

CANADA / JUDGMENT

Lougheed v. Wilson

2021 BCSC 2439

COURT

Supreme Court of British Columbia

DECIDED

15 December 2021

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2021 BCSC 2439 Lougheed v. Wilson IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Lougheed v. Wilson, 2021 BCSC 2439 Date: 20211215 Docket: S081334 Registry: Vancouver Between: Balwinder K. Lougheed, in her capacity as litigation representative for the estate of William F. Lougheed, deceased, and in her capacity as litigation representative for the estate of Norma Yvonne Lougheed, deceased and Norbill Investments Ltd. Plaintiffs And Kelly Janine Wilson and Charles Blair Wilson Defendants And Judeline Tyabji Wilson, Tugboat Enterprises Ltd., Mark Allan Marrisén, Eilene O'Connor, Postmedia Network Inc. and Steve Janke Defendants by Counterclaim Before: Master Muir (As Registrar) Reasons for Decision Counsel for the non-party, James L. Straith: R.C. Gibbs, Q.C. The Defendant by Counterclaim, Judeline Tyabji Wilson, appearing in person on her own behalf and for the Defendant by Counterclaim, Tugboat Enterprises Ltd.: J.T. Tyabji No other appearances Place and Date of Hearing: Vancouver, B.C. November 24, 2021 Place and Date of Decision: Vancouver, B.C. December 15, 2021

Introduction

- [1] The application before me was for an assessment of the bills of special costs of James L. Straith ("Mr. Straith").

Background

- [2] Mr. Straith was counsel for the defendant, Charles Blair Wilson ("Mr. Wilson"), in this action.
- [3] The trial of this action resulted in reasons of Justice Dardi dated August 3, 2017, indexed as Lougheed Estate v. Wilson, 2017 BCSC 1366.
- [4] The action was really several actions, and wound its way through the courts for many years, but for the purposes of this assessment, the only relevant proceeding was the claim for defamation by Mr. Wilson against the defendants by counterclaim, Judeline Tyabji Wilson ("Ms. Tyabji") and Tugboat Enterprises Ltd. ("Tugboat").
- [5] Ms. Tyabji for the most part represented herself and Tugboat throughout the proceedings.
- [6] Ultimately, the claims against Ms. Tyabji and Tugboat were dismissed.

- [7] Justice Dardi did not make an order for costs in her reasons, but gave leave to the parties to later address the issue.
- [8] Before the question or questions of costs could be resolved, Dardi J. retired and it fell to Justice Giaschi to resolve the matter. His reasons are indexed as *Lougheed v. Wilson*, 2019 BCSC 665.
- [9] Prior to Dardi J.'s retirement, however, certain preliminary matters were dealt with.
- [10] In submissions on costs filed July 6, 2018, Ms. Tyabji, amongst other things, sought special costs against Mr. Wilson and against counsel for Mr. Wilson, Mr. Straith, personally. She argued that Mr. Straith's conduct of the proceeding was highhanded and worthy of rebuke.
- [11] Ms. Tyabji argued that the claims advanced against her and Tugboat were meritless, were known by Mr. Straith to be meritless, and he, nevertheless, advanced them for an improper political motive. She submitted that the years of litigation had a disastrous impact on her and on Tugboat.
- [12] As a result of Ms. Tyabji's claim for costs, Mr. Straith felt compelled to cease representing Mr. Wilson and Mr. Wilson retained new counsel, Pamela Boles.
- [13] Mr. Straith, in turn, retained Richard Gibbs, Q.C. ("Mr. Gibbs") to represent himself.
- [14] As a result, two bills of special costs have been presented. One was a bill by Mr. Straith himself, directed to Ms. Tyabji and Tugboat, for costs incurred in reviewing the claim for costs against him personally and for various steps taken as a result, including transferring Mr. Wilson's file Mr. to Ms. Boles. Mr. Straith's bill was a lump sum fee of \$16,000 plus taxes and disbursements. The total amount of the bill was \$19,210.57.
- [15] The second was a bill by Mr. Gibbs. It is not, as one would expect, directed to Mr. Straith, but instead is simply designated a "Bill of Special Costs" of Mr. Straith. There is a listing of services provided, followed by a lump sum fee of \$100,000 plus taxes for a total of \$112,000. Also claimed are \$8,058.81 in disbursements plus taxes of \$398.95. The Bill of Costs of Mr. Straith
- [16] I questioned Mr. Gibbs as to why Mr. Straith would be entitled to put forward an account for his own time in attending to matters relating to Mr. Wilson or in retaining Mr. Gibbs.
- [17] Mr. Gibbs relied on the decision of Justice Ball in *K.M. v. I.M.*, 2016 BCSC 2125. In that case, "P.B." was counsel for I.M.
- [18] Justice Ball found that K.M. had made personal allegations against P.B., requiring P.B. to retain counsel herself. K.M. was using those allegations as the foundation for an application to disallow a s. 211 report.

- [19] It is clear that P.B. sought special costs for her time and expenses in preparing a response to the application (K.M., para. 13). Justice Ball considered the law carefully and decided that despite the unusual circumstance, he had jurisdiction to award special costs to P.B.
- [20] The award made, however, was not what P.B. sought. Justice Ball ordered:
- [32] The actual legal fees and disbursements charged by Mr. Gibbs to P.B. shall, be paid forthwith by K.M. to P.B. after an assessment of that account by the Registrar.
- [21] Thus, I do not agree that K.M. stands for the proposition that a counsel accused of wrongdoing is entitled to advance an account other than for fees charged by the lawyer they retain as a result.
- [22] It is worth noting the general law regarding special costs. In *Bradshaw Construction Ltd. v The Bank of Nova Scotia* (1991), 54 B.C.L.R. (2d) 309 (S.C.), Justice Bouck noted: Special Costs, as a division of Party and Party Costs, are now assessed under the 1990 rules; Rule 57 (3). When taxing Special Costs, there is no detailed scale corresponding to the scale that applies to Ordinary Costs in App B. Instead, fees are allowed "that the registrar considers were proper or reasonably necessary to conduct the proceedings to which the fees relate"; Rule 57 (3). When examining the circumstances, the registrar exercises his or her discretion by applying the provisions of Rule 57 (3) (a) to (g). As I understand the notion of Special Costs under Rule 57 (3), they are meant to provide a much higher indemnity than Ordinary Costs where the circumstances warrant. They are assessed under paragraphs (a) to (g) of Rule 57 with a view to the relationship between the successful party and his or her own solicitor. But they are not necessarily the fees that she successful solicitor would recover from his or her client. Those fees arise from a review of a solicitor's bill under the Legal Profession Act, S.B.C. 1987 ch. 25, Part 10, as amended by the Justice Reform Statutes Amendment Act, 1989, s. 26; in force 1 September 1990; B.C. Reg. 267/90. Instead, Special Costs are the fees that a reasonable client would pay a reasonably competent solicitor for performing the work described in the bill. On the other hand, fees payable by the client to the solicitor pursuant to a bill taxed under the Legal Profession Act represent fees for work done by that solicitor for that client. In the usual course of events, a bill taxed as Special Costs will be less than a bill taxed under the Legal Profession Act. This is because Special Costs still fall under the category of party and party costs, whereas fees due under the Legal Profession Act are assessed in a similar way to the old method of solicitor and own client costs. A taxation of Special Costs is objective in nature while a taxation under the Legal Profession Act is subjective. Put another way, a losing party should not have to pay for the cost of the most experienced and qualified lawyer if that kind of service was not necessary. However, in most instances, a bill for Special Costs will usually be about 80% to 90% of a similar bill assessed under the Legal Profession Act. [Emphasis added.]
- [23] I turn then to the order made by Giaschi J. in *Lougheed*. At para. 62, Giaschi J., after reviewing the law on special costs, including K.M., concluded:

- [62] In my view, such conduct is deserving of reproof or rebuke and entitles Mr. Straith to special costs for defending the application of the Tyabji defendants and for the costs of bringing his own application.
- [24] And at para. 64:
- [64] I therefore make the following orders:
- b) Mr. Straith is awarded his special costs against the Tyabji defendants of responding to the application of the Tyabji defendants and of bringing his own application for costs, with such special costs to be assessed by the Registrar;
- [25] Turning then to the account presented by Mr. Straith, the account is done in narrative form, without time entries or specific dates that work was attended to. The first page-and-a-half deals with matters in which Mr. Straith was largely representing the interests of Mr. Wilson, including considering whether Mr. Straith himself was in a conflict. The balance of the account is partly for his actions as a client, bringing Mr. Gibbs up to speed and instructing him regarding the costs application. The balance is for his actions in transferring Mr. Wilson's file to Ms. Boles.
- [26] Although some of these actions were necessitated by the actions of Ms. Tyabji and Tugboat in claiming costs against Mr. Straith personally, they do not properly fall within the ambit of the special costs order made by Giaschi J.
- [27] They are not fees that Mr. Straith as a "reasonable client", paid a "reasonable solicitor" for responding to the Tyabji/Tugboat application or in bringing his own application for special costs.
- [28] Thus, the account presented by Mr. Straith personally is disallowed in its entirety. The Bill of Costs of Mr. Gibbs
- [29] Mr. Gibbs was frank to say that he had never conducted a special costs assessment before. That perhaps explains some of the procedural issues in this assessment.
- [30] The account presented here is not the normal type of account presented for a special costs assessment. That would be an account tendered to a client. Usually with some evidence that it was paid.
- [31] Nevertheless, it was presented by Mr. Gibbs as a fair fee account for the work that was done.
- [32] The Court of Appeal considered the requirement for evidence of actual legal fees incurred in *Gichuru v. Smith*, 2014 BCCA 414:
- [115] In *Buchan [v. Moss Management Inc.]*, 2021 BCSC 121], an objection was made that there was not a proper "bill of special costs before the court". In that case the successful party had filed the affidavit of a legal assistant exhibiting the law firm's statements of account. Bauman C.J.S.C., as he then was, agreed with the comments in *Fraser, Horn & Griffin, The Conduct of Civil Litigation in British Columbia*, 2d ed. (Markham: LexisNexis, 2007) that a

bill for special costs is presented in the same form as a bill between a solicitor and client under the Legal Profession Act. Importantly, he did not suggest that an assessment should take place in the absence of any bill.

- [116] The need for a bill of a lawyer to tax his account against a client has been long recognized. In the absence of a bill a registrar does not have jurisdiction to conduct a review of a solicitor's account: *Kelly v. McMillan and Harbottle & Co.*, 2003 BCSC 307.
- [117] The Rules clearly indicate the need for an account. Since 1961 taxing officers have had the power to assess a solicitor-client bill in the form permitted for lump sum charges by the Legal Profession Act (MR 983a). Marginal Rule 983b required that every lump sum bill should contain a description of the nature of the services and of the matter involved as would in the opinion of the taxing officer afford any solicitor sufficient information to advise a client on the reasonableness of the charges made. Marginal Rule 983c allowed any party to a taxation of a lump sum bill to put into evidence the opinion of a solicitor as to the nature and importance of the services and the reasonableness of the charges.
- [118] The provisions in the 1961 Rules have been carried forward and are found today in Rules 14-1(30), 14-1(31) and 14-1(32). Rule 14-1 (30) sets out that a bill for special costs may be rendered on a lump sum basis. Rule 14-1(31) sets out that a party is entitled to a sufficient description of the nature of the services provided so that another lawyer can advise on the reasonableness of the charges. Absent a bill there is nothing to advise on. Rule 14-1 (32) allows a party to an assessment to put into evidence the opinion of a lawyer as to reasonableness of the charges made. Absent a bill there is nothing to opine on.
- [119] A party seeking an assessment of special costs must tender evidence of the legal fees incurred and a sufficient description of the nature of the services and of the matter involved to afford any lawyer sufficient information to advise a client on the reasonableness of the charge made. This will usually be provided in the same form as a bill between a solicitor and client under the Legal Profession Act. Those cases, such as *Bradshaw [v. Stenner]*, 2013 BCCA 61], that have held that a court can assess special costs absent evidence of actual legal costs were wrongly decided and should not be followed.
- [33] The bill of special costs presented here is quite out of proportion to most accounts for the conduct of a two-day hearing, no matter how complex. It is presented as a "fair fee" bill to Mr. Straith. I conclude that it is evidence to satisfy the requirement for a description of services providing "sufficient information to advise a client on the reasonableness of the charge made".
- [34] Although our Court of Appeal in *Gichuru* noted that an award of special costs might be made on the basis of actual costs or some percentage of actual costs, they concluded:
- [155] When assessing special costs, summarily or otherwise, a judge must only allow those fees that are objectively reasonable in the circumstances. This is because the purpose of a special costs award is to provide an indemnity to the successful party, not a windfall. While

a judge need not follow the exact same procedure as a registrar, the ultimate award of special costs must be consistent with what the registrar would award in similar circumstances. Thus, a judge must conduct an inquiry into whether the fees claimed by the successful litigant were proper and reasonably necessary for the conduct of the proceeding as set out in R. 14-1(3)(a), taking into account all of the relevant circumstances of the case and with particular attention to the non-exhaustive list of factors in R. 14-1(3)(b).

[35] It is on that basis that I will proceed with this assessment.

Analysis

a) The ambit of the assessment

[36] Rule 14-1(3) of the Supreme Court Civil Rules governs the assessment of special costs. It provides: Assessment of special costs

(3) On an assessment of special costs, a registrar must

(a) allow those fees that were proper or reasonably necessary to conduct the proceeding, and

(b) consider all of the circumstances, including the following:

(i) the complexity of the proceeding and the difficulty or the novelty of the issues involved; (ii) the skill, specialized knowledge and responsibility required of the lawyer; (iii) the amount involved in the proceeding; (iv) the time reasonably spent in conducting the proceeding;

(v) the conduct of any party that tended to shorten, or to unnecessarily lengthen, the duration of the proceeding; (vi) the importance of the proceeding to the party whose bill is being assessed, and the result obtained; (vii) the benefit to the party whose bill is being assessed of the services rendered by the lawyer; (viii) Rule 1-3 and any case plan order.

[37] As noted in *Bradshaw Construction*, special costs are not the same as costs payable by a client to counsel. The assessment ordered in Rule 14-1(3) is an objective one of what a reasonable client would pay a reasonably competent solicitor for the work that was proper or reasonably necessary. Sometimes those amounts are equivalent, often special costs are considerably less than actual legal costs.

[38] I will consider each of the rule 14-1(3) factors below.

(i) The complexity of the proceeding and the difficulty or the novelty of the issues involved
Factual background

[39] Mr. Gibbs was retained by Mr. Straith on August 16, 2018. He pointed out that he and Mr. Straith were professional friends but that he was only peripherally aware of the issues in the Loughheed Estate litigation at the time of his retainer.

- [40] Mr. Gibbs was faced with familiarizing himself with Dardi J.'s 219-page judgement and Ms. Tyabji's 52-page submission and 62-page affidavit in support of her application for special costs against Mr. Straith personally.
- [41] Mr. Straith then provided Mr. Gibbs 249 pages of written submissions from the underlying litigation, a 2015 chronology of 89 pages, and an annotated 20-page article.
- [42] Mr. Gibbs also met with Ms. Tyabji to learn the basis for her position regarding Mr. Straith.
- [43] Mr. Gibbs met with Mr. Straith at his home in Nanaimo to review the matter.
- [44] Mr. Gibbs was clear in his evidence that he did not undertake a review of the "40 boxes" of material from the underlying litigation.
- [45] He attended a hearing before Dardi J. on August 22, 2018 to seek an adjournment of the application, which was granted. It was adjourned to September 21, 2018 with a direction that, by September 13, 2018, Mr. Gibbs was to provide Ms. Tyabji with notice of objections to her July 6, 2018 affidavit in support of the costs application.
- [46] By letter of September 13, 2018, Mr. Gibbs advised that he would be objecting to the entire affidavit. He estimated the application would require a one-day hearing.
- [47] When the parties appeared before Dardi J. on September 21, 2018, Ms. Tyabji totally withdrew her affidavit.
- [48] Mr. Gibbs called this an "astonishing development with far-reaching implications" for the special costs claim, as there was now no evidence in support. Nevertheless, Ms. Tyabji persisted, intending to use the record of the proceedings themselves in support.
- [49] Mr. Gibbs was of the view that he had to guard against the possibility that Ms. Tyabji would retain counsel or get legal advice and seek to substitute a proper affidavit in support of the July 6, 2018 affidavit.
- [50] In his evidence, Mr. Gibbs said that this required several attendances on Mr. Straith in Nanaimo to try to ascertain the foundation for Ms. Tyabji's claim. That seems unnecessary, given that Mr. Gibbs had her affidavit, albeit which was no longer being relied upon, and her written submission.
- [51] This matter is complicated by the fact that Mr. Gibbs was also retained by Mr. Straith regarding certain Law Society of BC proceedings and was meeting with him for the purposes of that retainer.
- [52] Justice Dardi advised at the hearing on September 21, 2018 that she would be retiring and a new judge appointed. Mr. Gibbs was ordered to respond to Ms. Tyabji's submissions and submit any cross-application on costs by October 12, 2018.

- [53] To defend against the claims made by Mr. Tyabji, Mr. Gibbs drafted an affidavit for Mr. Wilson's consideration, in which Mr. Wilson took complete responsibility for the positions that Mr. Straith had taken on his behalf. Mr. Wilson agreed and the affidavit was sworn and filed on October 18, 2018.
- [54] Mr. Gibbs then drafted written submissions on special costs along with a notice of application on Mr. Straith's behalf seeking special costs against Ms. Tyabji and Tugboat, and for an order that those costs be deducted from the costs Mr. Wilson would be ordered to pay Ms. Tyabji, on the basis that Tugboat had no assets.
- [55] In response, Ms. Tyabji filed a 50-page written submission in which she "redoubled" her allegations against Mr. Straith.
- [56] The hearing was then conducted before Giaschi J. on January 31 and February 1, 2019. Judgment was rendered April 30, 2019, which was a complete victory for Mr. Straith. Mr. Gibbs then moved to get the order entered as soon as possible in case Ms. Tyabji sought to re-open to admit new evidence. This required an appearance before Master Tokarek on May 10, 2019 to settle the order.
- [57] The last step, of course, was this assessment hearing. The court of appeal in *567 Hornby Apartment Ltd. v. Le Soleil Restaurant Inc.*, 2020 BCCA 69 determined that on an assessment of a special costs award, the costs of the assessment are to be assessed as special costs.
- [58] For this assessment hearing, Mr. Gibbs prepared the appointment, a summary of disbursements, and an eight-page affidavit of justification with no exhibits.
- [59] The November 24, 2021 assessment hearing ran from 10:55 a.m. to 12:35 p.m. and from 2 p.m. to 3:30 p.m.--a little over three hours.

Analysis

- [60] The claim made by Ms. Tyabji was somewhat novel, but with ample jurisprudence on topic. It was certainly a major claim against counsel personally. The background was a very complex piece of litigation and there was clearly a need to get on top of a significant amount of material in relatively short order.
- [61] The primary difficulty, other than dealing with the factual matrix, was ensuring that Ms. Tyabji did not resile from her withdrawal of her July 6, 2018 affidavit. That was not within Mr. Gibbs' control, but was more of a 'watch and wait' and be prepared.
- [62] I note that Mr. Gibbs' submissions in response to the Tyabji/Tugboat claim against Mr. Straith were only three-pages long. His notice of application on behalf of Mr. Straith was only four pages long. The affidavit prepared for Mr. Wilson was two pages long. There is nothing difficult, novel, or complex about any of these documents. (ii) The skill, specialized knowledge and responsibility required of the lawyer

- [63] Mr. Gibbs is a senior and very experienced lawyer, with 45 years at the bar and significant experience with the Law Society of BC. He was appointed Queen's Counsel in 2001.
- [64] There was clearly a legal strategy involved in the steps taken to try to have Ms. Tyabji's affidavit disallowed. That resulted in her withdrawing the affidavit and undoubtedly contributed to the chances of Mr. Straith's ultimate success. The specialized knowledge involved is limited. This was not a complex tax application--it was an argument tilted from the outset in Mr. Straith's favour.
- [65] There was certainly a significant responsibility undertaken to defend Mr. Straith's reputation and to defend against a large costs claim. (iii) The amount involved in the proceeding
- [66] Ms. Tyabji and Tugboat's initial claim for costs was \$1,396,347.63. (iv) The time reasonably spent in conducting the proceeding
- [67] This is problematic. Mr. Gibbs did not keep time records. It is not his practice to bill on the basis of time records. He says he charges on a "fair fee" basis. In his affidavit of justification, he deposes that he charges \$7,500 per day, but other than saying that the matter involved "weeks" of his time and multiple trips to Nanaimo (where Mr. Straith lives) and Vancouver, there is no record or evidence of the time spent and why.
- [68] At \$7,500 per day, a lump sum bill of \$100,000 equals roughly 13 full days' work. There is nothing to support a finding that this matter required 13 complete days of effort by Mr. Gibbs.
- [69] As was noted by Justice Parrett in *Adams v. Emmott*, 1997 CanLII 746 (BC SC):
- [42] (7) The assessment of the time spent by Mr. MacLeod on this file is made difficult by the fact that he does not record his time. He persists in that approach to his files despite the pointed comments directed at that issue by Oliver, J. in *Cook v. Mission Memorial Hospital* (11 June 1996) (Vancouver Registry No. C92755 (B.C.S.C.)) at p. 16: . . . It has been suggested, and there is authority to support the proposition that in a case involving a contingency fee, time records need not be kept by the solicitors. Nevertheless, having regard to the way in which the law is developing and the way that Yule *v. City Saskatoon* [(1955), 1955 CanLII 186 (SK QB)] has been applied in recent contingency fee review cases, it is my view that any lawyer who hereafter fails to keep time records when undertaking contingency fee litigation in circumstances where there is a possibility of his bill being taxed is foolhardy - for the lack of detailed time records deprives the Court of important information necessary to protect the legitimate interests of the provider of legal services.
- [43] I am aware that the reasons in *Cook* were delivered on June 11, 1996 and that the settlement in the present case was finalized approximately five months later. I would add however my own views to those expressed by Oliver, J. Recorded time is one aspect of the information which the court is entitled to consider in assessing the reasonableness of a proposed fee. That information is not to be used in a contingency fee case to simply consider an appropriate hourly rate for that would ignore both the value of counsel's experience and

expertise and the time spent in staying on top of the field in which they practice. It would equally ignore the risk factor associated with these cases.

- [44] Nevertheless it is a factor which the court is entitled to consider and one which can be obtained with relatively little effort. I share the views expressed in Cook.
- [70] Although that case involved a contingency fee review, the principles are the same. The complete lack of time records or any real evidence of the amount of time devoted to this matter deprived me of information that is important in any assessment or review hearing.
- [71] The evidence is that Mr. Gibbs had to review about 700 pages of material, perhaps reasonably spend a day reviewing matters with Mr. Straith, attend brief hearings on August 22, 2018, September 21, 2018, and May 10, 2019, and prepare for and attend the hearing of the application on January 31 and February 1, 2019. All followed, of course, by this assessment process.
- [72] Assuming it took a day to read the material, another day with Mr. Straith, one day to prepare materials and to attend the short appearances, one day to prepare for the hearing and two days for the hearing, that is six days, which, based on 10- to 12-hour days, would be 60 to 72 hours. That seems to be a generous amount of time considering all of the circumstances. Based on Mr. Gibbs' billing practice of \$7,500 per day, that would result in a lump sum bill to Mr. Straith of \$45,000.
- [73] There is, however, one other piece of evidence, which is the account dated February 7, 2019 addressed to Mr. Straith. This is one of the interim bills discussed below under disbursements, but it includes a fee for preparation for and attendance at the January 30 and February 1, 2019 hearing before Giaschi J.
- [74] That fee was lump sum \$20,000. Slightly less than the \$22,500 that would result from a full three days at \$7,500 per day as set out above. If I parse the rest of the hours in that manner, the total fee that would have been charged to Mr. Straith was \$40,000.
- [75] Added to that must be the special costs of this assessment. Again, I do not have the assistance of any time records. The affidavit of justification was a short and not particularly helpful narrative with no exhibits. There was essentially no evidence as to the disbursements. There were no invoices included. There were virtually no authorities referred to.
- [76] I can only conclude that preparation time was minimal.
- [77] The hearing itself occupied slightly more than three hours. There were five pre-hearing conferences over which I presided, but they dealt with other assessments as well. I conclude that four hours on the day of the hearing and three hours preparation, including the pre-hearing conferences, are more than ample considering the work done and the lack of evidence provided.

- (v) The conduct of any party that tended to shorten, or to unnecessarily lengthen, the duration of the proceeding
- [78] The withdrawal by Ms. Tyabji of her affidavit certainly resulted in a much simpler case to face, despite the fears that she may attempt to resile from that position. (vi) The importance of the proceeding to the party whose bill is being assessed, and the result obtained
- [79] I am satisfied that this proceeding was very important to Mr. Straith. A loss would not only have impacted his reputation as a lawyer, it would have resulted in him being personally responsible to pay a significant costs award. (vii) The benefit to the party whose bill is being assessed of the services rendered by the lawyer
- [80] The benefit is clear. Mr. Gibbs was completely successful in defeating Ms. Tyabji and Tugboat's application for costs against Mr. Straith and succeeded in having special costs awarded to Mr. Straith. Conclusion on Costs
- [81] This was not a particularly complex matter. Although there was a complicated background and a fair amount of material to read in terms of reasons, submissions, and affidavits, it involved only three short appearances and one two-day application. Mr. Gibbs was required to draft one position letter and nine pages of application, affidavit, and submission material.
- [82] Those factors certainly cut against the large fee claimed by Mr. Gibbs.
- [83] Rule 14-3(a) requires that I only allow fees that were proper or reasonably necessary to fulfil the retainer. As noted in Bradshaw Construction, this is an objective assessment.
- [84] Mr. Straith is not entitled to claim for the most experienced and knowledgeable counsel if that is not required. Mr. Gibbs' daily rate of \$7,500 equates, I presume, to an hourly rate of about \$625 to 750. Comparing that to Mr. Straith's own hourly rate of \$400 exemplifies the point.
- [85] I do not believe that Mr. Straith required anyone more experienced or senior than he was to deal with this matter. He was obviously dealing with a very complicated piece of litigation himself in representing Mr. Wilson.
- [86] The one factor that does militate in favour of a higher fee is what Mr. Straith had at risk. Assuming that he was entitled to 'aim high' given what was at stake for him, I conclude that it would be reasonable to pay \$500 per hour for services rendered here.
- [87] Assuming six days is a reasonable amount of time here, if an account had been rendered for 60 hours at \$500 per hour, the bill would be \$30,000; if for 72 hours the bill would be \$36,000.
- [88] Looking at 80% to 90% of actual fees of \$40,000 as was discussed in Bradshaw Construction would result in a fee of \$32,000 to \$36,000.

- [89] I conclude that \$30,000 is a fair fee for the work of Mr. Gibbs based on the evidence provided. To that will be added \$3,500 for the special costs of the assessment for a total of \$33,500. Disbursements
- [90] Rule 14-3(5) of the Supreme Court Civil Rules 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.
- [91] Registrar Nielsen considered the law regarding the assessment of disbursements in *Carreiro v. Smith*, 2015 BCSC 2379. He noted:
- [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)
- [92] Here, there was almost no evidence presented as to the basis for the disbursement charges. There were no invoices. Mr. Gibbs simply provided a chart attached to the appointment that claims various amounts under various headings from six invoices to Mr. Straith. In his affidavit of justification, Mr. Gibbs asserts only that they are "fair and reasonable".

- [93] In his affidavit of justification, Mr. Gibbs refers to interim billings. There were none attached as exhibits to his affidavit. In his evidence, he identified six accounts that were produced in the record as interim billings. They are all directed to Mr. Straith, referenced as being for the costs application and are all for disbursements with one having a fee component. They are dated: November 15, 2018 \$2,020.15 February 7, 2019 \$24,547.01 May 16, 2019 \$1,136.96 May 30, 2019 \$1,659.12 November 14, 2019 \$748.61 December 22, 2020 \$848.31
- [94] These are the same billings referenced in the chart attached to the appointment for this assessment.
- [95] Mr. Gibbs did not seek to have these billings marked as exhibits on the assessment. I failed to note this at the time. Ms. Tyabji did, however, have the opportunity to review these in advance and she did cross-examine on them. There was no question raised as to their authenticity.
- [96] I am satisfied that for present purposes I may rely on them as having been incorporated by reference into Mr. Gibbs' affidavit.
- [97] The accounts are of some assistance in identifying when the various disbursements were incurred. Unfortunately, as noted, this is further complicated by the fact that Mr. Gibbs was also acting for Mr. Straith in defending a Law Society of BC matter. His evidence was that the disbursements for Mr. Straith were parsed between these matters. There is no evidence as to how or why.
- [98] In addition, Mr. Gibbs resides and practices in Prince George. I have considered whether it was necessary or proper for Mr. Gibbs' airfares to and from Vancouver and ancillary charges to be added as special costs in these proceedings. I have concluded it was not. Although it is perfectly acceptable for Mr. Gibbs to charge Mr. Straith for these flights, as it was Mr. Straith's decision to retain Mr. Gibbs, these are not costs that were objectively necessary for the defence and prosecution of these costs claims.
- [99] It is apparent from these disbursement accounts that Mr. Gibbs was attending to more than one matter when in Vancouver, as an example, an airfare claimed for a return flight to Vancouver September 14 to 30, 2018 is charged at only one-quarter of the actual fare.
- [100] There are disbursements claimed for dates that make no sense in the context of this application.
- [101] Given the paucity of evidence, it is almost impossible to determine which of these disbursements were necessarily or properly incurred for this matter.
- [102] Regardless, I am satisfied that Mr. Straith is entitled to recover any such disbursements that I can identify as having been necessarily or properly incurred.
- [103] The following disbursements correspond to evidence and dates provided by Mr. Gibbs in his affidavit and in his evidence at the hearing of this matter:

- a) November 15, 2018 account Disbursement Charge(\$) Photocopying 6.40 Accom: Vanc 21Aug18 x ½ 75.00 Accom: Nanaimo 23Aug18 x ½ 106.02 Airfare: Vanc - Nanaimo 22Aug18 x ½ 125.06 Auto rental Nanaimo 22/24Aug18 x ½ 103.56 Auto rental gas 2.77 Meals: (B) (L) 22Aug18 25.00 Meals: (S) 22Aug18 x ½ 15.00 Meals: (B) 24Aug18 x ½ 5.00 Vanc Parking 22Aug18 15.24 Vanc Taxi 22Aug18 12.90 Efiling requisition 20.00 Vanc taxi 22Aug18 27.71 Meals: (S) 20Sep18 30.00 Meals: (B) (L) 21Sep18 25.00 Total Taxable Disbursements 594.66 Tax GST 5% 29.73 Total \$624.39
- b) February 7, 2019 account Disbursement Charge (\$) Photocopying 6.00 Postage .85 Vanc Parking 21Sep18 - previously missed 15.24 Efiling notice of application 20.00 Meals: (S) 29Jan19 30.00 Meals: (B) (L) (S) 30Jan19 55.00 Meals: (B) (S) 31Jan19 40.00 Meals: (B) (L) (S) 1Feb19 55.00 Meals: (B) 2Feb19 10.00 Taxi/parking 29Jan19 35.48 Taxi/parking 31Jan19 15.24 Taxi 2Feb19 33.43 Total Taxable Disbursements 316.24 Tax GST 5% 15.81 Total 332.05 Non-taxable disbursement - Notice of application filing fee 80.00 Total \$412.05
- c) May 16, 2019 account Disbursement Charge (\$) Vanc parking previously missed 31Jan19 4.76 Vanc parking previously missed 1Feb19 12.86 Efiling appointment to settle order 10.00 Meals: (B) (L) (S) 10May19 x ½ 55.00 Vanc parking 10May19 12.38 Total taxable disbursements 95.00 Tax GST 5% 4.75 Total \$99.75
- d) May 30, 2019 account Disbursement Charge (\$) None allowed 0.00
- e) November 14, 2019 account Disbursement Charge (\$) None allowed 0.00
- f) December 22, 2020 account Disbursement Charge (\$) None allowed 0.00

[104] I consider that the disbursements listed totalling \$1,136.19 were necessarily or properly incurred and they are allowed.

[105] There were disbursements billed to Mr. Straith after the May 10, 2019 settlement of the order. Mr. Gibbs, when asked by Ms. Tyabji about the account of December 22, 2020, for example, did say it was included because he was claiming special costs of this proceeding. There is, however, absolutely no evidence what these disbursements were or why they were incurred. They do not appear to correspond to any of the dates for pre-hearing matters and I am unable to attribute, as I did for the costs above, any necessary or proper rationale for any of these charges.

[106] It is the obligation of the party bringing forward their costs assessment to bring evidence in support. Given the lack of evidence as to disbursements, I am unable to allow any of the disbursements claimed after May 10, 2019.

Conclusion

[107] As concluded above, Mr. Straith's special costs are assessed at \$33,500. To that, taxes of 5% GST (\$1,675) and 7% PST (\$2,345) must be added for a total of \$37,520. Disbursements of \$1,136.19, inclusive of taxes are also allowed.

[108] The total costs are therefore assessed at \$38,656.19. "Master Muir"

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