Court of King's Bench of Alberta

Citation: Gill v Khalsa Credit Union (Alberta) Limited, 2024 ABKB 194

Date: 20240405
Docket: 2401 03503
Registry: Calgary

Between:

Beant Singh Gill

Applicant

- and -

Khalsa Credit Union (Alberta) Limited

Respondent

Decision on Costs
of the
Honourable Justice Darren J. Reed

Introduction

[1] This matter came before me in Urgent Matters Chambers on March 14, 2024. The Applicant, Beant Singh Gill ("**Mr. Gill**"), by way of Originating Application, sought an injunction against the respondent Khalsa Credit Union (Alberta) Limited ("**KCU**"). The intent of the urgent portion of the application was to prevent the KCU from proceeding with a Special

General Meeting ("**SGM**") on March 17, 2024 ("**Injunction Application**"). The SGM was scheduled to obtain a vote on whether to remove Mr. Gill, and another individual, Mr. Gurinderjit Singh Kaura ("**Mr. Kaura**") as directors of the KCU by way of vote at that meeting, which required a supermajority of the members to pass. Both Mr. Gill and Mr. Kaura were to have the opportunity to speak to the attendees at the meeting.

[2] The Originating Application sought other relief, but given the circumstances, only the Injunction Application proceeded before me.

[3] Mr. Kaura did not seek any relief from the Court and did not appear in person or via counsel as an interested party.

[4] I dismissed Mr. Gill's Injunction Application in its entirety via oral reasons delivered the day of the hearing. With respect to costs, I asked the parties for written submissions, following which I would issue a decision on costs in relation to the Injunction Application. In response, each party filed an affidavit and a written costs brief to support their costs positions.

Procedural Background

[5] The Originating Application, along with Mr. Gill's Affidavit in support, was filed March 12, 2024. I understand that an unfiled copy of the Injunction Application and the Affidavit was served on KCU's counsel on March 11, 2024. KCU filed a responding affidavit on March 13, 2024. The matter was heard the afternoon of March 14, 2024.

[6] No cross examinations took place on the evidence, there was no time for those to occur.

[7] Mr. Gill failed to file an Undertaking as to Damages, although when pressed on this in the hearing counsel indicated in oral argument that he was prepared to provide one, which I found to be insufficient in the circumstances, in addition to the fact that the test for an injunction was not met on the circumstances before me.

The Position of the Parties

Position of the KCU

[8] KCU seeks "full-indemnity" costs (solicitor-client indemnity costs) arising from the Injunction Application, payable forthwith, in the amount of $33,875.75 plus a further amount of $3,000.00, being the estimated costs of preparing the costs submissions. It does not provide bills, even redacted ones. There is no detailed information as to the exact number of hours spent, by whom, for what, or other breakdown of this very specific amount. KCU provided evidence as to the days that such fees were incurred, a general description of the work done, and evidence of the hourly rates and years of call of the two senior lawyers who assisted it to respond to Mr. Gill's application. It provided no draft Bill of Costs.

[9] In sum, KCU argues the following factors justify an award of enhanced costs in this case:

(a) Unproven allegations of fraud made by Mr. Gill in his Affidavit and the Originating Application regarding KCU management and one of its customers;

(b) Delay in bringing the Injunction Application, given the knowledge of Mr. Gill that the meeting had initially been scheduled for February 18, 2024 but was rescheduled to March 17, 2024;

(c) The "extraordinary efforts" required by KCU management and counsel to respond to the application on two day's notice;

(d) The fact that the court dismissed the application in its entirety; and

(e) The failure of Mr. Gill to file an Undertaking as to Damages.

Position of Mr. Gill

[10] Mr. Gill points out the deficiencies in the way in which the KCU has presented its proposed costs and argues that the request for full indemnity costs is unjustified, in particular because:

(a) The Special General Meeting was scheduled "abruptly" and on minimal notice. Mr. Gill states that he consistently sought clarification and resolution, but these attempts were disregarded. He points out that there was no immediate necessity for the meeting to be scheduled when it was, since the KCU had a general meeting scheduled for later in March;

(b) He serves as a Director of the KCU without financial compensation;

(c) The nature of the application, the conduct of the litigation, and the facts before the Court do not mandate an award of solicitor client indemnity costs.

[11] Unsurprisingly, Mr. Gill submits that an award of costs under Schedule C of *Alberta Rules of Court*, Alta Reg 124/2010 ("***Rules of Court***") is proper and adequate in this case. He indicates that the issues warrant serious consideration, there was no failure to prove fraud, and no litigation misconduct. In his submission, the religious and voluntary nature of his role with the KCA, and the allegations he has brought forward in what remains in the Originating Application are important considerations.

[12] Mr. Gill submits an appropriate award of costs would be two times the amount of item 20(a) of Schedule C (in his submissions, Schedule C item 8(1) permits the court, for complex chambers applications, to apply the costs for appearing before an Appeal Court under Item 20. This amount equals $9,100.00, exclusive of taxable disbursements and other charges.

The Law on Costs Generally

[13] The *Rules of Court* set out the framework for determining a costs award. An award of costs is a discretionary one. The default rule that applies in the present case is that the successful party to an application is entitled to an award of costs payable forthwith, subject to the Court's general discretion under Rule 10.31: *Rules of Court*, Rules 10.29(1) and 10.29(1)(a).

[14] KCU notes that there is no special exception for injunction applications to the application of these general rules, citing: ***Enviro Trace Ltd. v Sheichuk***, 2015 ABQB 28 (Alta. Q.B.) at paras. 1 and 7-11. Mr. Gill on the other hand points out that this case deals with the successful applicant on an injunction application. I agree that there is no special exception for injunctions. The Court retains discretion as noted above, the default is that successful party is entitled to an award of costs payable forthwith, subject to that discretion. It is not necessary to rely upon ***Enviro Trace Ltd.*** for this proposition.

[15] The Court has broad discretion in making a costs award in accordance with Rules 10.31 and 10.33 of the *Rules of Court*. The Court of Appeal, in ***McAllister v Calgary (City)***, 2021

ABCA 25 (Alta. C.A.) at paras. 33, 37-38 noted that Rule 10.31(a) distinguishes between two types of costs awards, the first being "reasonable and proper costs" incurred, which can be structured in a variety of ways set out in Rule 10.31(3) and means some form of partial indemnity for actual legal expenses, with or without reference to Schedule C of the *Rules of Court*. The second type of costs award is any amount the court considers appropriate, including an indemnity for actual lawyers' charges.

[16] The decision in ***McAllister*** confirmed that judges have considerable discretion in setting "reasonable and proper costs" under R. 10.31(1). A costs award need not be based on Schedule C, and Schedule C is not a mandated default method: ***McAllister*** at para 54; ***Barkwell v McDonald***, 2023 ABCA 87 (Alta. C.A.) at para 53. ***McAllister*** confirmed at para 58, that does not mean that Schedule C is without utility and "is used day in and day out by judges in a great variety of situations." : ***Barkwell*** at para. 53.

[17] Since ***McAllister***, a number of recent authorities of this Court (including those relied upon by the KCU) have developed which suggest that party and party costs should normally represent partial indemnification of the successful party at a level approximating 40-50% of solicitor and client costs: ***McAllister***, at para. 41; ***R.V.W. v C.L.W.***, 2021 ABQB 546 (Alta. Q.B.) at para. 14; ***Barry v Industrial Alliance Assurance***, 2022 ABQB 265 (Alta. Q.B.); ***Olson v Olson***, 2022 ABQB 356 (Alta. Q.B.) at para. 35.

[18] However, in ***Barkwell***, and other recent decisions, the Court of Appeal has recently discussed the fact that there are no legal presumptions in favour of using a percentage of actual legal expenses or Schedule C to set "reasonable and proper costs." The governing principles are proportionality (having regard, for example, to the amounts in issue) and the factors in rule 10.33: ***Sutherland v Sutherland***, 2023 ABCA 185 (Alta. C.A.) at para 4; citing ***Barkwell*** at paras 52-61; and ***Sunridge Nissan Inc v McRuer***, 2023 ABCA 128 (Alta. C.A.) at para 58; ***Kantor v Kantor***, 2023 ABCA 329 (Alta. C.A.) at paras 12-15.

[19] The Court of Appeal also noted in ***Barkwell*** at para. 56 that:

> The starting point is to recognize the important distinction between solicitor and own client costs, and solicitor and client costs. Solicitor and own client costs are those costs that counsel can charge to the winning party, and that the winning party is required to pay as a matter of contract. Solicitor and client costs represent the costs that a reasonable client might be required to pay for the services rendered. It is rarely appropriate to award solicitor and own client costs as a costs award in litigation: ***Luft v Taylor, Zinkhofer & Conway***, 2017 ABCA 228 at paras 77-78, 53 Alta LR (6th) 44.

[20] The key theme of the inquiry is proportionality and reasonableness: ***Barkwell*** at paras. 57 and 58. The court in ***Barkwell*** went on to state at para. 58 that:

> The long-established principle is that costs awards are designed to partially, but not fully indemnify the winning party: ***McAllister*** at para 37. It is frequently said that a rough rule of thumb is that the costs award should reflect 40 to 50% of the solicitor and client costs: ***McAllister*** at paras 41-42. That again is not necessarily a reference to the costs incurred and paid by the client, but rather to the costs that should reasonably have been incurred given the issues. This was also the benchmark that was used to set the tariff in Schedule C (***McAllister*** at para 43),

> and why we stress that a party, regardless of the costs claimed, should always provide as a benchmark a draft Bill of Costs based on Schedule C.

[21] If the Court decides to make a costs award based on a percentage of solicitor and client costs the analysis must go further, the question is whether the quantum represents an amount that the losing party in the litigation should reasonably be expected to pay to the winning party: ***Barkwell*** at para. 59.

[22] Such costs claimed must be justified by the requesting party by consideration of the factors in Rule 10.2 and 10.33 that are relevant to the reasonableness of the fee. This includes a consideration of hourly rates (including paralegals and administrative time), the appropriateness of rates, whether the work was done by lawyers of appropriate seniority, the number of counsel involved, whether interlocutory proceedings were unnecessary and their outcome, and whether the ultimate fee was proportionate to the issues. It is not as simple, nor proper, to default to a percentage of fees claimed by the successful party; the issue is not what the successful party spent but how much it can reasonably expect the other party to pay. The analysis is one of proportionality: ***Barkwell*** at para. 60, 74; ***Kantor*** at paras 12-14.

Solicitor and Own Client Indemnity Costs

[23] In exceptional cases the Court does have the ability to award solicitor-client, and even solicitor and own client indemnity costs. For this proposition, KCU relies upon ***Olson*** at para. 37, citing the Court of Appeal in ***FIC Real Estate Fund v Phoenix Land Ventures***, 2016 ABCA 303 (Alta. C.A.) at para. 4 for the proposition that circumstances that justify an award of enhanced costs include:

(a) Blameworthiness in the conduct of the litigation;

(b) When justice can only be done by a complete indemnification for costs;

(c) When there was evidence that one party hindered, delayed or confused the litigation, there was no serious issue of fact or law, when one party was "contemptuous" of the other in forcing the other to exhaust legal proceedings to obtain that which was obviously hers;

(d) When there has been an attempt to delay, deceive and defeat justice, prolonging the trial, asking for unnecessary adjournments, concealing material documents and failing to produce material documents in a timely fashion;

(e) Positive misconduct, where others should be deterred from like conduct and the party should be penalized beyond the ordinary order of costs;

(f) Acting fraudulently or in breach of trust;

(g) Advancing untrue or scandalous charges.

[24] I note that at paragraph 36, the Court in ***Olson*** states:

> Enhanced costs may take several forms, including a lump sum in which costs are set at a fixed amount, solicitor-client costs, which provide full indemnity for all legal fees and disbursements reasonably incurred by a successful party, and solicitor and own client costs, which includes all services requested by a client which under ordinary circumstances are not fairly passed on to a third party. Such

an award is only justified in the most exceptional circumstances (see *Secure 2013 Group Inc. v Tiger Calcium Services Inc*, 2018 ABCA 110 at para. 12).

[25] Here, KCU argued for what it referred to as "costs on a full-indemnity basis". I have interpreted this to mean solicitor-client costs, based upon the fact that they appear to be claiming full indemnity for all legal fees and disbursements.

Decision

[26] I have reviewed all of the evidence on the application, and the evidence submitted as a part of the parties' costs submissions. I will first address the issue of solicitor-client indemnity costs and then costs.

Is the KCU Entitled to Solicitor-Client Indemnity Costs?

[27] I do not agree that this is a case where any of the relevant factors cited in ***Olson***, above, are met on the evidence, and as such decline to grant an award of solicitor-client indemnity costs.

[28] There has been no blameworthiness in the conduct of the litigation. The March 17th SGM was only called after a meeting of the Directors on February 29, 2024, after a prior attempt to have such a meeting called was deemed to have been procedurally flawed. Mr. Gill disputed that this meeting was also properly called. There was conflicting evidence on this point from the KCU and Mr. Gill. The evidence submitted suggests that there were attempts to work through the issue which failed at which time Mr. Gill moved to bring the Injunction Application. There is no doubt the timing was incredibly tight, but I find no blameworthy conduct here. While the KCU sought to rely upon ***Pillar Resource Services Inc. v PrimeWest Energy Inc.***, 2017 ABCA 19 (Alta. C.A.) as authority for the proposition that a failure to observe the timelines set out in the *Rules of Court* can amount to litigation misconduct, the circumstances of this case are not such that the abridged timing here amounted to that.

[29] While the KCU also alleged confusing pleadings put forward by Mr. Gill, and while I note that in the hearing itself, Mr. Gill attempted to cast his Originating Application as something akin to an oppression remedy when no such thing was pleaded, I do not think that this rises to the level of litigation misconduct.

[30] I also disagree with the KCU's assertion that there have been "unproven allegations of fraud". Only the Injunction Application proceeded. The serious issue to be tried in relation to the relief that would have been effected by an injunction (had one been found) related not so much to Mr. Gill's allegations of cheque kiting by a client of the KCU with knowledge of the KCU, but to his actions in removing KCU documentation from the premises with Mr. Kaura. While the parties have different explanations for the motive for such actions, the fact is that this occurred. Any fraud-like claims made by Mr. Gill were not determined in any way by the Court on the Injunction Application. They simply remain unsubstantiated allegations that remain in the context of the relief sought in the Originating Application.

[31] There were no charges that I would call "untrue" or "scandalous" advanced; the evidence was untested due to the speed of the application and while the allegations made regarding cheque kiting are serious, the evidentiary record is too underdeveloped at this time to find them to be so.

[32] There is no evidence that any of the other factors outlined in ***Olson*** are engaged here, and in fact, as I will discuss below, awarding solicitor-client indemnity costs in this case would not do justice – it would in fact do the opposite.

[33] While Mr. Gill's application was dismissed in its entirety, and he did not file an Undertaking as to Damages, these are factors to consider when assessing the overall quantum of costs to be awarded. When I view Mr. Gill's litigation conduct as a whole, I see no "blatant disregard" for the *Rules of Court*, the opposing party, or at all in the circumstances of this case: ***Pillar***, at para. 123. There simply is no solid ground for this Court to award solicitor-client indemnity costs on the facts before it.

What is the Proper Quantum of Costs to Award the KCU?

[34] The KCU is entitled to costs. It is entitled to have them payable forthwith.

[35] With respect to quantum, as noted above, despite clear direction from the Court of Appeal, KCU did not provide a Schedule C Bill of Costs. As I have noted, it did provide the hourly rate of the two senior lawyers who worked on the Injunction Application, a description of what they did, along with their staff and KCU representatives, and on which days, to prepare for and respond to the Injunction Application. While a very specific dollar figure is claimed, the underlying information that would permit the court to more fully and completely assess the validity of the amounts claimed is somewhat lacking.

[36] When I assess the evidence, given the rates of counsel and work required, the amount claimed to respond to and argue an injunction application on short notice, does not seem wholly unreasonable to the Court. I also note that Mr. Gill had two counsel representing him at the hearing.

[37] This was an urgent application brought by Mr. Gill. He was unsuccessful, and despite being represented by capable counsel did not file an Undertaking as to Damages with the Court with his application materials. The issues raised were complex and the evidence was somewhat voluminous. There is no doubt the parties, on both sides, put in a significant amount of work in a short time. In bringing such an application, Mr. Gill must have been mindful of the fact that if he lost, he could be exposed to a significant costs award.

[38] Mr. Gill argues that he is a volunteer and the fact that his role with the KCU was gratuitous and also linked to his religious affiliations in the Sikh community ought to be taken into account. That is true, but the significant costs the Injunction Application put the KCU through also must be taken into account.

[39] While the Court appreciates the reasonableness Mr. Gill showed in his position, I do not think this is an appropriate case to award costs based upon the Schedule C amount proposed by Mr. Gill. When I look at the evidence as a whole and consider the relevant factors in the *Rules of Court*, the law cited above, and the costs positions of the parties, I find that the most reasonable and proportionate costs award to be made in this matter is an all inclusive, lump sum award.

[40] KCU is awarded costs in the total amount of $15,750.00, all inclusive of fees, disbursements, taxes and other charges. Even though this award is made on a lump sum basis and not an attempt to provide partial indemnity for KCU's claimed fees, I am aware that this amount falls within the 40-50% range of the amounts that were sought by KCU. To the extent it is necessary in the face of a lump sum award, I do find that the amount I have awarded is an amount that Mr. Gill should be reasonably expected to pay the KCU in the circumstances.

[41] I thank the parties for their co-operation and submissions throughout.

Heard on the 14th day of March, 2024.
Dated at the City of Calgary, Alberta this 5th day of April, 2024.

The Honourable Darren J. Reed
J.C.K.B.A.

Appearances:

Mandeep Baydal and Arun Sahota
for the Applicant, Beant Singh Gill

Richard N. Billington, K.C. and Richard Hayles
for the Respondent, Khalsa Credit Union (Alberta) Limited