### 10. UNJUST ENRICHMENT, CONSTRUCTIVE TRUST, AND PROPRIETARY ESTOPPEL CASES [§2.23]

Where unjust enrichment has been found, whether to grant a proprietary remedy in the nature of a constructive trust is a matter of discretion to which the court owes deference. An appellate court will only intervene if the discretion has been exercised on the basis of an erroneous principle.[186]

The determination of whether the appropriate remedy for unjust enrichment should be quantified on a value-received or value-survived basis is subject to a high degree of deference.[187]

Where a claimant has established proprietary estoppel, the court has considerable discretion in crafting a remedy that suits the circumstances. As with any exercise of discretion, an appellate court should not interfere unless the trial judge's decision evinces an error in principle or is plainly wrong.[188]

### 11. COSTS [§2.24]

Awards of costs, including the appropriate scale, involve the discretion of the trial judge, and are subject to limited appellate review.[189]

However, determining whether it was appropriate to start a proceeding in Supreme Court under Rule 14-1(10) of the Supreme Court Civil Rules (costs in cases within the jurisdiction of Small Claims) does not involve an exercise of discretion. Rather, that determination is a question of mixed fact and law.[190]

Consideration of whether special costs should be awarded is particularly within the purview of the trial judge.[191] The Court of Appeal will interfere with the trial judge's discretion only if the trial judge has misdirected him or herself, or the decision is so clearly wrong as to amount to an injustice.[192] Misdirection may include error as to the facts of the case, taking into consideration irrelevant factors, or failing to take into account relevant factors, all of which would amount to an error in principle.[193]

An appellate court may interfere with a trial judge's discretion as to costs if the trial judge has misdirected himself or herself as to the applicable law or made a palpable error in assessing the facts.

Reviewable errors may include overemphasizing irrelevant considerations, misconstruing the court's power to make the order sought, and making assumptions without any basis in the evidence.[194]

Where the Court of Appeal has varied an award, and the amount or nature of the award had been a factor in the costs ruling, the court is entitled to reconsider the costs award without undue deference to the views of the trial judge.[195]

The difficulty facing a party who seeks to challenge a discretionary order as to costs has been described by Newbury J.A. in *Fraser v. Desmond*, 1996 CanLII 1610 (BC CA) at para. 7:

> I think it must be acknowledged that a person appealing an order for costs made at the close of detailed Reasons for Judgment faces an uphill battle in attempting to persuade an appellate court that a trial judge failed properly to assess the relative success or failure of each party. The trial court has before it not only the pleadings and final result of the case, but is able to assess as well how the evidence went in, who was responsible for any prolongation or shortening of the trial, the reasonableness of the positions taken by the parties, and what the "real issues" turned out to be. In my opinion, we should accord a good degree of respect to such an assessment and should not require a trial judge to list in detail the many factors behind it.[196]

Although an award of costs is discretionary, the discretion must be exercised in a manner consistent with the Rules of Court and earlier decisions. A judge who declines to apply such principles may be considered to have acted arbitrarily and capriciously, not judicially.[197]

Failing to obtain submissions from the parties may amount to an error in principle, allowing an appeal court to alter a costs order. For example, a chambers judge failed to provide a party with the requisite level of procedural fairness by making a special costs award without an application and without hearing submissions by the party against whom the order was made. The trial judge's order on costs was set aside on appeal.[198]

Where there has been a failure to give reasons for a costs order that is not obvious and is to some degree punitive, it is open to the court to intervene on appeal and make a contrary order.[199]

In *Hollander v. Mooney*, 2017 BCCA 238 at para. 30, leave to appeal refused 2018 CanLII 28109 (SCC), the court noted that it was telling

that counsel was unable to refer to any case where the court had set aside a costs order and replaced it with an order for special costs on the basis that the judge below erred in not awarding special costs.

Appeals from costs orders have been allowed where there was no proper basis in law for denying the successful party their costs,[200] where the judge below declined to permit meaningful submissions,[201] where the trial judge erred in their approach to the grounds for a Bullock order,[202] where it was impossible to determine the foundation upon which the trial judge exercised his discretion,[203] where the Court of Appeal was prepared to overrule its own earlier decision permitting costs to a lay litigant,[204] where the trial judge wrongly based his decision on the needy circumstances of plaintiffs,205 where the trial judge failed to take into account the results of a previous appeal,[206] where the trial judge wrongly attributed delay in the proceedings to one party,[207] where the trial judge wrongly exercised his discretion in awarding special costs,[208] where the trial judge erred in principle in awarding special costs based on pre-litigation conduct,[209] and where the trial judge erred in principle in failing to craft a costs award that took into account the defendants' success on a counterclaim.[210] A costs appeal was allowed where the judge below wrongly disallowed costs on the basis of conduct that was unrelated to the action, and relied on the unsuccessful party's health and financial hardship as the basis for departing from the usual rule (that costs should go to the successful party).[211] Appellate interference was also required where the order below (awarding increased costs on an application for leave to commence a derivative action) would "skew the balance" between litigants until final judgment was rendered.[212]

## V. REVIEW OF FINDINGS OF FACT [§2.25]

### A. RATIONALE FOR LIMITED REVIEW [§2.26]

The Supreme Court of Canada has summarized the reasons for deferring to the findings of fact of the trial judge as follows:[213]

(1) limiting the number, length and cost of appeals;
(2) promoting the autonomy and integrity of trial proceedings; and
(3) recognizing the expertise of the trial judge and his or her advantageous position.