IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Palaniuk v. Royal & Sun Alliance Insurance Company of Canada,* 2014 BCSC 1924

Date: 20141010
Docket: 97969
Registry: Kelowna

Between:

Wilfred Gerald Palaniuk, Poa Bernice Nellie Palaniuk, Poa Jason Bernard Palaniuk

Plaintiffs

And

Royal & Sun Alliance Insurance Company of Canada Agent National Home Warranty Programs Ltd.

Defendants

Before: The Honourable Mr. Justice Rogers

Reasons for Judgment

Plaintiffs appearing on their own behalf:	W.G. Palaniuk P.B.N. Palaniuk P.J.B. Palaniuk
Counsel for the Defendants:	M.J. Bryden
Place and Date of Trial/Hearing:	Kelowna, B.C. September 22, 2014
Place and Date of Judgment:	Kelowna, B.C. October 10, 2014

Introduction

[1] The defendant seeks an order dismissing the plaintiffs' claims. The defendant asserts that the disputes which the plaintiffs wish to litigate in this proceeding were resolved by a binding settlement agreement in 2007.

[2] The plaintiffs say that they should not be bound by the terms of the settlement because they acted under duress, were subject to undue influence, and the plaintiffs' principal player, Mr. Wilfred Palaniuk, was not mentally competent when he agreed to the settlement terms.

The Facts

[3] Wilfred and Bernice Palaniuk are married and own Unit #211 in the Discovery Bay condominium complex in downtown Kelowna. Jason Palaniuk is their son and he owns Unit #329 in the same complex. At all material times, the defendant insurance corporation acted as agent for the New Home Warranty ("NHW") that was in place for the Discovery Bay development. Among other things, clause 6 of the warranty provided that:

> 6. If repairs are required under this warranty and the damage to the *home* or the extent of the repairs makes the *home* uninhabitable, this warranty will cover the reasonable expenses incurred by the *owner* to find alternate accommodation, including hotel and motel, subject to a limit of $100 per day for the actual accommodation cost, up to the day the *home* is ready for occupancy.

[4] In or around the fall of 2005 and while the warranty was still in effect, various defects were identified in the structure of the Discovery Bay complex.

[5] A brief chronology of the events relevant to the present application is as follows:

October 19, 2005

The City of Kelowna revoked the occupancy permits for the Discovery Bay condominium complex.

November 23, 2005

Wilfred and Bernice Palaniuk gave notice to NHW that they intended to vacate their condominium and that they would seek payment of a living out allowance pursuant to the terms of the new home warranty. They moved out of their unit several days later.

January 1, 2006

Jason Palaniuk moved out of his condominium and sought payment of a living out allowance pursuant to the terms of the new home warranty.

February 1, 2006

NHW replied to the Palaniuks' requests, saying that it would not pay a living out allowance.

June 2006

Engineering reports indicated that the Discovery Bay complex required significant structural repairs and remediation.

July 1, 2006

NHW began to pay living out allowances to those Discovery Bay owners who vacated on or after June 1, 2006. NHW paid $3,000 per month to those owners.

NHW also paid a living out allowance of $3,000 to Wilfred and Bernice Palaniuk for each of July and August 2006.

October 6, 2006

NHW advised the Palaniuks that because the Palaniuks had moved out of the complex ahead of the date on which repairs and remediation rendered their units uninhabitable, NHW took the position that they did not qualify for any living out allowances.

November 1, 2006

NHW wrote to advise Wilfred and Bernice Palaniuk that the allowance they had received for July and August 2006 had been paid to them in error.

December 10, 2006

Wilfred and Bernice Palaniuk invoked mediation to resolve their dispute concerning their entitlement to a living out allowance. Mediation was specifically contemplated in the new home warranty.

February 20, 2007

Bernice Palaniuk suffered a stroke and was hospitalized on an urgent basis first in Kelowna and then in Vancouver. Her health was gravely affected by her stroke. Wilfred Palaniuk traveled with his wife to Vancouver and attended to her while she was in hospital. Wilfred was worried about his wife's health and was distracted from his family's dispute with NHW over the living out allowance.

February 23, 2007

Wilfred Palaniuk and his lawyer, Mr. Peters, negotiated a settlement of the Palaniuks' claim for living out allowance for their Unit #211. The settlement provided for payment of a living out allowance of $3,000 per month for the period September 2006 to February 28, 2007.

Wilfred Palaniuk executed a release and settlement agreement on his own behalf and on his wife's behalf as well as holder of her power of attorney.

The Palaniuks received the settlement funds stipulated in the settlement agreement.

NHW commenced payment of a living out allowance of $3,000 per month to the Palaniuks commencing March 1, 2007.

September 24, 2007

Wilfred Palaniuk acted on his authority as holder of his son Jason's power of attorney to attend a mediation of Jason Palaniuk's claim for a living out allowance with respect to Unit #329. Wilfred Palaniuk attended the mediation with his lawyer, Mr. Peters. The mediation resulted in settlement of Jason Palaniuk's claims for a living out allowance arising out of his ownership of Unit #329.

Wilfred Palaniuk executed a release and settlement agreement on Jason Palaniuk's behalf as holder of his power of attorney. Jason Palaniuk executed the release and settlement agreement himself a short time later.

Jason Palaniuk received the funds stipulated in the settlement agreement.

December 6, 2007

The City of Kelowna issued an occupancy permit for, among other units, Unit #329. Jason Palaniuk did not move back into his unit.

February 2008

Wilfred and Bernice Palaniuk moved into Unit #329.

May 15, 2008

The City of Kelowna issued an occupancy permit for, among other units, Unit #211.

Wilfred and Bernice Palaniuk did not move into their unit immediately but remained in Unit #329.

The Palaniuks complained to NHW that the noise of ongoing remediation in the building was bothersome to Bernice Palaniuk and interfered with her recovery from her medical condition. The Palaniuks asked NHW to extend payment of the living out allowance while construction was ongoing. NHW refused their request.

June 15, 2008

NHW terminated payment of the living out allowance to Wilfred and Bernice Palaniuk.

October 2008

Wilfred and Bernice Palaniuk re-occupied Unit #211.

January 18, 2013

The Palaniuks commenced the present civil proceeding against Royal & Sun Alliance Insurance Company of Canada ("Royal Sun") as agent for NHW. In their action, the Palaniuks claim damages for breach of contract, non-compliance, bullying, and cruelty. They claim a total of $160,000 for loss of living out allowance.

The Application

[6] Royal Sun has applied for orders as follows:

1. That the issue as to whether or not there is a binding settlement agreement between the plaintiffs and the defendants be determined before the determination of other issues in this action;

2. That the settlement agreements be declared of full force and effect and binding upon the parties and that the plaintiffs' action against the defendants be discontinued;

3. In the alternative, that the notice of civil claim filed by the plaintiffs be struck as against the defendants, and the claims against the defendants be dismissed; and

4. Special costs in any event of the cause.

Parties' Positions

Royal Sun

[7] Royal Sun maintains that the parties reached an accord and satisfaction of their dispute over their entitlement to living out allowances and the amount of allowance they should receive. Royal Sun says that the parties' agreements are embodied in the terms of the settlement agreements. Having received the consideration contemplated by the settlement agreements, and having expressly given up any claims for compensation in excess of that consideration, Royal Sun argues that the plaintiffs' present proceeding cannot succeed and ought to be brought to an end.

[8] In the alternative, Royal Sun argues that all or part of the plaintiffs' notice of civil claim must be struck because it does not disclose a cause of action.

[9] Finally, Royal Sun says that the present proceeding amounts to an abuse of process. It argues that the Palaniuks' behavior merits rebuke and that special costs ought to be ordered against them.

The Palaniuks

[10] Wilfred Palaniuk spoke for the plaintiffs. He argued that the plaintiffs ought not to be held to the terms of the release and settlement agreements because when he made those agreements, he did not understand what he was doing. Alternatively, Wilfred Palaniuk argued that the settlements were not binding because Royal Sun obtained the agreements through an exercise of undue influence. Although he did not specifically refer to unconscionable contract, by his submissions it is clear that he relies on that ground as well to vitiate the settlement agreements.

[11] Wilfred Palaniuk also argued that the settlement agreements speak only to payment of living out allowances for the period leading up to the agreements. He maintained that the agreements say nothing about claims that the Palaniuks might have arising out of events that took place after the agreements were signed. So, he says, the settlement agreement cannot bar the claim that he and his wife have for a

living out allowance between February when they asked for an extension of the allowance and September 2009 when they finally re-occupied their condominium unit.

Discussion

Jason Palaniuk's Claim

[12] I will deal first with Jason Palaniuk's claim. The settlement agreement with respect to his claim was executed by Wilfred Palaniuk as holder of Jason Palaniuk's power of attorney.

[13] Jason Palaniuk actually signed the release himself as well.

[14] Having executed the settlement agreement himself, Jason Palaniuk must be taken to have either independently agreed to the terms of the settlement or to have ratified his attorney's decision to agree to its terms. Having acted independently of his father, Jason Palaniuk cannot be heard to argue that any mental deficiency of his father's or inequality of bargaining position between his father and NHW vitiates the settlement. Jason Palaniuk adduced no evidence that could or would support the proposition that he was subject to undue influence or that he was not mentally competent when he signed the settlement agreement. Neither did he adduce any evidence that suggested that his bargain with NHW was unconscionable.

[15] That agreement provided that in return for payment of $27,000, Jason Palaniuk released and forever discharged NHW from all actions, causes of action, claims, and demands which he may have or may thereafter have for payment of a living out allowance arising out of the structural and other repairs at the Discovery Bay complex in or about 2005 and 2006. Jason Palaniuk received the settlement funds. Performance of the contract is therefore complete. In law, Jason Palaniuk has no claim for the damages he seeks in the present action.

[16] Jason Palaniuk's claim must be dismissed. I will discuss his liability for costs below.

Wilfred and Bernice Palaniuk's Claim

[17] The settlement agreement that Wilfred Palaniuk executed on his own and on his wife's behalf is dated February 23, 2007. The recital portion of the settlement agreement notes that they moved out of Unit #211 on or about November 28, 2005, and that they claimed entitlement to a living out allowance. The agreement provides for payment of a living out allowance of $100 per day for the period beginning July 1, 2006, and ending at the time required under the terms of the warranty, less any allowance already received. The Palaniuks received the lump sum payment due to them for the period July 1, 2006 to February 23, 2007, and they received payment of a living out allowance from that latter date until one month after the City of Kelowna issued an occupancy permit for Unit #211.

[18] The general rule is that a party is bound by the terms of the contract he or she executes: *Karroll v. Silver Star Mountain Resorts Ltd.* (1988), 33 B.C.L.R. (2d) 160 (S.C.). There are exceptions to that general rule. Those exceptions include the principle of *non est factum*, i.e.: "it is not my deed". According to *L'Estrange v. F. Graucob Ltd.*, [1934] 2 K.B. 394 (C.A.), a party cannot be bound to a contract when the document was signed in circumstances which made it not the party's act.

[19] In the present case, Wilfred Palaniuk deposes that he was not in his right mind when he signed the settlement agreement. He says that he was overwhelmed by concern for his wife's health and by financial stress brought about as a result of not having received a living out allowance for more than a year. In essence, he argues that he was not mentally competent to agree to the bargain.

[20] The difficulty with the position Wilfred Palaniuk takes on this point is that it is not supported by psychological, psychiatric, or medical evidence of any kind. Neither is it supported by evidence from his counsel who accompanied him during the negotiations that led to the settlement. That lawyer would certainly have been in as good a position as anyone to give evidence as to Wilfred Palaniuk's apparent mental state at the time.

[21] It is not sufficient for Wilfred Palaniuk to simply assert that he was mentally unfit - to establish that he is not bound by the agreement due to mental infirmity, he must adduce evidence that supports his contention. If a bald assertion such as Wilfred Palaniuk's were sufficient to vitiate a contract, parties would have little reason to have confidence in the binding nature of their contracts. The law of contract exists to, among other things, foster certainty in commercial dealings. To give effect to Wilfred Palaniuk's position would seriously erode that certainty.

[22] I find that the lack of evidence supporting Wilfred Palaniuk's assertion that he was not mentally competent is fatal to his assertion that the settlement agreement is not binding upon him and his wife.

[23] Mr. Palaniuk also argues that the settlement agreement was unconscionable.

[24] In *Loychuk v. Cougar Mountain Adventures Ltd.*, 2012 BCCA 122, Frankel J.A. discussed the test for unconscionability in contract. He wrote:

> [29] The language used to express the test for unconscionability has varied over the years. It was put this way by Mr. Justice Davey, as he then was, in *Morrison v. Coast Finance Ltd. (1965)*, 55 D.L.R. (2d) 710 at 713 (B.C.C.A.):
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> > [A] plea that a bargain is unconscionable invokes relief against an unfair advantage gained by an unconscientious use of power by a stronger party against a weaker. On such a claim the material ingredients are proof of inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which left him in the power of the stronger, and proof of substantial unfairness of the bargain obtained by the stronger. On proof of those circumstances, it creates a presumption of fraud which the stronger must repel by proving that the bargain was fair, just and reasonable: [citations omitted].
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> [30] That test was recently discussed in *McNeill v. Vandenberg*, 2010 BCCA 583, and Roy v. 1216393 Ontario Inc., 2011 BCCA 500. In *McNeill,* Madam Justice Garson stated:
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> > [15] In order to set aside a bargain for unconscionability, a party must establish:
> >
> > > (a) inequality in the position of the parties arising from the ignorance, need or distress of the weaker, which left him in the power of the stronger; and
> > >
> > > (b) proof of substantial unfairness in the bargain.

> This test was articulated in *Harry v. Kreutziger* (1978), 9 B.C.L.R. 166 (B.C.C.A.) at 173 and reiterated in *Klassen v. Klassen*, 2001 BCCA 445.
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> [31] In *Roy*, Mr. Justice Tysoe (at para. 29), quoted the following from the judgment of Madam Justice McLachlin, as she then was, in *Principal Investments Ltd. v. Thiele Estate (1987)*, 12 B.C.L.R. (2d) 258 at 263 (C.A.):
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> > Two elements must be established before a contract can be set aside on the grounds of unconscionability. The first is proof of inequality in the position of the parties arising out of some factor such as ignorance, need or distress of the weaker, which leaves him or her in the power of the stronger. The second element is proof of substantial unfairness in the bargain obtained by the stronger person. The proof of these circumstances creates a presumption of fraud which the stronger must repel by proving the bargain was fair, just and reasonable: *Morrsion v. Coast Fin. Ltd.* (1965), 54 W.W.R. 257, 55 D.L.R. (2d) 710 (B.C.C.A.); *Harry v. Kreutziger* (1978), 9 B.C.L.R. 166, 95 D.L.R. (3d) 231 (C.A.).
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> Mr. Justice Tysoe went on to state (at para. 30), that in *Tercon*, Binnie J. was "not intending to signal a departure from the usual test for unconscionability."

[25] The first question to ask is, as Garson J.A. put it in *McNeill*, was there "inequality in the position of the parties arising from the ignorance, need or distress of the weaker, which left him in the power of the stronger"? That test has been recently applied in this court in the retrial of the *Roy* matter. The retrial is reported at *Roy v. 1216393 Ontario Inc.*, 2012 BCSC 1752, and on the issue of inequality of the parties' positions, Bruce J. wrote:

> [138] ...To render the contract or the limitation clause invalid there must be evidence that the aggrieved party was in the control or power of the other party to the extent that their will is overborne. Typical examples include ignorance of the contract terms due to illiteracy, blindness, and senility of the weaker party...

[26] The evidence in the present case demonstrates that in February 2007, Wilfred and Bernice Palaniuk were feeling the financial stress of having lived away from their condominium for more than a year. Wilfred Palaniuk's evidence on this point is, however, brief and lacking in detail. At paragraph 16 of his affidavit in answer to the respondent's motion to dismiss the claim, he says only this:

> (16) My finances were so critical that on December 10, 2006 I asked NHW for mediation for both units.

[27] While I can accept that Wilfred Palaniuk subjectively believes that his finances were critical at that time, he has offered no evidence to support an objective finding that that was so. This is not unlike the case of an affiant who deposes that he is "poor" but offers no detail of his income, expenses, assets, or liabilities. Absent evidence of those financial data, an observer cannot assess whether the affiant is, in fact, poor, or only believes that he is poor when, in fact, he is not. Because neither Wilfred nor Bernice Palaniuk adduced evidence of their financial circumstances around the time that the settlement agreement was negotiated, I regret to say that they have not persuaded me that they were, in fact, at the mercy of NHW.

[28] Even if I were satisfied that the Palaniuks were in financial distress in February 2007 and that by virtue of their need for cash they were in the power of NHW, that finding alone would not be sufficient to vitiate the settlement agreement. The Palaniuks would have to go on to show that the agreement was substantially unfair to them. On the evidence before me, there was a genuine dispute between the parties over whether and when a living out allowance ought to have been paid to the Palaniuks. The Palaniuks' position was that they were entitled to a living out allowance as soon as they took the decision to abandon their unit. The NHW took the position that if they were not entitled to an allowance and that if they were, then their entitlement began on the first of the first month following receipt of an engineer's report confirming that the Discovery Bay building had to be vacated in order to complete the necessary repairs.

[29] These are arguable issues. They were never tested in court and the true answers to them cannot be known.

[30] What is known, however, is that in coming to the agreement that they did, the parties compromised their respective positions. NHW capitulated on the entitlement issue and the Palaniuks capitulated on the start date issue. While the Palaniuks may genuinely believe that NHW owed them an allowance from November 2005 on, the evidence does not support the proposition that the outcome of litigation would have

inevitably been in their favour on that issue. The same can be said of the entitlement issue.

[31] Notably, the consideration that NHW paid to the Palaniuks was in keeping with the terms of clause 6 of the warranty. The settlement agreement did not, therefore, stint the Palaniuks on the quantum of the allowance to be paid under its terms. It follows that NHW did not treat the Palaniuks any differently than it treated the other occupants of the Discovery Bay development.

[32] The evidence on this application satisfies me that both parties compromised their positions and that the settlement agreement was not so wholly in favour of NHW at the expense of the Palaniuks that it was substantially unfair.

[33] The next question is whether the terms of the settlement agreements, and in particular the release of claims contained in those agreements, encompass the Palaniuks' claims in this action. Put another way, did they, in 2007, give up their right to pursue the claims they advance in the present action?

[34] The answer to that question with respect to the Palaniuks' claims for payment of additional living out allowances is clearly "yes". I have come to that conclusion because the settlement agreements contain an unequivocal release of any and all claims for payment of living out allowances over and above the allowances contemplated in the agreement. The Palaniuks' claims for breach of contract are therefore estopped by the terms of the releases they signed, and those claims in this action must be dismissed.

[35] Wilfred and Bernice Palaniuk appear not, however, to have limited their claim to breach of contract for payment of the allowance alone. They allege as well that NHW's dealings with them caused them emotional upset. Although their pleadings are not well drafted, a careful reading reveals that they say that NHW's behavior in dealing with their claims was harmful to them. They claim damages for, among other things, a breach by NHW of a duty of care. It may be that the Palaniuks wish to advance a claim against NHW for what they may say was NHW's failure to deal in

good faith with their claim for an allowance. It may have been their intent to allege that the warranty was a "peace of mind" contract and that by managing its responsibilities under the warranty in the way that it did, NHW breached its contractual duty to deal with them in good faith.

[36] That a claim in damages for breach of a contractual duty to act in good faith in the context of a "peace of mind" contract exits in law was established by the Supreme Court of Canada in its decision in *Whiten v. Pilot Insurance Co.*, 2002 SCC 18. In that case, the insurer was found to be liable to the insured for damages arising out of the insurer's egregious management of the insured's fire loss claim.

[37] I conclude that Wilfred and Bernice Palaniuk probably intended to advance a claim against NHW for a breach of contract of the *Whiten* kind. Unfortunately, their notice of civil claim does not clearly articulate that proposition. In fact, as drafted, the notice of civil claim does not adequately describe the case that Royal Sun must meet. For that reason, I find that the portions of Wilfred and Bernice Palaniuk's pleadings seeking relief beyond payment of an additional living out allowance offend Rule 9-5 of the *Supreme Court Civil Rules* and they must be struck.

Conclusion

[38] In my view, the proper disposition of Royal Sun's application is as follows:

- Jason Palaniuk's claims are dismissed in their entirety.
- Wilfred and Bernice Palaniuk's claims for payment of a living out allowance in addition to the allowances they have received are dismissed.
- Wilfred and Bernice Palaniuk's pleadings as a whole are struck.
- Wilfred and Bernice Palaniuk may, within 30 days of the release of these reasons, amend their notice of civil claim to articulate the facts, the relief they seek, and the legal basis for their claims arising out of what they say was NHW's breach of its contractual duty to act toward them in good faith.

[39] The Palaniuks have set their claims down for summary trial. The summary trial is set to be heard on November 17, 2014. The outcome of this application dictates that the summary trial cannot proceed as scheduled. The summary trial will therefore be struck from the trial list.

Costs

[40] Royal Sun submits that the Palaniuks should be liable in special costs because the present action is so clearly within the scope of the terms of the settlement agreements. In support of its position, Royal Sun cites *Hartjes v.* Hietbrink, 2005 BCSC 1572. In *Hartjes*, Cole J. awarded special costs against the defendant who had refused to give effect to a settlement agreement. Cole J. relied on the 1998 decision of the B.C. Court of Appeal in *Ring Contracting Ltd. v. B & G Logging,* Vancouver Registry Docket CA023683. In *Ring Contracting*, the trial judge concluded that Ring Contracting's refusal to give effect to a settlement was totally unjustified, unreasonable and reprehensible, and awarded special costs against it. The Court of Appeal agreed with that disposition.

[41] An award of special costs is unusual. A recent discussion of the factors to be taken into account when considering an award of special costs may be found in *Russell v.* Parks, 2014 BCCA 367. At para. 11, the court said:

> [11] In *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 119 D.L.R. (4th) 740 (B.C.C.A.), Lambert J.A. for the Court said:
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> > [17] Having regard to the terminology adopted by Madam Justice McLachlin in *Young v. Young*, to the terminology adopted by Mr. Justice Cumming in *Fullerton v. Matsqui*, and to the application of the standard of "reprehensible conduct" by Chief Justice Esson in *Leung v. Leung* in awarding special costs in circumstances where he had explicitly found that the conduct in question was neither scandalous nor outrageous, but could only be categorized as one of the "milder forms of misconduct" which could simply be said to be "deserving of reproof or rebuke", 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.
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> …
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> [23] However, the fact that an action or an appeal "has little merit" is not in itself a reason for awarding special costs. See the reasons for Madam Justice McLachlin, for the majority in the Supreme Court of Canada on the question of costs, in *Young v. Young* at p. 28. Something more is required, such as improper allegations of fraud, or an improper motive for bringing the proceedings, or improper conduct of the proceedings themselves, before the conduct becomes sufficiently reprehensible to require an award of special costs.

[42] I take from this the proposition that simply advancing a claim that has little merit is by itself not a reason to award special costs against a plaintiff. The plaintiff must do something more to merit the special costs penalty.

[43] The question in this case is whether the Palaniuks did something more than making claims for additional living out allowances to which they are not entitled and, in the case of Wilfred and Bernice Palaniuk, drafting faulty pleadings. I can find nothing in Royal Sun's materials that suggests that the Palaniuks behaved badly in the conduct of the litigation, or that they were motivated by something other than a genuine if misplaced desire for redress.

[44] The Palaniuks' action was ill-conceived, but I cannot conclude that in advancing it they acted in a reprehensible manner. They were unwise, certainly, but I find that they are not deserving of rebuke.

[45] Royal Sun's application for special costs is dismissed. Royal Sun is entitled to a single bill of costs on Scale B against the Palaniuks for the application.

"P.J. Rogers, J."
The Honourable Mr. Justice Rogers