IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***ICBC v. Eurosport Auto Co. Ltd.,***
2008 BCSC 935

Date: 20080709
Docket: C986378
Registry: Vancouver

Between:

Insurance Corporation of British Columbia

Plaintiff

And:

Eurosport Auto Co. Ltd., Hwang Trading Co. ltd., Frederick Ngok Hwang, Patti Sze Ping Hwang, and Frederick Ngok Hwang and Patti Sze Ping Hwang doing business as Hwang Porsche Parts, Hwang Trading Porsche

Defendants

And:

Bill Goble

Defendant by way of Counterclaim

Before: The Honourable Mr. Justice Parrett

Oral Reasons for Judgment

In Chambers
July 9, 2008

Counsel for Plaintiff:	F.G. Potts B.T. Martyniuk
Appearing in person for the Defendants:	F. Hwang
Place of Trial/Hearing:	Vancouver, B.C.

[1] **THE COURT:** The plaintiff in this proceeding seeks at this point in time to have me as the trial judge assess the special costs that were awarded to them initially in one form in my trial judgment and subsequently in the order of the court of appeal. That order in the court of appeal specifically awarded the plaintiff special costs for the proceedings from December 10th, 1998, which I believe was the filing of the statement of claim, to December 17th, 2004.

[2] Initially I must deal with one aspect of the present application, and that is, even though Mr. Hwang has not raised it himself, the issue of whether I am *functus officio* with respect to such a proceeding, i.e., the original orders made with respect to costs have been finalized and entered.

[3] In my view, that, to some extent, limits what I am able to do as a result of the entry of those orders.

However, I do not accept a proposition that I am unable to generally entertain the undoubted jurisdiction that exists in the court to assess the costs summarily or otherwise that is recognized in the authorities. The proposition fails on one fundamental basis: after the order of the court of appeal special costs would have to be assessed, and although they are ordinarily and absent extraordinary circumstances, I suggest, assessed by a registrar or taxing officer, the authorities are clear that this court has the jurisdiction to do so.

[4] The second issue I wish to deal with is Mr. Hwang's continuing protests that he does not understand why he is here or how to deal with this matter. My general comments with respect to Mr. Hwang's understanding of the process, his use of the process and his access to counsel and advice in various forms were set out in my reasons for judgment with respect to the trial. Those observations are equally applicable today. In fact, during the course of the submissions this morning, although he is not present at this time, Mr. Kincaid, who I understand to have been assisting Mr. Hwang at various times in this proceeding, was present in this courtroom.

[5] I think it falls into the category of the old saying "methinks he protests too much." I think Mr. Hwang understands far more than he admits.

[6] In any event, the issue of jurisdiction to assess special costs was dealt with by our court of appeal in ***Harrington v. Royal Inland Hospital***, (1995) 131 DLR (4th) 15. In that case the issue for consideration was whether the court had jurisdiction to review the reasonableness of the solicitor's fee arising out of a contingency fee agreement and secondly to determine the amount of special costs themselves.

[7] After considering various authorities, Mr. Justice Hinds at paragraph 192 wrote the following:

> In my view there is no distinction between the inherent jurisdiction of a superior court to review a solicitor's bill of costs and the inherent jurisdiction to review the reasonableness of a solicitor's fee arising out of a contingency fee agreement.

[8] He went on at paragraph 237 to consider the trial judge fixing the amount of special costs rather than referring the matter to a registrar. At that point he said the following:

> 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 that 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 special costs. But in some circumstances, such as existed in this case, it is appropriate for the Judge, who has 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.

[9] The matter was also considered by our court of appeal in ***Graham v. Moore Estate***, 2003 BCCA 497, particularly at paragraphs 45 and 46, and earlier than that in ***Interclaim Holdings Limited v. Down***, 2002 BCCA 632. In that decision Madam Justice Southin at paragraph 38 wrote:

> This litigation has already consumed, as I have already indicated, far too much of the public resource of judicial time as it is. To send the claim to taxation will engage a large amount of the time of a taxing officer whose decision might be appealed and matters will go on and on. Among other things, the taxing officer would have to learn about this litigation all that we already know, a duplication of effort which does no one any good.

[10] At paragraph 40 she said the following:

> Taking it all in all, I consider justice will be done in this case if this Court adopts the rough-and-ready old-fashioned method of determining the sum to be awarded under s. 197(2) at a sum per half day, which sum will cover also reasonable award for preparation, but not including in those days those spent arguing the issue of champerty before Brenner J. Five thousand dollars per half day or less

seems right to me.

[11] A similar result occurred and conclusion was reached by Madam Justice Gray in ***Edwards v. Bell***, 2004 BCSC 399 particularly at paragraph 48. In that case after reviewing the bills the court awarded 75 percent of the amount billed as special costs.

[12] What is significant in the present case is that the present applicant, the plaintiff, maintains their claim with respect to privilege which causes practical difficulties in terms of an assessment before the registrar. In my view, from what background I have with respect to this and somewhat parallel litigation, the plaintiff has good reason to be concerned about the privilege issue.

[13] Mr. Potts has suggested that an assessment in the usual way of their accounts here might well occupy and cause a hearing on the order of two weeks duration. My experience with this file and throughout the trial, which dates back to at least 2001, leads me to suspect that that observation is accurate, if not potentially understated.

[14] Mr. Hwang in particular and the defendants generally in this case feel very wronged by the process they have been through, and as I observed in my trial reasons, they have taken every conceivable opportunity to delay and hinder the proper process of this matter. All in all, I am satisfied that it is in the best interests of everyone including the administration of justice, that this matter be brought to an end as much as it can be.

[15] I would be inclined to apply the rough formula introduced by Madam Justice Southin which forms one of the calculations the plaintiff has brought before me today. What makes that difficult in the present case, in my view, is that would yield a number on the order of $446,362.03 consisting of 23 full days of trial, 9 and a half full days of discovery, 5.5 day or 11 half days of pre-trial motions and a full day of post-judgment applications totalling 39 full days. This, taken together with the prorated disbursements for the period allowed by the court of appeal, which total $56,462.03 lead to the total I have outlined earlier.

[16] One of Mr. Potts' calculations recalculated those amounts deleting the 9.5 days of discovery evidence. I would not even consider such a deletion in this case. This case was difficult enough. It would have been more so without the benefit of those examinations.

[17] I have considered over the luncheon break a possibility of assessing the costs as a percentage of the actual costs, but that approach, in my view, is inappropriate in this case because of the already discounted hourly rates that exist by agreement between the plaintiff and this law firm.

[18] My real difficulty with applying Madam Justice Southin's formula here is the next proposition, which is that the actual legal costs amount to the legal fees charged between the period allowed by the court of appeal, December 1st, 1998, and July 31st, 2001, i.e. to the end of the trial, total $295,000. The disbursements for the same period, as I have already indicated -- sorry, were $291,297. The disbursements for the same period were the $56,462.03 I quoted earlier yielding a total of $347,759.03 to which obviously there would be added the applicable taxes. That amount is almost a hundred thousand dollars lower than the amount that would be yielded by Madam Justice Southin's formula.

[19] The difficulty that I suggest exists is that the actual legal cost calculation is less than that yielded by this rough and ready approach mandated in the reasons of Madam Justice Southin.

[20] In approaching such an assessment and having concluded that a summary assessment is desirable and appropriate in this case, it is necessary to consider the various factors identified by Rule 57(3). Those include the complexity of the proceeding and the difficulty or novelty of the issues involved, the skill, specialized knowledge and responsibility required of the solicitor, the amount involved in the proceeding, the time reasonably expended in conducting the proceeding, the conduct of any party that tended to shorten or to unnecessarily lengthen the duration of the proceeding, the importance of the proceeding to the party whose bill is being assessed and the result obtained and the benefit to the party whose bill is being assessed of the services rendered by the solicitor.

[21] Without trying to be exhaustive but touching on each of those factors I do not think, with respect, that this was overly complex legally in the traditional sense, but it was an enormously difficult and novel case because of the way it was conducted and in particular the way it was defended. It involved masses of documents and disruptive and calculated applications by the defence. This was a trial which in my view required the skill, specialized knowledge and responsibility that was brought to bear on this case by counsel for the plaintiff.

[22] The third factor is the amount involved in the proceeding. There are two potential ways to look at that factor. The first is the actual amounts involved in this litigation itself. That amount was not great, certainly not in terms of some of the proceedings that go on in this court, but that issue cannot, in my view, be isolated from another of the factors, namely the importance of the proceeding to the party whose bill is being assessed.

[23] This was a case brought to try and deal with a problem of civil fraud that the plaintiff as a public corporation was attempting to deal with. In my view that issue was substantial and of justifiable concern to a public corporation. The time expended in this proceeding by counsel for the plaintiff was substantial, and that time was necessary both because of the mass of documents and applications brought forward and by the complicating factor of the defendants taking the position they would represent themselves while availing themselves of advice both legal and otherwise throughout the proceeding. That factor complicated life enormously for counsel for the plaintiff in this court.

[24] The conduct of the defendants that tended to unnecessarily lengthen the duration of this proceeding has already been the subject of detailed comment from me in my reasons for judgment. It was a very real and substantial factor. And finally, in my view, the result obtained was important and favourable to the plaintiff.

[25] I have already touched on the length of the trial and the number of discoveries. Prior to trial there were no less than 13 orders made to address various procedural and document disclosure issues.

[26] There are, in any view, decisions in this province that deal with the issue of the costs of realtime transcripts, and the general tenor of those decisions seem to me at least to be in conflict with similar decisions emerging from the province of Ontario.

[27] The test with respect to disbursements generally is well known. It dates back to the decision of our court of appeal in ***Van Daele v. Van Daele***, (1983) 56 BCLR 178 at page 180 where Mr. Justice McFarlane determined that:

> The proper test is whether at the time the disbursement or expense was incurred it was a proper disbursement in the sense of not being extravagant, negligent, mistaken or a result of excessive caution or excessive zeal, judged by the situation at the time when the disbursement or expense was incurred.

[28] A decision of Registrar Wellburn, ***Roesner v. Roesner***, (1997) 32 BCLR (3d) 289, is often quoted in relation to the type of disbursement I am about to touch on. In that case she refused to allow a claim for trial transcripts observing at paragraph 21 of her reasons:

> In my experience, trial transcripts are rarely claimed on a bill of costs except when there has been some significant controversy as to the evidence of a particular witness or where there has been a direction made by the trial judge which counsel need to have clarified. In those instances a portion of the transcript only is ordered.

[29] That extract was quoted with apparent approval by our court of approval in Carlson versus Tylon Steepe Development Corporation, 2008, BCCA 179.

[30] The court went on to cite a portion of the decision of Madam Justice Boyd in ***C(IR) v. C(S),*** 2005 BCSC 1640, 53 BCLR (4th) 339 where a disbursement for real time reporting was allowed. Madam Justice Boyd served at paragraph 27:

> I agree that in many cases, the ordering of real time reporting is a sheer luxury and ought not to be considered a necessity. However here, the real time reporting was of particular importance, since the outcome turned on a precise and extensive cross examination of each of the plaintiffs and a comparison of their individual accounts with those of the psychologist and each other. In my view, while counsel's longhand or computer trial notes of witnesses, other than the plaintiffs, were likely sufficient (particularly with two defence counsel in attendance), the ordering of real time reporting of each of the plaintiffs was indeed justifiable. The defendant will be entitled to real time reporting of the plaintiffs' evidence.

[31] The court of appeal in paragraph 44 of that decision in ***Carlson*** found as follows:

> Madam Justice Boyd's reasons highlight the exceptional nature of the circumstances in which a disbursement for real-time reporting is justified. She allowed only real-time reporting of particular witnesses whose precise evidence required close and careful comparison with other evidence. The circumstances in the case at bar did not meet that high standard of necessity. In my view, the trial judge erred in principle in allowing the cost of real-time reporting of the trial evidence and I would allow the appeal from that award.

[32] That decision is of course binding upon me especially as that decision was reached on April 30th of this year. This is a case, however, in which in my view the realtime reporting was and does meet the exceptional test outlined. This is a case in which the exact words uttered at various stages of this trial and the pre-trial proceedings were frequently of substantial moment. This was the case in which attempts were made to force the withdrawal of counsel for the plaintiff for a variety of reasons, and it was a case in which the defendants sought to use each and every possible advantage. The detail in this case, the extent to which on occasion the defendant's position seemed to alter and the fact that plaintiff's counsel were dealing with in-person litigants who were adopting those techniques all dictated, in my view, the necessity of extreme caution.

[33] When those factors are coupled with the importance of the litigation to the plaintiff, as I have already indicated in my view, the test outlined in ***Carlson*** is met.

[34] I have already indicated that in my view this is a case where this matter should be brought to an end and the special costs should be summarily assessed. In my view the approach that is appropriate in all the circumstances of this case is the third option on plaintiff's counsel's summary of their special costs, namely actual legal costs, and the approach is that approach with the applicable taxes added to the numbers I have already indicated.

[35] In reaching that conclusion I am specifically allowing the cost of realtime reporting which amounted to $15,795.44 which I understand Mr. Potts has included within the disbursement figure.

[36] MR. POTTS: It is, My Lord.

[37] THE COURT: The special cost claim is assessed summarily in the amounts I have indicated.

[38] Yes, Mr. Potts?

[39] MR. POTTS: Just for the record, My Lord, as against -- jointly and severally as against the defendants?

[40] THE COURT: Sorry, I meant to go on and do that.

[41] That claim is found to be jointly and severally applicable against the defendants.

"Parrett J."
The Honourable Mr. Justice Parrett