SUPREME COURT OF YUKON

Citation: Golden Hill Ventures Limited Partnership v. Ross Mining Limited and Norman Ross, 2012 YKSC 18

Date: 20120315
Registry: Whitehorse

S.C. No. 09-A0014

Between:

NORMAN ROSS

PLAINTIFF

And

ROSS MINING LIMITED, MACKENZIE PETROLEUMS LTD.
AND GOLDEN HILL VENTURES LIMITED PARTNERSHIP

DEFENDANTS

S.C. No. 09-A0087

Between:

GOLDEN HILL VENTURES LIMITED PARTNERSHIP

PETITIONER

And

ROSS MINING LIMITED, MACKENZIE PETROLEUMS LTD.
AND NORMAN ROSS

RESPONDENTS

Before: Mr. Justice R.S. Veale

Appearances:

Murray J. Leitch	Counsel for Norman Ross
Michael Morgan	Counsel for Golden Hill Ventures Limited Partnership
Jocelyn Barrett	Counsel for Mackenzie Petroleums Ltd.

REASONS FOR JUDGMENT
(COSTS)

INTRODUCTION

[1] Norman Ross applies for special costs under Rule 60(1) or, in the alternative, costs on Scale C and increased costs pursuant to s. 2(e) of Appendix B of the *Rules of Court*. Mackenzie Petroleums Ltd. seeks costs on Scale B.

[2] These Reasons will determine the scale of costs. To put this application in a monetary context, counsel for Norman Ross seeks special costs in the approximate amount of $235,000 or some percentage of actual fees, or, if I decline to award special costs, either $78,200 on Scale C or $50,000 on Scale B. I am also urged to exercise my discretion to award increased costs under Scale C; in which case the costs award would be $117,300. The quantum of costs will be argued once the scale is determined. The sum of $75,000 has been previously ordered as security for costs.

[3] The Reasons for Judgment discharging and vacating the claim of lien of Golden Hill Ventures Limited Partnership ("Golden Hill") are cited as *Golden Hill Ventures Limited Partnership and Norman Ross*, 2011 YKSC 91 (the trial judgment).

SPECIAL COSTS

[4] In *Young v. Young*, [1993] 4 S.C.R. 3, McLachlin J., as she then was, set out the principle for awarding special costs (formerly known as solicitor-client costs) at page. 28 (para. 251 QL):

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

[5] In *Brosseuk v. Aurora Mines Inc.,* 2008 YKSC 18, costs were awarded in this court for pre-litigation conduct involving the unauthorized transfer of mining claims. The conduct of the petitioner in that case was described at para. 31:

> It is always a serious matter when one party appropriates property in a completely unauthorized manner “to steal a march”, so to speak, against an adversary. In this case, there was no legal justification for Mr. Brosseuk to transfer 50% of the claims comprising the Aurora mine to himself. It would certainly be appropriate to commence an oppression proceeding as he has now done, but fraudulent would not be too strong a word for the unauthorized transfer of the placer claims. There appears to be no justification for the transfer except as a power play to pressure Mr. Oppenheimer or to interfere with the Option Agreement.

[6] I found this conduct to be reprehensible and considered that “reprehensible”, “scandalous” or “outrageous” remain the standards to be applied. As Lambert J.A. stated in *Garcia v. Crestbrook Forest Industries Ltd.*, [1994] B.C.J. No. 2486 (B.C.C.A.) at para. 17:

> … it is my opinion that the single standard for the awarding of special costs is that the conduct in question properly be categorized as "reprehensible". As Chief Justice Esson said in Leung v. Leung, the word reprehensible is a word of wide meaning. It encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke. Accordingly, the standard represented by the word reprehensible, taken in that sense, must represent a general and all encompassing expression of the applicable standard for the award of special costs. (my emphasis)

[7] The circumstances set out in *Garcia* that justified an award of special costs included the following:

a) improper allegations of fraud;

b) improper motive for bringing the proceedings, such as imposing a burden on a weaker party;

c) improper conduct in the proceedings themselves;

d) material non-disclosure or misrepresentation;

e) obtaining an order without notice when the situation required notice.

[8] A more detailed list of circumstances that can support a special costs award is found in *Mayer v. Osborne Contracting*, 2011 BCSC 914, at para. 11:

> (a) where a party pursues a meritless claim and is reckless with regard to the truth;
>
> (b) where a party makes improper allegations of fraud, conspiracy, fraudulent misrepresentation, or breach of fiduciary duty;
>
> (c) where a party has displayed "reckless indifference" by not recognizing early on that its claim was manifestly deficient;
>
> (d) where a party made the resolution of an issue far more difficult than it should have been;
>
> (e) where a party who is in a financially superior position to the other brings proceedings, not with the reasonable expectation of a favourable outcome, but in the absence of merit in order to impose a financial burden on the opposing party;
>
> (d) where a party presents a case so weak that it is bound to fail, and continues to pursue its meritless claim after it is drawn to its attention that the claim is without merit;
>
> (e) where a party brings a proceeding for an improper motive;
>
> (f) where a party maintains unfounded allegations of fraud or dishonesty; and
>
> (g) where a party pursues claims frivolously or without foundation.

[9] This list is by no means exhaustive.

[10] However, it should also be noted that special costs are not merely a punitive sanction based on misconduct but are also intended “to substantially indemnify a party for costs to which he or she has been put”. See *Everywoman’s Health Care Centre*

Society v. Bridges (1991), 54 B.C.L.R. (2d) 294 (C.A.) at para. 16 and *Bradshaw v. Stenner*, 2012 BCSC 237, para. 9.

[11] The case of *Evergreen Building Ltd. V. IBI Leaseholds Ltd*, 2009 BCCA 275, is particularly instructive for the case at bar. In that case Evergreen owned a commercial office building. Evergreen was controlled by a single shareholder, John Laxton. Evergreen wished to convert the building to residential use and applied for city approval to convert the building. In order to make the conversion, Evergreen had to bring IBI's commercial lease to a premature end and IBI protested. Evergreen commenced an action for a declaration that a breach of the IBI lease would give rise only to a remedy in damages rather than specific performance. The first-instance trial judge decided that Evergreen had no right of re-entry and issued a permanent injunction against it, effectively preventing the conversion of the building. Although Evergreen successfully appealed the decision in November 2005, an interim injunction nevertheless remained in place. In January 2006, Evergreen stopped paying the mortgage on the building. Mr. Laxton knew this would cause the lender to foreclose on the property. While foreclosure proceedings were implemented, changes in city bylaws ultimately persuaded Evergreen to maintain commercial space in the building and IBI remained as a tenant.

[12] IBI subsequently commenced a lawsuit seeking damages relating to alleged breaches of the lease and the tort of nuisance. While the trial judge dismissed IBI's claim for damages against Evergreen, he nonetheless awarded special costs to IBI as a rebuke to Evergreen's conduct with respect to the foreclosure. The issue before the Court of Appeal was whether it is appropriate to award special costs in respect of conduct outside the litigation that does not found the cause of action.

[13] Bauman J.A. in the Court of Appeal reversed the trial judge on the issue of special costs, finding that the misconduct was outside the litigation and therefore not properly the subject of a special costs award. Bauman J.A. concluded at paras. 33 and 34:

> 33. What the learned judge has done is to penalize conduct which he found "reprehensible" but which he also found gave rise to no actionable wrong. As I have said, the judge found no breach of the covenant of quiet enjoyment, no breach of the lease agreement generally, and no basis for an award of punitive damages. Those findings, in my view, preclude an award of special costs in respect of conduct outside the litigation which may be, in the judge's view, deserving of reproof or rebuke, but which gives rise to no compensable legal wrong.
>
> 34 Further, I agree with Evergreen's alternative submission that in visiting the consequences on Evergreen, the judge made a palpable and overriding error in his findings of fact. It was not Evergreen, but Mr. Laxton, who decided to stop funding the Evergreen mortgage. Evergreen relied totally on Mr. Laxton for funding. While Mr. Laxton controlled Evergreen, no case for piercing the corporate veil was made before the learned judge. Yet that is the effect of his order - the conduct of Mr. Laxton becomes that of Evergreen.

[14] The case before me is somewhat similar, in that the conduct complained of is that of Mr. Rudolph as the owner of both Ross Mining Limited and Golden Hill Ventures, however it is distinguishable to the extent that his creation of a lien against the property of Ross Mining Limited is the subject of the litigation. I would not categorize the conduct in the case at bar as being outside the litigation.

BACKGROUND

[15] This court action was brought by Golden Hill to validate its claim of lien against a placer gold mine on Dominion Creek (“the mine”) which is located south of Dawson City, Yukon and owned by Ross Mining Limited (“RML”). A more extensive background is set

out in the trial judgment, however the unusual feature of this case is that Golden Hill and RML are both owned by Jon Rudolph.

[16] I have presided over 10 of the 11 case management conferences conducted before the trial of this matter. These case management conferences have proven a very useful tool and have helped the parties avoid interlocutory applications and move the case to trial.

[17] As set out in the trial judgment, 38890 Yukon Inc., a company also owned by Jon Rudolph, purchased the mine from Norman Ross and his wife for a cash payment of $2 million dollars and a further $7 million by way of a Loan Agreement dated November 1, 2005 ("the Ross Loan Agreement"). The Ross Loan Agreement was between Norman Ross as lender and RML and 33890 Yukon Inc. as borrower. At para. 14 of the trial judgment, I found that Jon Rudolph was the principal owner and sole controlling and operating mind of:

> (a) Golden Hill Ventures Ltd. which Jon Rudolph used to negotiate the purchase of the gold mine;
>
> (b) 33890 Yukon Inc. owned by Jon Rudolph and used to complete the purchase of RML on November 1, 2005;
>
> (c) Golden Hill Ventures Partnerships Limited, which is a limited partnership with Golden Hill Ventures Ltd. as its general partner;
>
> (d) Ross Mining Limited, which is an amalgamation of the company originally owned by Norman Ross and 33890 Yukon Inc., the latter being the numbered company used by Jon Rudolph to purchase the gold mine on Dominion Creek.

[18] The Ross Loan Agreement contained important covenants for Ross Mining Limited to protect and secure the Ross Loan Agreement (see para. 8 of the trial decision):

> (a) RML agreed to take all necessary actions to ensure that the Ross Loan and security for it will rank ahead of other indebtedness;
>
> (b) RML agreed to keep proper books and records at all times for all financial transactions;
>
> (c) RML would not create, incur, assume or suffer any indebtedness to exist (except for Permitted Liens which are not applicable here);
>
> (d) RML would not permit repayment of a subordinated debt, except for certain loans or credit arrangements to fund the purchase price, unless the repayment was not reasonably anticipated to prevent RML from repaying the Ross Loan;
>
> (e) RML would not create, incur or permit to exist any lien, charge, security interest or encumbrance on the property and assets of RML (except the Permitted Liens);
>
> (f) RML would not make any investments, loan advances or extensions of credit without the prior written consent of Norman Ross.

[19] I interject to say at this point that it is the breach of these covenants, albeit by Golden Hill rather than RML, that has especially incensed Norman Ross and his counsel.

[20] The mine was operated in the name of RML but the operations were financed by Golden Hill by way of a Consolidated Loan Agreement (“CLA”) dated November 1, 2006, whereby Golden Hill provided loans for working capital to Ross Mining Limited. The amount owed to Golden Hill was $4,215,414.12 as of the completion of the 2006 mining season. The CLA was signed by Jon Rudolph on behalf of both companies and it contained a clause that deemed the financial records of Golden Hill to be conclusive evidence of RML’s indebtedness. It appears, and it is an important part of Norman Ross’ special costs submission, that the CLA was designed so as not to offend RML’s

covenants under the Ross Loan Agreement listed in para. 18 above. I add that the Financial Statements of RML and Golden Hill treated the indebtedness as a long-term liability from RML to Golden Hill.

[21] RML defaulted under the Ross Loan Agreement and the total sum owing to Norman Ross, the original mine owner, was $3,401,713.40 as of July 2009. A Consent Order was filed on June 9, 2009, to provide a monitorship for the mine permitting Jon Rudolph time to arrange for financing to pay out Norman Ross. That did not happen and I ordered the appointment of a Receiver and Manager on July 29, 2009.

[22] In my Reasons for Judgment on July 29, 2009, cited as *Ross v. Ross Mining Limited,* 2009 YKSC 55, I stated the following at para. 18:

> Counsel for RML submits that the application for the appointment of a Receiver should be adjourned for a further unspecified period of time, with the Monitor in place to develop a marketing plan, to permit RML to conclude its re-financing. Counsel submits that the appointment of a Receiver sends a clear message that precludes RML's ability to re-finance. He further submits that the mine is not in operation so there is no danger of depleting the placer gold in place or risking the attachment of further liens to the Property. He submits that there is no prejudice to Ross in an adjournment but great prejudice to Mr. Rudolph's investment of $6 million and the investment of GHV [Golden Hill]. Counsel for RML concedes that the re-financing from the 0847390 Loan Agreement as amended has not come to fruition but submits that RML is as close as it has ever been to re-financing. (my emphasis)

[23] On August 27, 2009, Golden Hill filed a claim of lien against RML in the amount of $4.7 million dollars. Jon Rudolph swore in an attached affidavit that the facts set forth were true and correct.

[24] On October 21, 2009, Golden Hill filed an amended claim of lien for over $6.7 million, which on its face was out of time. On the application of Norman Ross, I struck

the amended claim of lien but allowed the original claim of $4,713,543 to proceed in *Golden Hill v. Ross Mining Limited and Norman Ross*, 2009 YKSC 80. However, in that decision, I dismissed the summary judgment application of Norman Ross at para. 13 as follows:

> It is my view that on the face of the pleadings filed there is no basis upon which the pleadings should be struck on the ground that the claim is bound to fail. The pleadings show a cause of action, and could certainly be amended if necessary to clarify the point that the CLA is a separate agreement from a claim upon which the lien is based, that being the provision of work and services. In other words, it is perfectly reasonable on these pleadings that the CLA and the claim of lien as pleaded provide sufficient material facts to support a cause of action. It is not appropriate under Rule 18(6) to weigh the evidence to make a determination on the merits. It is not, in my view, a case that is bound to fail on the pleadings. (my emphasis)

[25] The Yukon Court of Appeal dismissed Mr. Ross' appeal under Rule 18 with the following analysis in *Ross v. Golden Hill Ventures Limited Partnership*, 2010 YKCA 4, at para. 16:

> … Here, the appellant points to terms of the inter-company agreements and also parts of the financial statement reflecting these inter-corporate accounts that would seem to support his assertion that the relationship between the parties is solely that of lender and borrower. However, GHVLP asserts that there is a separate contractual arrangement in which, quite apart from the loan agreements, there is an agreement by Ross Mining Ltd. to provide work and services to GHVLP. The respondent refers to this agreement at paras. 13 and 14 of the petition. This agreement is also referred to at paras. 5-8 of Randolph's affidavit of December 1, 2009, filed in the R. 18(6) application. (my emphasis)

[26] The basis for allowing Golden Hill to pursue its claim of lien was premised on the fact that Golden Hill had a separate contractual arrangement with RML quite apart from the Consolidated Loan Agreement. It is also clear that but for the allegation of a

separate contractual arrangement for work and services, the Golden Hill claim may have been struck under Rule 18(6) as having no merit. Counsel for Norman Ross submits that at the trial, Mr. Rudolph abandoned the claim of a separate contractual agreement for the claim of lien.

[27] At trial, Mr. Rudolph was asked whether he was saying that there were two separate agreements, one for the Consolidated Loan Agreement and one to provide materials and service to Ross Mining. The transcript reads as follows:

> Q Thank you, Mr. Rudolph. Now, Mr. Rudolph, if you could put down Volume 1 of the examination for discovery transcript and pick up Volume 2. And if you could turn to page 124, and line 10.
> THE COURT: Sorry, you said 124?
> MR. LEITCH: Page 124, Your Honour, line 10.
> THE COURT: Thank you.
> MR. LEITCH:
> Q Thank you, Mr. Rudolph. Now, Mr. Rudolph, what is the relationship between this second agreement, to provide materials and services to Ross Mining, and the Consolidated Loan Agreement; are these agreements totally separated – separate; or is this agreement, to provide materials and services, a subset of the monies due to the Limited Partnership under the Consolidated Loan Agreement?
> A Well, the monies owing are in the general accounting that – not necessarily within the Consolidated Loan Agreement, but within the general account that's used for tracking them.
> Q Used for tracking what?
> A Used for tracking the costs going to Ross Mine.
> Q So, I take it you're saying they're two separate agreements?
> A No, I didn't say that.
>
> Now, Mr. Rudolph, that is the testimony you gave at your examination for discovery on April 12, 2010?
> A That's correct
> Q And you were sworn to tell the truth at that examination for discovery?
> A That's correct.

Q And did you tell the truth?
A I did.
Q And is that still the truth today?
A I believe so.

[28] Counsel for Norman Ross submitted that this exchange leads to the conclusion that Mr. Rudolph abandoned the two-agreement claim that is fundamental to pursuing the claim of lien for Golden Hill. While the particular answer relied upon could be interpreted to be abandoning the two-agreement claim, I am satisfied that Mr. Rudolph did not abandon his claim that there was a separate agreement for work and services. The answer given above, in context, can also be interpreted to mean that only one of the two agreements, namely the CLA, provided for the accounting and tracking for the claim of lien. He did not abandon his position that the claim of lien agreement also included a separate goods and services agreement as that was partly oral and partly conduct as alleged and pleaded in the Amended Petition.

[29] In my trial judgment, I found as a fact that prior to the appointment of a Receiver and Manager on July 29, 2009, neither Golden Hill nor Jon Rudolph ever asserted that the work or services provided by Golden Hill to RML under the CLA would entitle Golden Hill to a claim of miners lien against the mine. I found that the intercompany account listing supplies and services for the years 2006, 2007, 2008 and 2009 was prepared for the first time as a claim of lien on October 15, 2009. I also found at para. 32 of my trial judgment that the accounting provided in 2009 could not be reconciled by the Receiver and contained numerous inaccuracies. I concluded there was no basis for the intercompany account to establish a claim of lien and that Golden Hill and RML had a relationship of borrower and lender under the CLA.

ANALYSIS

Special Damages

[30] Counsel for Norman Ross submits that there are a number of factors which, taken together, make a special costs award appropriate. He asks the court to draw "the inescapable inference" that Golden Hill's purpose or motive for filing and pursuing its claim of lien was not to pursue a meritorious claim but to further delay Ross' enforcement of his security against the mine. The factors that lead to this inference are the combination of the following factors:

a) the first claim of lien for $4.7 million was filed recklessly as evidenced by the ultimate claim in the amount of $2.8 million;

b) the amended claim of lien in the amount of $6.7 million was, on its face, outside the time for filing the lien;

c) Golden Hill never provided a proper accounting for its alleged claim of lien;

d) Golden Hill knew or should have known from December 16, 2009, the date that the $4.7 million claim of lien was struck, that its claim was without merit;

e) Golden Hill was insulated from a claim for costs in excess of the security for costs in the amount of $75,000 by its filing of a Proposal in bankruptcy; and

f) Golden Hill's conduct in failing to consent to certain procedural issues increased the costs and court time.

[31] The essence of the claim for special costs is that Golden Hill acted reprehensibly by, at the very least, conducting itself in a manner deserving of rebuke in putting forward a claim of lien where all the documentation supported the view that the money owed

was a loan which would have no security against the mine. Counsel for Norman Ross submits this is conduct deserving rebuke because Golden Hill attempted to elevate a loan to a claim of lien and gain a secured position against the mine. Counsel for Norman Ross submits that special costs are appropriate because the claim of lien is meritless and an attempt to impose a financial burden on Mr. Ross.

[32] Counsel for Golden Hill submits that its claim of lien is not without merit and is subject to an appeal. As acknowledged in my decision, the *Miners Lien Act* does not prohibit a claim of lien by an owner. Counsel also submits that it has not been unreasonable in pursuing its claim and notes that its voluntary reduction of the amount of the lien claim confirms this. With respect to the proposal in bankruptcy filed by Golden Hill, it included the obligation to pursue its claim of lien on behalf of creditors and cannot be interpreted as being driven solely by the fact that it may insulate Golden Hill from some court costs. Counsel for Golden Hill also argues that a claim for special costs requires both a claim without merit and an improper motive, and that neither has been established by counsel for Norman Ross.

[33] Although this is arguably a case where the conduct of Golden Hill approached the category of “deserving of rebuke”, I am not satisfied that special costs are appropriate in the circumstances of this trial. While I concluded that there was no merit to Golden Hill’s claim of lien, I cannot conclude that pursuing it was reprehensible, scandalous or outrageous. There is no doubt that it was an unusual claim, in that it did not fit the usual requirements of a claim of lien based on invoices, but there was no fabrication of the fact that goods and services were actually supplied by Golden Hill to RML. Because I have found the claim of lien was without merit, it could be inferred that there was an improper motive. On the other hand, the rulings on the Rule 18(6)

application to strike clearly determined that the claim of lien was not devoid of any merit and could proceed.

[34] It has no doubt been frustrating for Norman Ross to see the same person as one corporate entity do what he covenanted not to do as another corporate entity. However, it is not conduct that is sufficiently reprehensible to attract special costs.

[35] As I indicated there are similarities between this case and the *Evergreen Building* case, however I find this is not a case where Mr. Rudolph's objectionable conduct took place outside the litigation. Here, as noted, the conduct formed the basis of the litigation.

[36] In rejecting Norman Ross' application for special costs, however, I do not accept Golden Hill's submission that both a lack of merit and improper motive are required before such an award can be made. Either one may suffice in circumstance that are reprehensible, scandalous or outrageous.

SCALE OF COSTS

[37] Section 2(b) of Appendix B of the *Rules of Court* provides three levels of court costs. Scale A is for matters of little or less than ordinary difficulty. Scale B is for matters of ordinary difficulty, and Scale C is for matters of more than ordinary difficulty.

[38] Section 2(c) of Appendix B sets out the factors which may be taken into account in fixing the appropriate scale:

> (i) whether a difficult issue of law, fact or construction is involved;
>
> (ii) whether an issue is of importance to a class or body of persons, or is of general interest;
>
> (iii) whether the result of the proceeding effectively determines the rights and obligations as between the parties beyond the relief that was actually granted or denied.

[39] I find that this proceeding for a claim of lien contained difficult issues of both fact and law. The unusual and somewhat impenetrable inter-company accounting procedures that could not be reconciled by the Receiver were clearly a difficult and voluminous factual issue that Golden Hill must take responsibility for. The legal issue of whether an owner can claim a lien was the first case of its kind in this Court and must be acknowledged as difficult both from a corporate relationship perspective and a legal perspective, as there was little case authority, particularly from Northern jurisdictions. In my view, it was also a case of critical importance for lien claimants, who generally provide goods and services to mine owners. If a mine owner were permitted to file claims of lien under separate but non-arms length corporate entities, the special purpose of the *Miners Lien Act* giving a secured position to lien claimants would be in jeopardy.

[40] I find that Norman Ross, who took the lead role and succeeded in discharging the claim of lien should receive costs on Scale C. Mackenzie Petroleums Ltd. having played a lesser role, but still having a claim of lien that could have been adversely affected, should receive its costs on Scale B.

Increased Costs for Norman Ross

[41] Appendix B provides for increased costs for 1.5 times the value as follows:

> 2 (e) If, after it fixes the scale of costs applicable to a proceeding under subsection (a) or (d), the court finds that, as a result of unusual circumstances, an award of costs on that scale would be grossly inadequate or unjust, the court may order that the value for each unit allowed for that proceeding, or for any step in that proceeding, be 1.5 times the value that would otherwise apply to a unit in that scale under section 3 (a).
>
> (f) For the purposes of subsection (e), an award of costs is not grossly inadequate or unjust merely because there is a

> difference between the actual legal expenses of a party and the costs to which that party would be entitled under the scale of costs fixed under subsection (a) or (d).

[42] To award an increase, three factors must be met:

1. there must be unusual circumstances;
2. the unusual circumstances must result in the award of costs, in this case on Scale C for Mr. Ross, that are grossly inadequate or unjust; and
3. the increase cannot be applied merely because there is a difference between the actual legal expenses and the Scale C costs.

[43] In this case, the actual legal fees are approximately $235,000 and Scale C costs are approximately $117,300, although I present these numbers not as findings of fact but as the range presented by counsel for Norman Ross.

[44] There is a line of cases that counsel for Golden Hill cites for the proposition that unusual circumstances require "conduct that is deserving of some form or rebuke": see *Insurance Corp. of British Columbia v. Patko*, 2009 BCSC 578, at para. 18; *Gurney v. Gurney*, 2007 BCSC 1745, at para. 17; *Bajwa v. British Columbia Veterinary Medical Assn.*, 2008 BCSC 905, at para. 76 and *D. v. D.*, 2008 BCSC 1260, at para. 18.

[45] In my view, it is arguable that conduct deserving some form of rebuke is necessary to meet the test of "unusual circumstances", and I do not interpret s. 2(e) as requiring this. Section 2(e) addresses "unusual circumstances" that results in an award of costs that is grossly inadequate or unjust. It is not specifically focussed on conduct in the way that a special costs award is conduct-dependent. I also agree with *D. v. D.*, cited above, that increased costs are not awarded as punishment "but where the innocent party is required to spend time and effort responding to misconduct, or is required to deal with a trial that is lengthened or delayed unnecessarily…" (para. 18, my

emphasis). I conclude that the focus of increased costs should be on indemnification for the innocent party without necessarily importing the onus of establishing misconduct. In my view, ss. 2(e) and (f) of Appendix B provide an alternative to special costs, with the lower threshold of “unusual circumstances”, which on its face does not require conduct deserving rebuke.

[46] In the case of Golden Hill’s claim of lien there are “unusual circumstances”:

1. the claim of lien was unusual in that it did not arise in the normal circumstances of a supplier providing goods and services and invoicing the owner for them;
2. the use of inter-company accounts between two non-arms length corporate parties created a complex factual situation for Norman Ross, and, because of the absence of means of objective verification or reconciliation, the result was prolonged discovery and trial processes;
3. the fact that the claim of lien was made by a corporation owned and operated by the same person, who had covenanted not to make such a claim under another corporate entity, also prolonged the discovery and trial; and
4. the claim of lien raised a novel claim where I concluded that an owner was effectively using the *Miners Lien Act* to claim against his own mine, a point of law that had not previously been raised in the Yukon and for which very scant precedent existed. This too prolonged the discovery, trial and closing argument.

[47] In my view, all of these factors taken together merit an award of increased costs of 1.5 times for each unit claimed. It would be unjust for Norman Ross to bear a

significant fee burden over and above the Scale C cost recovery in these unusual circumstances. While it was determined that Golden Hill should have its day in court, it would be unjust not to award Norman Ross increased costs.

CONCLUSION

[48] I award Norman Ross his costs on Scale C with a 1.5 times increase. I award Mackenzie Petroleums Ltd. costs on Scale B. Counsel can schedule another hearing if the quantum remains in dispute.

VEALE J.