

BRIEFING NOTE

The British Columbia Court of Appeal (BCCA) draws bright line test on special costs – pre litigation conduct cannot be considered.

Mr. Justice Goepel very recently provided reasons in *Smithies Holdings Inc. v. RCV Holdings Ltd.*¹ [*Smithies*]. This was an appeal of an award of special costs and specifically raised the consideration of whether pre-litigation conduct can be the basis of an award of special damages. He held that pre-litigation conduct will not be a consideration for special costs.

Background

The underlying actions consist of facts which are tortious. They involve multiple parties with unequal interest entering a joint venture to purchase and develop land. A dispute arose which resulted in one party withdrawing from the joint venture. Pursuant to the joint venture agreement, the remaining parties could opt to purchase the withdrawing party's share, with the price set by fair market value. The fair market value was to be determined by an appraiser if the parties could not agree.

During the appraisal process a prospective buyer approached one of the remaining parties to the joint venture to purchase the land, which was followed by a letter of intent with an offer that was almost double the valuation (the "Greenfield Offer"). All of this information was kept from the withdrawing party and the appraiser, while the joint venture attempted to speed up the appraisal and slow down the Greenfield Offer.

In consideration of whether special costs should be awarded, the trial judge suggested any misconduct in the course of the litigation, while worthy of admonition, may not in itself support an order for special costs. He held that the particular case warranted an award for special costs based on pre-litigation conduct.

The trial judge referred to prior case law to support the position that while awards of special costs are usually reserved for misconduct in the course of litigation, there was no rigid rule that prohibited an award of special costs for pre-litigation conduct.²

Decision of the BC Court of Appeal

In determining whether the trial judge was correct in awarding special costs for pre-litigation conduct, Mr. Justice Goepel considered how the BCCA has historically addressed the subject. In doing so, Mr. Justice Goepel cast the light on the BC Court of Appeal's commentary in dissent and obiter which appear to keep the door open for awarding special costs for pre-litigation conduct.³

The state of the law with respect to whether special costs may be awarded for conduct outside of the litigation appeared to be unclear and it is not difficult to see why, when

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¹ 2017 BCCA 177

² See *Smithies Holdings Inc. v. RCV Holdings Ltd.*, [2016] B.C.J. No. 468 at paras. 16 and 17

³ See *Sussex Investments Ltd. v. Leskovar* (1981) 30 B.C.L.R. 372 (C.A.) at paras. 31 and 32; *Stiles v. British Columbia (Workers Compensation Board)* at para. 311; *Sun Life* at para. 54; *Dockside* at para. 90

reviewing appeal judgment. Mr. Justice Goepel provides a breakdown of the BC Supreme Court decisions on the issue in paragraphs 74 through 105 which illustrates the inconsistencies of the BCSC attempting to reconcile the decisions of the BC Court of Appeal.

Concluding on the matter, Mr. Justice Goepel held that there exists no sound judicial policy argument to support considering pre-litigation conduct in awarding special costs. He stated:

[131] ... pre-litigation conduct that gives rise to a cause of action will already be the subject of a damage award flowing from the objectionable conduct. Where a party's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency, an award of punitive damages may also follow.

...

[133] Attempting to draw the line on a principled basis as to what pre-litigation conduct should be sanctioned by special costs and which should not is, as amply demonstrated by the case law, a near impossible task...

[134] In the result, I am of the view that a bright line can and should be drawn so that judges will be able to exercise their discretion in like cases in a like manner. Special costs should be reserved to punish and deter reprehensible conduct in the course of litigation. Pre-litigation conduct should not be considered in determining whether such an award is appropriate.⁴

[Emphasis added]

Conclusion

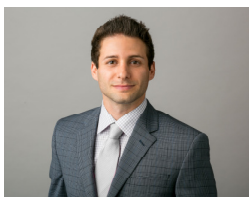
Following the Court of Appeal's decision in *Smithies*, it would appear the bright line test has been adopted: special costs are not awarded for pre-litigation conduct. Pre-litigation conduct that raises a cause of action will already be the subject of a damage award. Where a party's misconduct offends the court's sense of decency, the court may award punitive damages.

Special Costs for Pre-Litigation Conduct after *Smithies*

In the case of *Evergreen*, Bauman J.A. (as he then was), stated:

[29] The state of the law, in light of the conflicting authorities, is as expressed in *Dockside Brewing Co. Ltd.* Any further refinements in the area would require a decision by a five judge panel of this Court.

It should be noted that *Smithies* was decided by a three judge panel. Will *Smithies* provide the clarity the Court was seeking to provide, or will the case simply add to the uncertainty? Only time will tell.



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⁴ *Supra* note 1 at paras. 131 and 133 - 134