

CANADA / JUDGMENT

LeRoy v. Timberwest Forest Corp

2021 BCSC 2346

COURT

Supreme Court of British Columbia

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2021 BCSC 2346 LeRoy v. Timberwest Forest Corp.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

LeRoy v. Timberwest Forest Corp.,

2021 BCSC 2346

Date: 20211201

Docket: S14836

Registry: Duncan

Between:

Rebecca LeRoy and Ted LeRoy

Plaintiffs

And

Timberwest Forest Corp., Timberwest Holdings Ltd.

Timberwest Forest Company, David Whiteley,

Paul McElligott, Beverlee Park

Defendants

Before: Registrar Nielsen

Reasons for Decision

Counsel for Plaintiffs:

A. Crabtree

Counsel for Defendants:

J. Yates

A. Gray

Place and Date of Hearing:

Vancouver, B.C.

October 26, 2021

Place and Date of Decision:

Vancouver, B.C.

December 1, 2021

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Introduction

- [1] On December 9, 2013, the plaintiffs commenced a legal action against the corporate and personal defendants. The plaintiffs alleged the defendants fraudulently and deliberately conspired to destroy their company, Ted LeRoy Trucking, by causing it to go bankrupt. The plaintiffs originally claimed damages of \$100 million, which increased to \$1 billion, and by the time of trial had decreased to \$300 million.
- [2] The defendants denied the allegations and alleged the plaintiff's difficulties arose from their weak financial position brought about by debt, poor financial planning, operating costs, a strike in the forest industry, and a global economic recession in 2007 and 2008.

- [3] The case went to trial six years after the claim was filed. Following a 38 day trial and a further five days of closing submissions, the court dismissed the action in its entirety, issuing reasons cited *LeRoy v. Timberwest Forest Corp.*, 2020 BCSC 978. The court concluded:
- [621] I am unable to find that the evidence supports any conspiracy between the individual defendants to force TLT to declare bankruptcy. The plaintiffs have not met their burden of proving the conspiracy on the balance of probabilities. I have no doubt that Mr. McElligott, Mr. Whiteley and Ms. Park were operating consistent with the duty they owed to TimberWest and its unit holders to act in their best interests. I am neither persuaded that in carrying out the implementation of the subdivision plan the predominant purpose was to harm TLT, nor that the plan was unlawfully carried out.
- [622] The credibility of Mr. McElligott, Mr. Whiteley and Ms. Park was directly challenged by the plaintiffs. In essence, the plaintiffs submit that the three of them were co-conspirators who lied, gave false evidence and colluded together. Those allegations are rejected and have no merit. These three senior executives aggressively pursued the plan they had mapped out for TimberWest as it related to TLT through lawful means, as they had every right to do.
- [623] I accept Ms. Park's evidence, as a sentiment also shared by Mr. McElligott and Mr. Whiteley, that contrary to the plaintiffs' assertions that TimberWest and the executive team were on a plan to destroy TLT, their collective position was to try to support TLT and stabilize it.
- [624] On the totality of the evidence, I find that the elements of the tort of civil conspiracy, either through predominant purpose or unlawful means, have not been made out.
- [625] I also find that the claims for fraudulent misrepresentation or deceit fail in that they are not established on the evidence, and must be dismissed.
- [626] Since I have found that the plaintiffs have not proven the claims advanced in conspiracy or civil fraud, it is not necessary that I consider the last fundamental element of both these claims, being causation. However, the plaintiffs had a large hurdle to overcome with respect to causation in light of the evidence of the weak financial situation that TLT was already in, the ongoing issues with their bank that had started as early as 2005 and were significantly exacerbated by the early fall of 2007, the lack of internal accounting systems, the significant debt load it was carrying, the coastal logging strike in 2007 that lasted for almost four months shutting down all harvesting, amplified by the weak logging market and the global recession. In my view, the demise of TLT was causally connected to these other factors, and not to any unlawful acts of TimberWest or its executive team.
- [627] The claims are dismissed. In respect to costs, I ask that the defendants consider the significant losses that these plaintiffs have sustained. If the defendants decide to pursue costs, the defendants may make written submissions on costs within 60 days of release of this decision. The plaintiffs will have 30 days to reply in writing to those submissions. If anything new arises in the plaintiffs' submission, the defendants have 14 days to respond.

- [628] I would like to thank counsel for their assistance throughout this factually complex and legally challenging case. Credit goes to both sets of counsel for the expeditious presentation of the evidence and the very thorough and helpful submissions.
- [4] In a subsequent cost's decision cited *LeRoy v. TimberWest Forest Corp.*, 2020 BCSC 1811, the court awarded costs to the defendants at scale C for increased difficulty. The court stated in part:
- [26] Though not dealt with in the Reasons, the damages posed a further level of complexity. The factual basis of the plaintiffs' claim (in their amended notice of civil claim filed August 25, 2017) consisted of 172 paragraphs. They sought damages on behalf of TLT of no less than \$150 million or disgorgement of profit by TimberWest of approximately \$957 million. At the time of closing submissions the plaintiffs' claim for disgorgement was in the range of \$300 million. The plaintiffs' expert evidence primarily focused on issues of damages, and canvassed issues relating to the valuation of harvesting and road construction contracts, the cost of parts and equipment, the valuation of log sort contracts, the potential gross revenue TLT could have achieved assuming contract renewals, and the fair market value of equipment and machines. The defendants' expert evidence qualified the economic gain or loss to TimberWest arising from the Compromise Agreement and the fair market value of TLT, and projected TLT's income from TimberWest, amongst other opinions.
- [27] In my view, the scope of the legal issues that had to be addressed and the complexity of the factual matrix clearly brings this case past the realm of more than ordinary difficulty.
- [34] I concluded my 628 paragraph Reasons with the comment that this was a "factually complex and legally challenging case", and that remains my view.
- [35] Taking all the circumstances into account, I am satisfied that the defendants are entitled to costs at Scale C.

Issues

- [5] The defendant's Bill of Costs claims a total of 1,205,412.93 for both tariff items and disbursements. The parties have resolved all of the tariff items, and most of the disbursements.
- [6] During a pre-hearing conference heard prior to the assessment of costs, the plaintiffs were ordered to advise, in writing, what they took issue with and why, in the defendant's bill of costs. The plaintiffs were ordered to communicate their objections by a specific date. The purpose of the order was to allow for an accurate time estimate, and the formulation of evidence by way of affidavit, and argument, which was responsive to the issues raised. This is particularly important in a case of this scale.

- [7] After advising the defendants of their objections, and following the expiry of the time by which the plaintiffs were to so advise, the plaintiffs sought to adduce a further challenge to the online legal research charges, and the photocopy and scanning charges.
- [8] The plaintiffs submit the defendants are not prejudiced by the late addition of the two issues. However, I do not agree. Both parties provided excellent and comprehensive written submissions. By comparison, the two additional issues sought to be raised were only addressed cursorily in the defendant's reply submissions. The evidence and argument on both these issues is light at best when compared to the other issues properly raised within the defined time frame.
- [9] Given that the plaintiffs are sophisticated litigants, represented by counsel, and the absence of a proper reason, or indeed any reason, for not complying with the order issued at the pre-hearing conference, I decline to hear the late objections raised after the date specified in the order.
- [10] The remaining issues concern the following disbursements:
1. the cost of electronic document production, organization, analysis and storage;
 2. the cost of the experts;
 3. the cost of third-party document production;
 4. witness costs for a Royal Bank representative; and
 5. the cost of real-time reporting.

General Principles Concerning Disbursements

- [11] SCCR 14-1(5) provides:
- (5) When assessing costs under subrule (2) or (3) of this rule, a registrar must
- (a) determine which disbursements have been necessarily or properly incurred in the conduct of the proceeding, and
 - (b) allow a reasonable amount for those disbursements.
- [12] In *Carreiro v. Smith*, 2015 BCSC 2379, the court summarized the appropriate principles to be applied:
- [18] There are a number of principles to be considered on an assessment of disbursements. Those applicable principles were summarized in *Turner v. Whittaker*, 2013 BCSC 712 at para. 5, wherein Master MacNaughton stated:
- [5] Counsel were also able to agree on the following legal principles which are applicable on an assessment of disbursements:

1. Rule 14-1(5) requires an assessing officer to determine which disbursements were necessarily or properly incurred in the conduct of a proceeding and to allow a reasonable amount for those disbursements.
 2. The consideration of whether a disbursement was necessarily or properly incurred is case- and circumstance-specific and must take into account proportionality under Rule 1-3. (*Fairchild v. British Columbia (Vancouver Coastal Health Authority)*, 2012 BCSC 1207).
 3. The time for assessing whether a disbursement was necessarily or properly incurred is when the disbursement was incurred not with the benefit of hindsight. (*Van Dael v. Van Dael*, 56 B.C.L.R. 176 (SC) rev'd 56 B.C.L.R. 178 at para. 4 (CA))
 4. A necessary disbursement is one which is essential to conduct litigation; a proper one is one which is not necessary but is reasonably incurred for the purposes of the proceeding. (*McKenzie v. Darke*, 2003 BCSC 138, para. 17-18)
 5. The role of an assessing officer is not to second guess a competent counsel doing a competent job solely because other counsel might have handled the matter differently. (*McKenzie v. Darke*, 2003 BCSC 138, para. 21)
- [19] To these principles I would add those in *Holzapfel v. Matheusik* (1987), 14 B.C.L.R. (2nd) 135, which are summarized in *Cloutier v. Wong*, 1992 12 C.P.C. (3d) 169 where the Court stated at para. 5:
5. In *Holzapfel v. Matheusik* (1987), 14 B.C.L.R. (2d) 135, the Court of Appeal approved the following principles set out in the authorities:
 1. Rule 14-1(5) requires an assessing officer to determine which disbursements were necessarily or properly incurred in the conduct of a proceeding and to allow a reasonable amount for those disbursements.
 2. The consideration of whether a disbursement was necessarily or properly incurred is case- and circumstance-specific and must take into account proportionality under Rule 1-3. (*Fairchild v. British Columbia (Vancouver Coastal Health Authority)*, 2012 BCSC 1207).
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The Cost of Electronic Document Production, Organization, Analysis and Storage

- [13] The defendants claim \$216,000 for "data hosting fees" for their electronic document database. The service provider for this disbursement is MT/3, which is a division of the law firm which represented the defendants throughout the litigation.
- [14] In January of 2017, the defendant's law firm bought a data management company and rebranded it as MT/3. This company offers document management and litigation services to clients of the law firm and others.
- [15] By way of background, on June 20, 2017, before document production within the action had occurred, the plaintiffs demanded production of 92 categories of documents dated between 2004 and 2011, which included "all records of discussions, presentations, and decisions made at Board meetings" and a further 28 listed topics, which included Timberwest's capital structure, and all communications related to the 28 general topics without a date parameter. As the litigation progressed, there were further demands for document production.
- [16] Given the extensive and expansive demands for document production, the defendants collected, scanned, and uploaded both hard copy and electronic documents to a document production database called Relativity. The documents were then reviewed and coded for relevance and privilege, redacted, and processed for disclosure.
- [17] MT/3 was provided with over 3.4 million documents for processing. During processing a total of 166,785 records were uploaded to the database, from which the defendants produced a total of seven lists of documents, totalling 57,930 documents.
- [18] The plaintiffs delivered seven lists of documents including 2,092 documents, and 13 bankers' boxes of paper, which were individually listed and scanned into the database by MT/3.
- [19] Further documents were received from third party providers. The Royal Bank of Canada ("RBC") who were the plaintiff's bankers, produced 1,218 documents. Price Waterhouse Cooper ("PwC") who were the plaintiff's restructuring advisor, CCAA monitor, and bankruptcy trustee, produced 1,026 documents. Hayes, who were the plaintiff's auditors, produced 12 documents.
- [20] The plaintiffs concede the documentary evidence adduced within the action supports the use of an electronic database. The crux of the plaintiff's dispute is the fact that the billings come from a non-arms length company, MT/3, which is wholly owned by the defendant's law firm. The plaintiffs submit that there is no evidence of the reasonableness of the disbursement other than the assertion that the data hosting and E-Discovery fees incurred by the defendants are reasonable and were necessarily incurred in order to manage documents for the action.

- [21] The plaintiffs submit that the uploading and storage of documents should not be a recoverable disbursement as it is not reasonable, or within the contemplation of the rules that a law firm can profit from a step within the litigation, whereas a traditionally organized law firm could not.
- [22] The evidence indicates that in order to use an electronic document database for e-discovery, a party must incur costs for e-discovery services to collect the data, load the data into a database, and host that database through cloud-based storage until the database can be archived, and access terminated. This process requires specialized software such as Nuix and Relativity, both of which were used in this case.
- [23] Nuix is a software used for processing data into indexes and making the data searchable. It allows for the review of records and production of documents to be more efficient in a documents rich case, as this was.
- [24] Relativity (now ReativityOne) is another software program that allows for the uploading and organization of documents to facilitate coding for relevance, privilege, and redaction where appropriate, search keys, and the exporting of lists of documents to other parties. Both software programs charge fees including processing fees, loading fees, and hosting fees which were incurred by MT/3 and passed onto the defendant's who paid the cost.
- [25] There is precedent which supports the recovery of disbursements for e-discovery in both Ontario and Alberta.
- [26] In *Harris v. Leikin Group Inc.*, 2011 ONSC 5474, the Ontario Superior Court allowed a disbursement in the amount of \$30,373.36 for electronic document production and database management stating:
- [36] Part II of Tariff A of the Rules of Civil Procedure lists recoverable disbursements. The Tariff does not contain a specific line item for disbursements incurred for electronic document management. Previous cases of this court have commented that omissions of numerous items from the tariff "illustrate the degree to which the tariff of disbursements has lost touch with modern legal practice".[7] That is one way of viewing the matter. But, at the same time, the courts who have adopted that perspective ended up using Tariff Item 35 to fill the gap and approve more "modern disbursements". Item 35 provides:

Where ordered by the presiding judge or officer, for any other disbursement reasonably necessary for the conduct of the proceeding, a reasonable amount in the discretion of the assessment officer.

- [37] In my view, disbursements made to a third party, or billed to a client, for electronic document management should now be regarded as a standard "disbursement reasonably necessary for the conduct of the proceeding" and, as a matter of course, a party should be entitled to recover a reasonable amount for such a disbursement when receiving an award of costs. I say this for several reasons.

- [38] First, today the overwhelming majority of documents are created, stored and retrieved electronically. The efficient conduct of litigation involving large numbers of documents requires the use of electronic document management systems. Our Rules of Civil Procedure recognize this reality. Our discovery plan rule - Rule 29.1.03(4) - requires all parties, when preparing their discovery plan, to "consult and have regard to the document titled 'The Sedona Canada Principles Addressing Electronic Discovery' developed by and available from The Sedona Conference."
- [27] In *PM&C v. Specialist Contractors Inc. v. Horton CBI Limited*, 2018 ABQB 842, the court allowed a total of \$165,000 in security for costs related to a claim for \$557,195 for e-discovery costs. The court relied upon *Harris v. Leikin Group Inc.* *supra*, as authority for same at para. 13 where the court states:
- [13] I conclude then on this application much as before, that there is some authority in Alberta and elsewhere in favour of recoverable third-party disbursements for e-discovery. This decision adds to it. No authority squarely against it was brought to my attention. (The issue of recoverable law firm disbursements for e-discovery, though addressed favourably in *Harris v Leikin Group Inc.*, above, does not arise in this case.)
- [28] Finally, in *Inzola Group Ltd. v. City of Brampton*, 2019 ONSC 3490, the court allowed a claim for e-discovery services in the amount of \$430,203.04 stating:
- [33] The City subsequently did provide invoices substantiating an amount slightly higher than the amount claimed for the e-Discovery Services. The City submitted the following:
- i. because of the volume of documents (approximately 65,000), the initial review and coding of documents was out-sourced to a third-party provider, ATD (subsequently acquired by Deloitte), which was a reputable service provider in the e-discovery field. Pursuant to ATD's retainer, the initial review of the documents was done by Ontario ATD lawyers at a rate of \$95/hour. This was a more cost-effective way to do the initial review of documents than having lawyers or clerks at Stieber Berlach LLP carry out that task (whose hourly rates were more than \$95/hour);
 - ii. many individuals at different locations needed access to the documents over the course of the litigation, including witnesses, experts, and individuals at the City. Accordingly, it was determined that the most efficient and cost-effective manner of storing these documents would be on a web-based server (Eclipse). Use of Eclipse meant that witnesses, experts, and individuals at the City could access the documents using the internet, rather than multiple and voluminous paper briefs having to be copied, shipped and then stored. The costs of uploading the documentary database to the internet, and for internet cloud-based hosting, were therefore reasonable and necessary.

- [34] Counsel for the City had no motive to incur unnecessary expenses. Obviously counsel made the judgment the e-discovery services would be cost effective. At the conclusion of the trial I took away 20 banker's boxes of paper documents. While I appreciate that not all witnesses needed access to all documents, it remains that it would have been very expensive to prepare multiple paper briefs. While the e-discovery disbursement is a large amount, I accept that it is reasonable and recoverable.
- [29] The defendants submit that the e-discovery costs they incurred are not in the nature of a law firm's overhead, such as rent or salaries. Rather, they are specialized costs, necessarily incurred in this specific litigation, as opposed to a general office expense such as Microsoft Office 365. They submit the e-discovery costs were incurred to make the production of documents possible and efficient, within a unique, complicated, and document intensive case. They further submit that whether MT/3 is a company wholly owned by the law firm is irrelevant, and unless the plaintiffs can establish the costs were unreasonable, the disbursement ought to be allowed in full.
- [30] The plaintiffs have conceded that e-discovery services were necessary in the action. In my view this is a proper concession given the unique circumstances of this case.
- [31] The amounts paid by the defendants for the e-discovery services are described and detailed in the affidavits filed herein. That evidence has gone unchallenged. The affiants were not cross examined, contrary affidavit evidence was not adduced, nor were applicable cost comparisons made. In short, there is nothing to suggest that the amounts claimed are unreasonable, or the costs were an ordinary part of a typical law firm's tool kit which comprise overhead costs.
- [32] Further, in terms of proportionality pursuant to SCCR 1-3, the cost must be measured in relation to the matters at stake. Serious allegations of fraud and deceit were the basis of a claim that began at \$100 million, and evolved over time to \$1 billion, and eventually became a claim for \$300 million by the time of trial. The trial spanned 43 days, the issues were complex, the financial history of the plaintiffs was examined over a period of roughly seven years and involved the review of 3.4 million documents. The cost of e-discovery was not disproportionate when viewed in context.
- [33] The need for e-discovery services arose inherently and directly from the issues and allegations arising within the proceeding. The cost was directly related to the direction, management, or control of the litigation in order to prove a claim or defense. See *MacKenzie v. Rogalasky*, 2014 BCCA 446. In my view, the cost of e-discovery was properly incurred in the conduct of the proceeding and the amount claimed is reasonable in the circumstances.
- [34] The defendant's claim for \$216,000 in e-discovery costs is allowed in full.

The Cost of the Experts

- [35] The defendants engaged two experts whose accounts are at issue. In November 2017 they engaged McEwan Valuation & Forensic Inc. ("MVFI") to provide a qualitative financial and economic assessment relative to damages, and in February 2018, the defendants retained Rocky Point Forest Services Ltd. ("Rocky Point") to opine on issues related to logging plans, rates, and Bill 13 contracts.
- [36] A total of five expert reports were delivered by the parties prior to trial. The defendants delivered three reports; two reports from MVFI, one which opined on economic gain related to the plaintiffs, and the other assessed the financial position and fair market value of the plaintiffs. The defendant's third report was from Rocky Point, which opined on the reasonableness of the defendants logging plan rates and Bill 13 contract valuations. The plaintiffs delivered a report authored by McLaughlan, in respect to damages, and the defendant provided a further report from MVFI in response.
- [37] The defendants paid MVFI a total of \$225,123.87 for their services, and a total of \$219,050.10 to Rocky Point for their services.
- [38] The plaintiffs do not dispute the necessity or propriety of the reports, rather they challenge the reasonableness of the cost.
- [39] The plaintiff's concerns with the MVFI reports are that the valuation report was an estimate, and there is no evidence concerning the complexity of the task, and therefore, the approximate cost of each report being \$90,000 is too much; there are significant costs incurred before they were retained (\$21,456); there is no breakdown of the hours incurred for each report; expenses were billed but not itemized within the invoices; and, the cost of the reply report and a day's testimony was excessive at \$47,000. The plaintiffs allege the defendants went overboard, leaving no stone unturned, and therefore a material reduction ought to be applied to the MVFI accounts.
- [40] The defendants submit the accounts of MVFI are reasonable and should be allowed in full as the case was complex as characterized by the trial judge, the amount claimed by the plaintiffs was significant and required an analysis that would withstand challenge.
- [41] Responding to the plaintiff's allegation that significant costs were incurred prior to MVFI's retainer, the defendants submit the expert needed to review the material, gain a sufficient understanding of the nature of the dispute, and the economic context of the industry and plaintiff's company.
- [42] Further, the general complexity of the issues arising required information from multiple sources, the historical nature of the claims required looking back more than eleven years, and involved multiple valuation dates and events, rather than a single event or point in time.

- [43] Overall, I agree with the submissions of the defendants. However, the lack of a breakdown of the hours billed for each report, the insufficient itemization of the expenses, and the \$47,000 cost of the reply report and a day's testimony, requires a modest reduction in the billings. In all the circumstances, the MVFT's accounts are reduced by \$8,000 inclusive of taxes.
- [44] In regards to the Rocky Point report, the plaintiffs submit that the cost in the amount of \$219,050.10, is excessive and unreasonable in all the circumstances and requires a significant reduction. Again, the plaintiffs do not challenge the necessity or propriety of the expert report, only the cost.
- [45] In support of this submission, they cite the following factors:
- a) \$137, 796.44 in fees were incurred by the time the request letter for an expert report was received;
 - b) of the \$137, 000, approximately \$42,000 was for time incurred by outside consultants without adequate explanation of why outside experts were needed and how their work factored into the report;
 - c) the billings included excessive amounts for single days, including 19.5 hours and 16 hours;
 - d) the amount of time billed for testifying was excessive as 9 hours was billed for a 4 hour court attendance;
 - e) 87.5 hours were billed for trail preparation when the expert's testimony lasted only 4 hours;
 - f) expenses were billed for overhead, such as a computer hard drive for \$179.19; and finally
 - g) travel was billed for meetings in Vancouver with counsel at a cost \$370 per night at the Fairmont Pacific Rim Hotel, and \$80.00 was billed for dinners.
- [46] The defendants submit the Rocky Point report contained four separate opinions which were critical to their defence, including; whether the logging plans of the defendant were reasonable, whether the harvesting rates offered were reasonable, whether the logging road construction rates offered were reasonable, and the way the prices for Bill 13 contracts were set. Each of these opinions required a historical analysis dating back between 11 and 13 years, required analytical models, and an analysis, which was technical and complex. Part of this complexity required the hiring of an outside consultant, Meridian Forest Services Ltd. ("Meridian"), in order to construct an analytical model necessary to deliver the Rocky Point opinion. Meridian billed hourly rates of \$65 and \$45 per hour depending on the individual billing the time.
- [47] The defendants submit that in order to provide the necessary opinions, Mr. Coleman of Rocky Point needed to visit each of the 263 settings by car, boat, or helicopter in order to verify the information required to construct models and plans underlying the opinions tendered.

- [48] The outside consultant costs were necessary for Rocky Point to formulate their opinions. Travelling to Vancouver to consult and prepare are also reasonable in all the circumstances.
- [49] Again, overall, I agree with the submissions of the defendants. However, I find the billings for trial preparation to be excessive given the actual time the witness spent testifying. I also agree with the plaintiffs that the billings for upwards of 19.5 and 16 hours per day cannot be reasonably justified and must be reduced. Further, the billing for the computer hard drive is a matter of overhead and cannot be passed onto the plaintiffs.
- [50] The accounts of Rocky Point are reduced by 18,000 inclusive of taxes.

The Cost of Third-Party Document Production

- [51] Given the allegations of the plaintiffs within the action, the defendants required full disclosure of all the plaintiff's financial records in order to prove their defense. These records included those of RBC, PwC, and Hayes.
- [52] RBC had been the plaintiff's bank, providing loans and financial services. PwC had been the plaintiff's restructuring advisor, CCAA monitor, and bankruptcy trustee. Hayes had been the plaintiff's corporate auditors. The documents in the possession of each of these third parties was compelled by court order when the plaintiffs failed to provide them, despite being within their control. The relevance of the information contained in these records was noted by the learned trial judge in her reasons for judgement at para. 626 quoted above. The records were ultimately critical to the defence of the action.
- [53] The plaintiff's objections to the costs center on the fact that they are excessive given the number of documents ultimately produced, and the fact that the third-party providers ought to have been able to easily produce the records given their familiarity with the plaintiffs as their former agents.
- [54] In my view, the plaintiffs are the authors of their own misfortune. The defendants were required to pay the third party's invoices because the plaintiffs failed to produce the documents themselves, or comply with prior orders of the court to this effect. This left the defendants with no choice other than to compel their production from the third parties with all the associated costs. Costs that could have been avoided if the plaintiffs had simply produced the documents themselves. The third-party document billings are allowed in full.

RBC Witness Costs

- [55] In the fall of 2007, the plaintiffs were referred to the special loans department of RBC. Ms. Watson was in charge of the special loans department during the relevant time frame, and handled the plaintiff's file. By the time the action came to trial, Ms. Watson had retired and moved to Ontario.

[56] The weakening financial condition of the plaintiffs at the relevant time was critical to the defence, and therefore, Ms. Watson's evidence was crucial to meeting the allegations of the plaintiffs.

[57] On November 29, 2018, the defendants filed an application seeking a certificate pursuant to the Subpoena (Interprovincial) Act, to enforce a subpoena compelling Ms. Watson to attend the trial. The application was heard by the learned trial judge who granted the order.

[58] On January 3, 2019, the defendants brought an application in the Ontario Superior Court of Justice to enforce the subpoena. The order was granted which, in part provided:

"Counsel for the Applicants shall pay Ms. Watson witness fees in accordance with the agreement of counsel after the date of her testimony".

A copy of the court's order and the "agreement of counsel" were not before me. I was advised that neither plaintiff's counsel, nor an agent on their behalf, appeared at either application.

[59] Ms. Watson was represented by her own counsel. She submitted two invoices totalling \$7,683.10, for her hourly fees and disbursements, which was paid by the defendants. Ms. Watson billed \$125 per hour for her time.

[60] Ms. Watson testified during the trial via video conferencing from Ontario. The cost of the video conferencing services was \$1,600. This amount is not in dispute.

[61] The defendants submit that the hourly fees and disbursements for Ms. Watson's testimony at trial are reasonable, and were necessarily and properly incurred in order for the defendants to mount a complete defence to the plaintiff's claims.

[62] The plaintiffs submit that half the time billed by Ms. Watson was for the time period before the Ontario court issued its order, and would arguably not be captured by it.

[63] It is agreed by the defendants that Ms. Watson was not called upon to give expert opinion, rather, she was a fact witness. The defendants argue that as Ms. Watson is not in the business of giving opinions for hire, she needed time to refresh her memory, and it was reasonable to pay her for that time spent.

[64] In my view, this situation is captured by the BCCA's decision in *Luis v. Marchiori*, 2018 BCCA 317. In that case the BCCA dealt with the issue of whether a successful party could recover hourly fees charged by an expert witness, the plaintiff's family doctor, who had been called to provide fact evidence, not an expert opinion. The court held that as the witness was not called to give expert evidence, the successful party was limited to "witness fees" prescribed in schedule 3. The Court stated:

[32] The question of whether a sum paid to an expert witness to compensate him or her for time spent giving fact evidence amounts to a proper disbursement was considered by Master Joyce in *United Contractors Ltd.* That case involved a dispute over a contract for the supply of fuel for a construction project. A Mr. Ahola was employed by the defendant during the

contract as an engineer on site and was also responsible for overseeing deliveries. He was called as a witness for the defence, and also acted as a resource person throughout the litigation, providing advice on tactical issues. By the time of trial, Mr. Ahola was no longer working for the defendant, having moved to a private engineering firm. In order to secure his presence at trial, the defendant agreed to compensate him for his time at his regular rate. The defendant argued that the reality and practicality of the situation was such that it would be unreasonable for the defendant to rely on its subpoena power and refuse to compensate the witness reasonably for his time and trouble in giving material evidence: *United Contractors Ltd.* at 5.

[33] After noting the fundamental difference between a compellable fact witness and a non-compellable opinion witness, Master Joyce said at 9–10:

Notwithstanding that it was open to the defendant in this case to rely upon its ability to compel the attendance of the witnesses, through subpoena if necessary, and thereby limit its obligation for attendance fees to \$20 per day, should the successful party be permitted to recover a greater sum from the unsuccessful party because the successful party has made an arrangement with the witness for some compensation greater than that provided for by Appendix C? In my opinion there are good reasons why that question should be answered in the negative.

In the first place, to do would be to detract from the long standing principle, reaffirmed in the *Northland Properties Ltd.* decision, that the cost of the judicial process is to be borne, in part, by the citizenry at large in requiring persons with material evidence to give of their time as witnesses. To permit the party to recover the attendance fee on an assessment of party/party costs would be to sanction, in effect, an amendment to Appendix C, Schedule 3 to permit the witness, in effect, to extract an attendance fee of more than \$20 in the particular case. It could tend to lead witnesses to refuse to cooperate unless paid what they might believe their time is worth and might encourage a system of paid witnesses. That, in my respectful opinion, is to be avoided.

If the submission of the defendant is accepted in this case then in future cases registrars will have to inquire into the particular circumstances surrounding the securing of the witness' evidence and determine whether counsel acted reasonably in making a private arrangement with the witness rather than compelling that witness' attendance. This will create additional difficulty and uncertainty in the assessment process which is not desirable. Will it be necessary to have evidence from the witness as to his or her degree of cooperation? Will the reasonableness of the arrangement depend upon the factors referred to in *Northland Properties Ltd. v. Equitable Trust Co.* as appropriate for consideration when determining the quantum of preparation fees or some other factors?

I therefore conclude that the defendant is not entitled to recover an amount in respect of the witnesses' attendances greater than \$20 per day plus reasonable travel, meal and lodging expense.

[Emphasis added.]

- [34] The Nova Scotia Court of Appeal reached a similar conclusion in *D.W. Matheson & Sons Contracting Ltd. v. Canada (Attorney General)*, 2000 NSCA 44, though the language of the statutory provisions was somewhat different from that of the British Columbia Rules.
- [35] I would adopt this reasoning. In my view, a payment made to a fact witness that exceeds the amount set out in Schedule 3 is not a disbursement "properly incurred in the conduct of the proceeding" as that phrase is used in Rule 14-1(5)(a). That is not to say that a party may not reasonably agree to make an additional payment to a witness to cover loss of income or other expenses. A payment of that kind is not prohibited by Schedule 3. Subject to legal and ethical limits, a party is free to enter into such arrangements--the payment, however, is not recoverable from the opposing party as a disbursement.
- [65] Without the Ontario Court's order and the "agreement of counsel" before me, there is no basis to depart from the decision of the BCCA in *Luis v. Marchiori*, *supra*.
- [66] The invoice in the amount of \$7,683.10 is disallowed in its entirety. However, the defendants are entitled to reimbursement to the extent provided by Schedule 3 of Appendix C of the SCCR's.

The Cost of Real Time Reporting

- [67] The defendants claim for the cost of real-time reporting throughout the trial. The plaintiffs only object to the cost of the real time transcription costs, not the cost of ordinary trial transcripts, or other transcriptions made within the proceeding. The additional cost of obtaining the real time transcripts, rather than ordinary transcripts, was \$9,411.69 of the total transcript costs of \$70,159.02.
- [68] The plaintiffs emphasize the cost of real time reporting is ordinarily considered a luxury and not recoverable as a disbursement. Exceptional circumstances need to be proved to warrant an exception to the general rule. The plaintiffs cite the decision of the BCCA in *Carlson v. Tylon Steepe Development Corp.*, 2008 BCCA 179, as summarizing the applicable legal principles. The Court states:
- [41] In *Roesner v. Roesner* (1997), 32 B.C.L.R. (3d) 289 (S.C.), Registrar Wellburn followed *Jamieson v. Jamieson* (1980), 22B.C.L.R. 11 (S.C. Chambers), and refused to allow a claim for trial transcripts. She observed (at para. 21):

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.

- [42] In my view, those observations apply with additional force to real-time transcripts.

[43] The respondents rely on *C.(I.R.) v. C.(S.)*, 2005 BCSC1640, 53 B.C.L.R. (4th) 339, aff'd 2006 BCCA 428, 57 B.C.L.R. (4th) 37, where a disbursement for real-time reporting was allowed. Madam Justice Boyd observed (at para. 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.

[44] 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.

[69] The plaintiffs submit the defendants have not met the hurdle to warrant an exception to the general rule.

[70] In *ICBC v. Eurosport Auto Co. Ltd.*, 2008 BCSC 935 at para. 32 the court states:

[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 real time 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.

[71] In *567 Hornby Apartment Ltd.v. Le Soleil Hospitality Inc.*, 2016 BCSC 1340, the Registrar allowed the cost of real time reporting for a 36 day trial of significant complexity, but disallowed the cost of a third lawyer in the proceeding during an assessment of special costs. The Registrar found that the real time reporting provided the necessary third "set of ears". At para, 119 the Registrar states:

[119] In allowing this disbursement, I have also taken into account that I determined that it was not necessary to have three counsel attend at trial. Effectively, the real time reporting served as "another set of ears" to aid counsel with preparation during the trial.

- [72] In 567 Hornby supra, the court recognized the importance and appropriateness of real time reporting in complex matters. The court also recognized the significant stakes at issue being \$7.5 and \$10 million dollars.
- [73] During this proceeding, both the plaintiffs and defendants had two lawyers present during the course of the trial, and the stakes varied from \$100 million dollars to upwards of \$1 billion, and then evolving to \$300 million by the date of trial.
- [74] The defendants submit real time reporting services were necessary due to the 38 day length of the trial, its complexity, the seriousness of the allegations, the historic nature of much of the evidence, the need to deal with evidentiary issues and applications during the trial, the magnitude of the damages claim, the credibility issues, and the fact that 19 witness's testified.
- [75] The defendant's evidence attests that they relied heavily on the real time transcripts throughout the trial to follow the factual disputes between the party's evidence in relation to the plaintiff's allegations; to prepare for direct, cross, and re-examination based upon the specific words used by witness's; to argue applications during trial; to assert objections where there was misstatement of prior evidence; and, to respond to objections made.
- [76] I agree with the submissions of the defendants that this proceeding justified an exception to the general rule that real time reporting is a luxury. The disbursement for real time reporting is allowed in full.

Disposition

- [77] The Bill of Costs of the defendants is allowed, except as modified by prior agreement of counsel, and these reasons. If a certificate is required, one containing the signatures of both counsel may be submitted through the registry for my signature.

"Registrar Nielsen"

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