered by taxation at the ordinary scale are far, far less than what the plaintiff has incurred in successfully pursuing this case.

[16] Was there something more than that that would suggest that awarding costs on the ordinary tariff would lead to an unjust result? I think in these circumstances there was. There were numerous affidavits; there were points taken by the defendant in support of its position that had to be tracked down and responded to by the plaintiff.

[17] This became a complicated and hard-fought matter. Taking into

account, as well, the conduct that I have outlined that I decided fell short of the mark in justifying an award of special costs and taking into consideration the substantial discrepancy between the plaintiffs' bill and its recoverable costs at scale 3, I have concluded that an award of costs of 50 percent of special costs is justified.

[18] Therefore, to summarize, I award damages in the amount of \$2,000 against the defendant; I award increased costs at 50 percent of special costs; the plaintiff is entitled to costs on scale 3 in the other action.

A handwritten signature in black ink, appearing to read 'Justice Sigurdson', written over a horizontal line.

The Honourable Mr. Justice Sigurdson