IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Pacific Hunter Resources Inc. v. Moss Management Inc.,* 2010 BCSC 283

Date: 20100305
Docket: C940939
Registry: Vancouver

Between:

**Pacific Hunter Resources Inc. and
Robert Rome, the Administrator *de bonis non*
of the Estate of Bruce Rome (Deceased)**

Plaintiffs

And

Moss Management Inc.

Defendant

Before: The Honourable Madam Justice Ross

Reasons for Judgment

Counsel for the Plaintiff Robert Rome, the Administrator *de bonis non* of the Estate of Bruce Rome (Deceased):	K. Wellburn
A. Winstanley	Appeared on his own Behalf
Counsel for the Defendant:	T. Delaney
Place and Date of Hearing:	Vancouver, B.C. November 16,17 and 27, 2009
Place and Date of Judgment:	Vancouver, B.C. March 5, 2010

Introduction

[1] This litigation arose out of an unsuccessful effort to develop and bring into commercial production certain tailings left at an abandoned mine, mill and smelter site in Anyox, British Columbia. The plaintiffs' position was that the parties entered into an enforceable agreement with respect to this development, which agreement the defendant repudiated. As a result, the plaintiffs alleged that they had been deprived of the potential profits from the venture. In the alternative, the plaintiffs advanced claims in *quantum meruit*, fraudulent misrepresentation and negligent misrepresentation. The defendant took the position that the

parties did not conclude a binding agreement and that the plaintiffs had terminated the negotiations. The defendant disputed all of the other claims advanced by the plaintiffs. I dismissed all of the plaintiffs' claims in Reasons for Judgment indexed at 2008 BCSC 960, 48 B.L.R. (4th) 90.

[2] The defendant then sought an order for special costs, to be assessed summarily, together with an order that plaintiffs' counsel be liable jointly and severally with the plaintiffs for a portion of the costs. In Reasons indexed at 2009 BCSC 1049 I ordered the plaintiffs to pay the defendant's ordinary costs at Scale B from the commencement of the action to the date of the Amended Statement of Claim filed June 21, 2001 and special costs from June 22, 2001 to the completion of trial, subject to the exception that the plaintiffs were entitled to the costs of the appeal of the order of January 27, 2004. The issues of whether there should be a summary assessment of the special costs and the liability of the solicitor for costs were adjourned at the request of the plaintiffs.

[3] The estate of Bruce Rome, one of the plaintiffs, retained counsel for the purposes of the present application. Mr. Winstanley, who represented the plaintiffs at trial and in the first stage of the costs application, represented himself on the application.

Issues

[4] There are three issues in the present application:

(a) The defendant seeks an order that costs be assessed summarily by the court. This application is opposed by the solicitor and the plaintiff estate both on the grounds that the court does not have jurisdiction to make such an order and, in the alternative, that if there is such jurisdiction, it should not be exercised in the circumstances of the present case.

(b) The defendant seeks an order that the plaintiff's solicitor be jointly and severally liable with the plaintiffs for a portion of the costs. The plaintiff estate submits that it should be liable for the costs up to the time of the amendment of the pleadings on June 21, 2001. The estate submits that it should not be liable for costs during the period when it had no administrator to give instructions and that the solicitor should be liable for the costs concerning the claims of fraud and misrepresentation. The solicitor submits that the circumstances of this case do not fall within the limited scope of situations in which it is appropriate to fix the solicitor with costs.

(c) The estate seeks a reconsideration of an aspect of the earlier ruling with respect to costs.

Summary Assessment of Special Costs

<u>Does the Court have Jurisdiction to Assess Special Costs Summarily?</u>

[5] The defendant submit that the Court of Appeal has confirmed that a trial judge has the jurisdiction to summarily assess the quantum of special costs, citing *Harrington (Guardian ad Litem of) v. Royal Inland Hospital* (1995), 131 D.L.R. (4th) 15, 69 B.C.A.C. 1 [*Harrington*] and *Graham v. Moore Estate,* 2003 BCCA

497, 186 B.C.A.C. 303 [*Graham*] and *Down (Re),* 2002 BCCA 632, 222 D.L.R. (4th) 521.

[6] In *Harrington,* with respect to the issue of the jurisdiction of the trial judge to summarily assess special costs, Hinds J.A. stated at paras. 236 and 237:

> The remaining aspect of this issue is whether the Judge erred in fixing the amount of the special costs himself rather than referring the matter to the registrar for determination.
>
> The inherent jurisdiction of the court to award special costs includes, in my view, the power to determine the amount of the special costs. If the registrar has jurisdiction to determine the amount of special costs it is not reasonable to suggest that a judge of the Supreme Court, exercising the court's inherent jurisdiction, would not have equivalent jurisdiction. That is not to say that generally a judge, rather than the registrar, should make the determination as to the amount of the special costs. But in some circumstances, such as existed in this case, it is appropriate for the Judge, who had been involved on seven separate days dealing with the application to obtain court approval of the infant settlement and approval of the solicitor's contingency fee, to determine the amount of the contingency fee and the percentage thereof payable to the Public Trustee. The Judge did not err in respect of this aspect of the third issue.

[7] In *Graham* Donald J.A., speaking for the court, stated at para. 46:

> It is well settled that a trial judge has the authority to determine the quantity of the award although it is a power to be exercised sparingly: *Harrington v. Royal Inland Hospital* (1995), 131 D.L.R. (4th) 15 (B.C.C.A). As in *Harrington*, the trial judge in the present case did not want to burden the parties with the task of acquainting the Registrar with the complexities of the case when he was fully familiar with all aspects of it.

[8] The defendant cites decisions in which the trial court has assessed special costs summarily; namely, *Insurance Corporation of British Columbia v. Eurosport Auto Co. Ltd.,* 2008 BCSC 935 [*Eurosport*] and *Edwards v. Bell,* 2004 BCSC 399 [*Edwards*].

The estate and the solicitor submit that, notwithstanding the appellate authority to the contrary, the court does not have jurisdiction to assess special costs summarily. It is submitted that the court can exercise its inherent jurisdiction only so long as it can do so without contravening any statutory provision. It is submitted that the Rules of Court have legislative effect, see *Re Rosandik and Manning (*1978), 83 D.L.R. (3d) 598 (B.C.S.C.).

[9] Rules 57(13) and (13.1) of the *Rules of Court*, B.C. Reg. 221/90, provide:

> *Lump sum costs*
>
> (13) With the consent of the parties, the court may fix a lump sum as the costs of the whole proceeding, either inclusive or exclusive of disbursements and expenses.
>
> *Lump sum costs of interlocutory application*
>
> (13.1) The court may award lump sum costs of an interlocutory application and may
>
> > (a) fix those costs, either inclusive or exclusive of disbursements, or
> >
> > (b) order that the costs amount be in accordance with Schedule 3 of Appendix B and fix the scale of those costs in accordance with section 2(2), (4.1) and (4.2) of that Appendix.

[10] Counsel submits that it follows that the court cannot fix the lump sum costs of the action as an exercise

of inherent jurisdiction because to do so would contravene Rule 57(13) which requires the consent of the parties, citing *GWL Properties Ltd. v. W.R. Grace & Co. of Canada* (1993), 14 C.P.C. (3d) 91 (B.C.S.C.) [*GWL*], in which the court concluded that absent consent, the court could not award lump sum costs with respect to the whole proceeding.

[11] The solicitor submits that both *Edwards* and *Eurosport* relied upon *Harrington*. In neither case was Rule 57(13) or *GWL* addressed. The solicitor submits further that both the *Harrington* and *Graham* judgments were given *per incuriam*, having been decided without reference to Rule 57(13). Accordingly, the solicitor submitted, it would not be in the interests of justice for this court to follow them.

[12] At the time this application was heard, counsel advised that the same submissions with respect to jurisdiction had been made to Chief Justice Bauman in the other action arising out of the Anyox properties, *Buchan v. Moss Management,* 2010 BCSC 121 [*Buchan*], and that the matter was under reserve. The Chief Justice has now rendered his decision, and with respect to the issue of jurisdiction, he concluded at para. 20 as follows:

> The thrust of Mr. Delaney's submission is that Rule 57(13) has application only to the fixing of party and party costs in a sum certain rather than following an item by item assessment under the tariff. This is made clear in the companion provision found in Rule 57(13.1) which refers specifically only to Schedule 3 of Appendix B.
>
> Essentially, there is a distinction to be drawn between fixing "a lump sum as the costs" of the whole or a portion of a proceeding (Rules 57(13) and (13.1)) and rendering a bill for special costs "on a lump sum basis" under Rule 57(34). This was a distinction drawn by Justice Burnyeat in *Jack Pine Forest Products Ltd. (Ruling No. 1)*, 2004 BCSC 20, 27 B.C.L.R. (4th) 332 (see in particular para. 16). In the former, a line by line assessment is foregone by the fixing of a lump sum. In the latter situation, an assessment of a lump sum is carried out in light of the considerations set out in Rule 57(3).
>
> I agree with this submission. I note, in conclusion on this issue, that the plaintiff relied on the Court of Appeal's decision in *Snarpen Contracting Ltd. v. Arbutus Bay Estates Ltd.*, [1996] B.C.J. No. 2370 (C.A.). I find no assistance in that decision as it was a case where the court awarded party and party costs and declined to fix them as a lump sum under Rule 57(13).

[13] I conclude, for the reasons in *Buchan,* and on the authorities cited by the defendant, that there is jurisdiction to make the award sought.

<u>No Bill of Costs</u>

[14] The solicitor submits that the application is deficient because no bill for special costs has been delivered. Rather the defendant has delivered a Bill of Costs for the Scale B Costs awarded from the commencement of the action to June 2001 and a series of accounts rendered by the defendant's solicitor to the defendant with respect to the balance of the period.

[15] The same objection was made in *Buchan.* The Chief Justice concluded at para. 12:

> Mr. Turriff, counsel for Mr. Buchan, submits that the Moss defendants simply have not put a proper "bill of special costs" before the court. I disagree and I accept Mr. Delaney's submission for the Moss defendants. He notes that there is no prescribed form for a bill of special costs (unlike that prescribed for a party/party bill – Form 67) and he cites this passage on *Practice Before the Registrar*

(2009: CLEBC):

> A bill of special costs is prepared in the same form as a bill from a lawyer to her or her own client under the *Legal Profession Act*. This means that a single fee may be stated as a lump sum (see Rule 57(34)), as opposed to stating fees for components of the work done. A lump sum bill must contain a description of the nature of the services and of the matter involved, as would, in the opinion of an assessing officer, afford any lawyer sufficient information to advise a client about the reasonableness of the charge made (Rule 57(35); but see *Wright v. Wright* (1984), 58 B.C.L.R. 89 (C.A.)). Particulars may be demanded, and they may be ordered if no sufficient description is given.

To the same effect, the editors Fraser, Horn & Griffin, *The Conduct of Civil Litigation in British Columbia*, 2d ed. (Markham: LexisNexis, 2007) at 33-26 state:

> A bill for special costs is presented in the same form as a bill between a solicitor and his client under the *Legal Professions Act*.

There would be little utility in requiring the Moss defendants to simply reproduce the solicitor/client accounts with the heading "Bill of Special Costs". I would not give effect to this objection.

[16] For the reasons given by the Chief Justice in *Buchan*, I do not give effect to this objection.

Discretion

[17] In the alternative, both the solicitor and the estate submit that even if the court does have jurisdiction to assess special costs it should not exercise that discretion in the present case. The amount at issue is substantial. It is submitted that it would be unfair to the plaintiffs if they are not given the opportunity to have the costs reviewed by the registrar who has particular expertise and experience in the assessment of costs, see *Genesse Enterprises Ltd. v. Rached*, 2001 BCSC 1172 and *Canadian National Railway Co. v. A.B.C. Recycling Ltd*., 2005 BCSC 1559, 47 B.C.L.R. (4th) 185.

[18] I am mindful that the trial judge's jurisdiction to assess special costs summarily is one to be exercised sparingly and conscious of the special expertise of the registrar in this area. However, I am satisfied that the present case represents one of the special circumstances in which a summary assessment is appropriate. In particular I note:

(a) the litigation has been before the courts since 1994;

(b) the trial occupied 17 days;

(c) the case had two aspects, the original claim in contract or in the alternative, *quantum meruit* and the tort claim alleging fraudulent misrepresentation which was added in 2001. The contract and *quantum meruit* claims were straightforward. It is unlikely that they would have required more than 3 days to complete. Thus, the majority of time at trial was consumed with the tort action. However, the only significant damages that could have been recovered were in relation to the lost opportunity claim in contract. The total amount claimed by the plaintiffs in relation to the expenses incurred in reliance on the contract was $44,000. Thus, the damages potentially flowing from the tort claim were modest and in essence duplicated those claimed in *quantum meruit*.

(d) the costs application has occupied four days of hearing. As part of this process Mr. Winstanley filed and spoke to several volumes of exhibits tracing the litigation back to its inception and covering each of the applications along the way. A good part of these submissions could realistically only be viewed as an attempt to re-litigate earlier motions and indeed issues at trial.

[19] This litigation has already consumed considerable judicial resources. Since the amendments introducing the tort claims, it cannot be said that the litigation has been conducted by the plaintiffs with any discernable attention to efficiency or considerations of risk and reward. There is every reason to believe that a reference to the registrar would result in further protracted hearings during which the registrar would have to duplicate a meticulous reconstruction of the progress of this litigation that would likely consume days if not weeks of hearing time. I echo and adopt the comments of the Chief Justice in *Buchan* – *"...*to what end?" – and conclude that this is one of the special cases in which a summary assessment is appropriate and in the interests of justice.

[20] Counsel submitted the following chart with respect to the costs from June 2001 to the completion of trial:

1. Actual Legal Costs	The actual legal fees for the time frame over which special costs were $164,804.50. Fees plus disbursements and taxes total $206,353.52.
2. The rough-and-ready ($5,000 per half day) approach	The $5,000 per half day approach leads to $170,000.00 for fees based on a 17 day trial. This is $5,200 more than the defendant's actual fees. Taxes and disbursements would be added to these amounts.
3. The percentage of actual legal costs approach	Actual legal fees were $164,804.50. Thus 75% of this amount equals $123,603.37. 90% euqls $148,324.05. Taxes and disbursements of would be added to these sums.

[21] With respect to the factors listed in Rule 57(3) I note that the litigation had a number of features which added to the complexity including the length of time that it took to prosecute the action, legal issues surrounding the introduction of Mr. Rome's evidence and numerous evidentiary issues. The case required experienced counsel. With respect to the amount involved, as noted earlier the majority of the time was consumed with the tort issues for which the damages if the claims had succeeded would have been modest. However, the applicant was a defendant. Certainly no criticism with respect to the economy of the litigation can be laid at its feet. With respect to that issue, as already noted this was a relatively lengthy proceeding with numerous interlocutory applications. In my view, the conduct of the plaintiffs significantly lengthened the

proceedings in particular with respect to the manner in which the tort claims were prosecuted. The issue was clearly of importance to the defendant.

[22] In all of the circumstances and having regard to the factors identified in Rule 57(3) I am satisfied that a special costs order of 80% of actual fees and disbursements plus tax for the fees and disbursements incurred from June 2001 to the end of trial represents costs reasonably necessary to conduct the proceedings. The defendant is entitled to an order for special costs calculated in accordance with these reasons.

Liability of the Solicitor for Costs

[23] The court has jurisdiction to award costs against a solicitor personally. Rules 57(37) and (38) provide:

> (37) Where the court considers that a solicitor for a party has caused costs to be incurred without reasonable cause, or has caused costs to be wasted through delay, neglect or some other fault, the court may do any one or more of the following:
>
> (a) disallow any fees and disbursements between the solicitor and the solicitor's client or, where those fees or disbursements have been paid, order that the solicitor repay some or all of them to the client;
>
> (b) order that the solicitor indemnify his or her client for all or part of any costs that the client has been ordered to pay to another party;
>
> (c) order that the solicitor be personally liable for all or part of any costs that his or her client has been ordered to pay to another party;
>
> (d) make any other order that the court considers appropriate.
>
> Costs may be ordered without assessment
>
> (38) Where the court makes an order under subrule (37), the court may
>
> (a) direct the registrar to conduct an inquiry and file a report with recommendations as to the amount of costs, or
>
> (b) subject to subrule (41), fix the costs with or without reference to the tariff in Appendix B.

[24] The case law emphasizes that such orders are to made only in the clearest of cases. The issue of a solicitor's personal liability for costs was considered by the Court of Appeal in *Young v. Young* (1990), 50 B.C.L.R. (2d) 1, 75 D.L.R. (4th) 46 (C.A.), varied [1993] 4 S.C.R. 3 [*Young* cited to B.C.L.R.] in which the judgment of Cumming J.A. was the judgment of the court with respect to the issue of costs. The trial judge had granted a costs order against the solicitor on the basis that he had prolonged the trial, brought in irrelevant evidence, misled the court and subjected the court to unwarranted abuse and insult. The Court of Appeal set aside the costs order against the solicitor. Cummings J.A., at 69-70, expressed the following view:

> Because of the compensatory nature of an award of costs pursuant to R. 57(30), the rule should be interpreted in a manner consistent with the traditional immunity of a barrister from suit, as laid down in *Rondel v. Worsley*, supra, and as applying only to matters other than what may be described as counsel work.
>
> ....
>
> It follows that an award of costs pursuant to R. 57(30) should not be made against a solicitor

> personally in respect to his role in the management and conduct of a case in court or in the preliminary work which is related to the conduct of the case in court which are his functions as a barrister.

[25] With respect to the issue of exposure of the solicitor to costs on the basis that the proceeding brought on behalf of the client lacked merit, Cumming J.A. stated at 71:

> An award of costs should not be made against a solicitor personally on the ground that proceedings brought on behalf of a client lack merit unless it is beyond doubt, not only that the proceedings are devoid of merit and that the solicitor knew or ought to have known them to be so, but also that the responsibility for continuing with the proceedings despite their lack of merit lies with the solicitor, rather than the client. Firstly, a solicitor should not usurp the function of the court by prejudging a client's case. Secondly, it will generally be impossible for a solicitor to defend a charge that he or she is responsible for proceeding with a meritless claim, by showing that the client has been advised of the improbability of success and has nevertheless insisted on proceeding, without a violation or waiver of solicitor-client privilege: see: McGowan, annotation to *Naeyaert v. Elias* (1985), 4 C.P.C (2d) 298 (Ont. H.C.).

[26] The Supreme Court of Canada upheld the decision of the Court of Appeal with respect to the issue of costs against the solicitor in *Young v. Young*, [1993] 4 S.C.R. 3. McLachlin J., as she then was, gave the majority judgment with respect to this issue, stating at 135-6:

> The Court of Appeal held that no order for costs should have been made against Mr. How. There is no need to repeat that entirely satisfactory analysis. The basic principle on which costs are awarded is as <u>compensation</u> for the successful party, not in order to punish a barrister. Any member of the legal profession might be subject to a compensatory order for costs if it is shown that repetitive and irrelevant material, and excessive motions and applications, characterized the proceedings in which they were involved, and that the lawyer acted in bad faith in encouraging this abuse and delay. It is clear that the courts possess jurisdiction to make such an award, often under statute and, in any event, as part of their inherent jurisdiction to control abuse of process and contempt of court. But the fault that might give rise to a costs award against Mr. How does not characterize these proceedings, despite their great length and acrimonious progress. Moreover, courts must be extremely cautious in awarding costs personally against a lawyer, given the duties upon a lawyer to guard confidentiality of instructions and to bring forward with courage even unpopular causes. A lawyer should not be placed in a situation where his or her fear of an adverse order of costs may conflict with these fundamental duties of his or her calling. [Emphasis in original.]

[27] In *International Hi-Tech Industries Inc. v. FANUC Robotics Canada Ltd.,* 2007 BCSC 1724, 49 C.P.C. (6th) 233, Madam Justice Ballance summarized the principles to be applied and concluded at para. 46:

> By its very nature a trial is a confrontational process. Lawyers are entitled to adopt strategies and advocate positions in the interests of their clients even where, in the end, they turn out to be ill-conceived, unjustified or otherwise misguided. Counsel's apparent mishandling of a case or aspects of it may be due to any number of factors such as incompetence, lack of experience or general ineptitude; or it may be a reflection of the client's instructions. Such conduct will not, of itself, justify an award of special costs against the lawyer. The impugned conduct needs to have a more deplorable or corrupt feature, which marks it as conduct that is reprehensible, or an abuse of process or contemptuous in order for counsel's conduct to descend into the grubby realm where there is personal liability for costs.

[28] Costs were awarded against solicitors for advancing an application in circumstances in which the

materials were so deficient that it was doomed to fail in *World Wide Treasure Adventures Inc. v. Trivia Games Inc.* (1987), 16 B.C.L.R. (2d) 135 (S.C.) in which Mr. Justice Gibbs stated at 140:

> It is for these reasons that I have described the supporting affidavit as hopelessly deficient. On that evidence the application could not have been successful, even if the defendants had not appeared at all. The plaintiff's solicitors had two choices: if the evidence necessary to make out at least an arguable case could not be produced, the application ought never to have been made; alternatively, if an arguable case could be made out, there was a duty to ensure that the evidence to support the argument was contained within the supporting affidavit. The solicitors did not select either alternative. Instead they proceeded to file application material which comes perilously close to being deserving of the description of frivolous. In any event, regardless of the choice of descriptive adjective, in my opinion, the solicitors were negligent in the performance of their duty to their client, and in that connection I rely upon the very erudite judgment of the Supreme Court of Canada in *Central Trust v. Rafuse*, [1986] 2 S.C.R. 147 ... delivered by Mr. Justice Le Dain on 9th October 1986.

[29] Costs for a portion of the action were awarded against the solicitor in *Chaplin v. Sun Life Assurance Co. of Canada*, 2004 BCSC 116, 1 C.P.C. (6th) 271, leave to appeal ref'd 2004 BCCA 361, in which Mr. Justice Holmes concluded at para. 65:

> I agree with the submissions of plaintiff's counsel this action became enlarged beyond the one instructed by Ms. Chaplin and she ought to be entitled to relief pursuant to Rule 57(37).
>
> The evidence supports the view that in essence Solicitor Pierce "hijacked" the plaintiff's action and without authorization promoted what he envisaged as an enormous potential award of punitive damages for his own benefit as a stakeholder through his contingency fee. He was on a frolic of his own.
>
> In my view Solicitor Pierce did not properly advise Mrs. Chaplin of the very significant cost penalty she would incur if his similar fact and dishonest bonus plan allegations failed. In fact, he hid the risk from her. On inquiry as to costs he repeatedly told her not to worry about them. He told her the action was good for a multi-million dollar award.

[30] While the court must be mindful of the difficulty the solicitor faces in responding because of his duty of confidentiality, there have been cases in which, although there has been no waiver of solicitor client privilege, on the basis of inference from the evidence, the court has concluded that an award of costs against the solicitor personally is appropriate, see *Ross v. Henriques*, 2007 BCSC 1381, leave to appeal ref'd 2008 BCCA 282 and *Nazmdeh v. Ursel*, 2008 BCSC 1632, supplementary reasons at 2009 BCSC 19, leave to appeal granted 2009 BCCA 135.

[31] The defendant and the estate advance several grounds in support of the submission that the solicitor should be held liable for a portion of the special costs. First it is submitted that the evidence supports a conclusion that the solicitor "highjacked" the plaintiffs' action. Prior to his retainer in the present proceedings, Mr. Winstanley acted for Mr. Buchan in the litigation against Moss Management and other owners of Moss Management and various mining assets in Anyox. Curiously, Mr. Buchan paid a portion of Mr. Winstanley's retainer in this matter at the early stages of his representation.

[32] The plaintiffs' action in this proceeding had been dormant for several years prior to Mr. Winstanley being retained. The defendant brought an application to dismiss the claim action for want of prosecution. Mr. Bruce Rome filed an affidavit in which he deposed that Mr. Winstanley told him about facts that formed

the basis of the tort claims advanced against Moss Management. After Bruce Rome died, Mrs. Rome instructed for the plaintiffs in her capacity as executrix of the estate. Mrs. Rome had no first-hand knowledge of the matters in issue. Thus, it is submitted both the information and the impetus to commence and continue the tort claims originated with counsel not the client.

[33] However, while it is clear that Mr. Winstanley told Mr. Rome about the facts which formed the basis of the tort claims, it is also the case that Mr. Rome deposed that certain representations were made to him with respect to the ownership of Moss Management shareholdings that also formed the basis of the tort claims. So it is not the case that the only information in relation to the tort claims came from the solicitor.

[34] Counsel submits that the impetus and the evidence for the advancement of the tort claims originated with the solicitor and not the client. In counsel’s submission, throughout the trial it was clear that there was an attempt to use the proceedings to prove a conspiracy and fraud had been perpetuated against Mr. Buchan or Prospectors Airways as opposed to a wrong against the plaintiffs. It is certainly the case that the majority of the evidentiary rulings concerned an attempt by Mr. Winstanley to introduce evidence relating to matters that were clearly relevant to the Buchan litigation but which I held did not fall within the scope of the issues defined by the pleadings in the present litigation.

[35] Second, it is submitted that even if the solicitor had instructions to pursue the tort claims, doing so amounted to an abuse of the court’s process and no officer of the court should pursue an action for another or for an improper purpose. In support of this counsel makes reference to the statement made by Mr. Winstanley during closing arguments that the tort claims were brought to expand the discovery of documents. With respect to this submission it is the case that Mr. Winstanley did make this statement. However during the course of the trial and the costs proceedings he advanced other reasons for bringing the tort claims. Accordingly, I think that it is not fair to conclude that he conceded that discovery was the only reason for advancing the claims. As well, it is significant that Mr. Rome deposed to certain representations that formed the basis of the tort claims. Thus, one could not conclude that there was no evidentiary foundation for the tort claims.

[36] Third, it is submitted that the solicitor caused costs to be incurred without reasonable cause by repeatedly attempting to lead evidence contrary to the court’s rulings. Counsel submits that in addition, despite numerous evidentiary rulings by the Court throughout the trial, the solicitor, time and again, attempted to lead evidence which the Court ruled was inadmissible and not relevant. Three issues arise from this conduct. First, it is submitted this conduct supports the inference the tort claims were part of the solicitor’s personal crusade for which he lost any sense of objectivity. Second, it is submitted that advancing the tort claims amounted to an abuse of the court’s process as the court was being used for an extraneous and irrelevant purpose. Third, this conduct had the effect of unnecessarily and significantly increasing the length of the trial, and accordingly, the costs.

[37] The estate submits that the solicitor should be personally liable for the costs in relation to the tort action because the tort claim was either wholly without merit or such that no properly informed client would have instructed the solicitor to proceed. This submission is based upon the fact that while the prosecution of

the tort claim greatly expanded the length of the trial and exposed the plaintiffs to the possibility of an award of special costs in the event the claims in fraud were not made out, the damages recoverable if the claim succeeded were modest and in any event largely the same as those recoverable in the *quantum meruit* claim. In other words, the tort claims exposed the plaintiffs to great risk and no appreciable potential gain.

[38] Finally, the estate submits that the solicitor acted during a period after Mrs. Rome died when there was no administrator to give instructions and did not seek appropriate directions. However, the evidence in the trial was completed on December 21, 2007. Mrs. Rome died after the evidence was closed. When counsel next attended for argument on March 27, 2008 counsel informed the court that Mrs. Rome had died and sought an order to replace Mrs. Rome with Robert Rome as administrator of the estate.

[39] I have considerable sympathy for the position advanced by the defendant and the estate. However, in the present case there has been no waiver of solicitor client privilege. Accordingly, it is not possible to conclude, as the court did in *Chaplin* that the clients did not receive appropriate advice with respect to the risks of advancing the tort claims. In this case, unlike *Chaplin,* the solicitor had no personal financial interest in the prosecution of the tort claim. There is no evidence of bad faith, deceit or dishonesty. There is no evidence of conduct that is, to use the language of Ballance J., “deplorable or corrupt”, an abuse of process, or contemptuous. The issue with the tort claims is not so much that they were doomed to fail but that it did not appear to make sense to advance them in terms of the relative risk and reward. However, in my view, the evidence does not meet the standard articulated by Cumming J.A. in *Young.*

[40] I have concluded that this is not one of the rare circumstances in which it is appropriate to order that counsel be personally responsible for any portion of the special costs.

Reconsideration

[41] The estate sought to have the court reconsider a portion of the earlier ruling with respect to the party and party costs. The order has been entered. The matter is one that was addressed in submissions by counsel at the previous hearing. None of the circumstances in which a court retains jurisdiction to re-visit a matter once the order has been entered are present, see *Buschau v. Rogers Communications Inc.*, 2004 BCCA 142, 237 D.L.R. (4th) 260. In the circumstances, it would not be appropriate to re-consider this issue.

Summary

[42] In the result, I have concluded that the defendant will have an order for 80% of actual fees and disbursements plus tax for the fees and disbursements in relation to the costs of the action from June 21, 2001 to the end of trial. The solicitor will not be liable for any portion of the costs awarded.

“Ross J.”