Court of King's Bench of Alberta

Citation: Breen v Foremost Industries Ltd, 2024 ABKB 9

Date: 20240105
Docket: 1501 03872
Registry: Calgary

Between:

PATRICK BREEN

Plaintiff

- and -

FOREMOST INDUSTRIES LTD. and ROY H. ALLEN, BRUCE J. MACLENNAN, BEVAN MAY, and GORDON M. WIEBE IN THEIR CAPACITIES AS TRUSTEES OF FOREMOST COMMERCIAL TRUST

Defendants

FOREMOST INDUSTRIES LTD. and ROY H. ALLEN, BRUCE J. MACLENNAN, BEVAN MAY, and GORDON M. WIEBE IN THEIR CAPACITIES AS TRUSTEES OF FOREMOST COMMERCIAL TRUST

Plaintiffs by Counterclaim

-and-

PATRICK BREEN

Defendant by Counterclaim

Reasons for Decision
of the
Honourable Justice K.D. Yamauchi

I. Background to the Costs Award

[1] This Court rendered its decision following a lengthy trial of this action in ***Breen v Foremost Industries Ltd***, 2023 ABKB 552 (the "Trial Decision"). In the Trial Decision, this Court dismissed the wrongful dismissal action that the Plaintiff/Defendant by Counterclaim Patrick Breen commenced against the Defendants/Plaintiffs by Counterclaim Foremost

Industries Ltd, Roy H. Allen, Bruce J. Maclennan, Bevan May, and Gordon M. Wiebe in their capacities as trustees of Foremost Commercial Trust (the "Wrongful Dismissal Action").

[2] The Trial Decision also found that Mr. Breen, while acting in his capacity as President and Chief Executive Officer of the Foremost Income Fund ("FIF") and the various businesses that operate under FIF (collectively, the "Foremost Group"), breached a number of duties that he owed to the Foremost Group, including, his fiduciary duty, a duty of care and skill, a duty to safeguard the Foremost Group's property, a duty to avoid conflicts of interest, and his duties of loyalty, honesty, and good faith. It went on to hold Mr. Breen personally liable to pay to the Foremost Group the following:

(a) various gifts that Jim Chernyk made to Mr. Breen's corporation, 849183 Alberta Ltd. totalling $55,974.90 USD and $110,250 CAD;

(b) payments totalling $113,000 USD made to Alpheus Ltd, which Mr. Breen knew or ought to have known were fraudulently charged as agent fees;

(c) $200,000 CAD for the damages that the Foremost Group suffered as a result of Mr. Breen's breaches of his fiduciary duties and his employment agreement; and

(d) punitive damages in the amount of $50,000 CAD.

(the "Counterclaim").

[3] As a result of the foregoing, this Court found that the Foremost Group was entitled to its costs. The parties were not able to agree on the quantum of the costs award. In accordance with this Court's invitation, they provided it with their written submissions concerning costs.

[4] The Foremost Group argues that it is entitled to full indemnity costs. Mr. Breen argues that the Foremost Group is entitled only to party-party costs.

II. *Alberta Rules of Court*

[5] In this decision, this Court will be guided by the *Alberta Rules of Court*, Alta Reg 124/2010 [*Rules*], which will assist it in determining the quantum of the costs to which the Foremost Group is entitled. *Rules* r 10.29(1) provides that a successful party is "entitled to a costs award against the unsuccessful party" and the "unsuccessful party must pay the costs forthwith." The Foremost Group was completely successful in its defence to the Wrongful Dismissal Action and substantially successful in the Counterclaim.

[6] *Rules* r 10.33 outlines factors that this Court might consider when it is making a costs award, the provisions relevant to the case at bar are as follows:

> 10.33(1) In making a costs award, the Court may consider all or any of the following:
>
> (a) the result of the action and the degree of success of each party;
>
> (b) the amount claimed and the amount recovered;
>
> (c) the importance of the issues;
>
> (d) the complexity of the action;
>
> (e) the apportionment of liability;

> (f) the conduct of a party that tended to shorten the action;
>
> (g) any other matter related to the question of reasonable and proper costs that the Court considers appropriate.

(2) In deciding whether to impose, deny or vary an amount in a costs award, the Court may consider all or any of the following:

> (a) the conduct of a party that was unnecessary or that unnecessarily lengthened or delayed the action or any stage or step of the action;
>
> (b) a party's denial of or refusal to admit anything that should have been admitted;
>
> ...
>
> (d) whether any application, proceeding or step in an action was unnecessary, improper or a mistake;
>
> ...
>
> (f) a contravention of or non-compliance with these rules or an order;
>
> (g) whether a party has engaged in misconduct;
>
> (h) any offer of settlement made, regardless of whether or not the offer of settlement complies with Part 4, Division 5.

III. Discussion

[7] This Court has discretion in its award of costs, but it must exercise this discretion "judicially, and in line with the factors in [*Rules* r 10.33]": ***Stewart Estate v TAQA North Ltd,*** 2016 ABCA 144 at para 26. It must also exercise that discretion in a "principled manner" and within "a logical framework": ***Pillar Resource Services Inc v PrimeWest Energy Inc***, 2017 ABCA 19 at para 63, 46 Alta LR (6th) 224.

[8] The *Rules* say that costs should be "reasonable and proper." See e.g. *Rules* rr 10.33(1)(g), 10.31(1)(a), 10.31(2)(a), and 10.31(3). However, *Rules* r 10.31(1)(b) allows a court to award, among others, "an indemnity to a party for that party's lawyer's charges, or a lump sum instead of or in addition to assessed costs."

[9] As mentioned, Mr. Breen argues that the reasonable and proper costs for which he should be responsible to pay to the Foremost Group are party-party costs under the appropriate column of Schedule C to the *Rules*. In ***ATU v ICTU***, [1997] 7 WWR 696 at paras 10-11, 203 AR 204, 51 Alta LR (3d) 207 (QB), Justice Lutz said that party-party costs do not "serve to completely indemnify the successful party but is viewed as a reasonable apportioning of the expense of the litigation between the parties," and they strike the "proper balance as to the burden of costs which should be borne by the winner without putting litigation beyond the reach of the loser."

[10] The *Rules*, however, allow for an award that goes beyond party-party costs in certain circumstances. The leading case that has guided Alberta courts in this regard is ***Jackson v***

Trimac Industries Ltd (1993), 138 AR 161, 8 Alta LR (3d) 403 (QB) at para 28, where Justice Hutchinson said:

> ... In order for costs to be awarded on an indemnity basis or even on a solicitor-client basis, as opposed to a party-party basis, the court must conclude that the case fits within the parameters of a rare and exceptional or unusual case. Examples from the above cited cases resulting in the identification of a rare and exceptional case include:
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> > 1. circumstances constituting blameworthiness in the conduct of the litigation by that party;
> >
> > 2. cases in which justice can only be done by a complete indemnification for costs;
> >
> > 3. where there is evidence that the plaintiff did something to hinder, delay or confuse the litigation, where there was no serious issue of fact or law which required these lengthy, expensive proceedings, where the positively misconducting party was "contemptuous" of the aggrieved party in forcing that aggrieved party to exhaust legal proceedings to obtain that which was obviously his;
> >
> > 4. an attempt to deceive the court and defeat justice, an attempt to delay, deceive and defeat justice, a requirement imposed on the plaintiff to prove facts that should have been admitted, thus prolonging the trial, unnecessary adjournments, concealing material documents from the plaintiffs and failing to produce material documents in a timely fashion;
> >
> > 5. where the defendants were guilty of positive misconduct, where others should be deterred from like conduct and the defendants should be penalized beyond the ordinary order of costs;
> >
> > 6. defendants found to be acting fraudulently and in breach of trust;
> >
> > 7. the defendants' fraudulent conduct in inducing a breach of contract and in presenting a deceptive statement of accounts to the court at trial;
> >
> > 8. fraudulent conduct;
> >
> > 9. an attempt to delay or hinder proceedings, an attempt to deceive or defeat justice, fraud or untrue or scandalous charges.
>
> [Citations excluded]

[11] Justice Huchinson went on to provide courts with a caution when he said:

> Two major propositions appear to mitigate against an award of solicitor-client costs. The first is that it is the conduct of the action and not the conduct of the party that gives rise to the action that determines an award of solicitor-client costs. Secondly, punitive damages or damages should not be confused with a costs award.

Jackson at para 30.

[12] Although this Court will discuss the ***Jackson*** factors more thoroughly later in these reasons, it is important to address this caution that Justice Hutchinson provides. This Court must not base an award of full-indemnity costs on pre-litigation conduct alone, independent of other circumstances: ***Pillar*** at para 1. Why must this be the case? This Court has already dealt with pre-litigation conduct, or conduct that gave rise to the action, when it awarded damages in the Foremost Group's favour. In particular, this Court awarded punitive damages in the Foremost Group's favour. At this stage, this Court is dealing only with the quantum of the costs award and costs "are not granted as a sanction for the purpose of punishing past misconduct and altering the future behaviour of the litigants or the community": ***Pillar*** at para 66.

[13] But that does not mean that the award of punitive damages ends the discussion of whether the Foremost Group is entitled to enhanced costs. Mr. Breen appears to suggest that it does when he argues that the award of punitive damages "was the one and only opportunity to make a punitive damages award and the conduct that justified it should have no bearing on the assessment of costs": Breen's Brief dated November 27, 2023, at para 2. There are, however, many cases in which courts have awarded punitive damages *along with* full indemnity costs. See e.g. ***Whiten v Pilot Insurance Co***, 2002 SCC 18, [2002] 1 SCR 595 at 663; ***Leenen v Canadian Broadcasting Corp*** (2001), 54 OR (3d) 612, 6 CCLT (3d) 97 (CA) at para 38. In ***Jackson*** itself, Justice Hutchinson said:

> Where the positive misconduct of the party which gives rise to the action is so blatant and is calculated to deliberately harm the other party, then despite the technically proper conduct of the legal proceedings, the very fact that the action must be brought by the injured party to gain what was rightfully his in the face of an unreasonable denial is in itself positive misconduct deserving of indemnification whether punitive damages are awarded or not. Such positive misconduct must be taken into account one more time on the costs issue ...
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> ***Jackson*** at para 32 [emphasis added].

[14] Accordingly, despite its award of punitive damages in the Foremost Group's favour, this Court may consider whether full indemnity costs are called for in the case at bar. It in this context that this Court must consider the ***Jackson*** factors.

[15] This Court did not provide the citations for the cases that supported the principles that Justice Hutchinson articulated. It is important at this stage to consider some of them. Many of the principles that he articulates deal specifically with litigation misconduct, such as items 1, 3, 4, 7, and 9. Others deal with pre-litigation conduct, such as items 2, 5, 7, and 8. Still others deal with both, such as items 2, 7, and 9.

[16] In ***Dusik v Newton*** (1984), 51 BCLR 217 (SC), Justice Meredith found pre-litigation misconduct that, had the defendants succeeded, would have "bilked Dusik of over $1 million." He found that "others should be deterred from like conduct and that the defendants should be penalized beyond the ordinary order for costs": ***Dusik*** at 219.

[17] In ***Davis v Davis*** (1981), 9 Man R (2d) 236 at 266 (QB), Justice Kroft found that the defendants were required to pay solicitor and client costs as a result of their pre-litigation fraudulent conduct, which amounted to a breach of trust.

[18] ***Kepic v Tecumseh Road Builders*** (1987), 18 CCEL 218, 23 OAC 72 (CA) was a wrongful dismissal case in which the court found that the personal defendants fraudulently induced corporate defendant to breach its contract with the plaintiff and fraudulently presented the plaintiff and the court with deceptive statements of account. This was a hybrid case in which there was pre-litigation misconduct *and* litigation misconduct. The court allowed the appeal and awarded solicitor and client costs in favour of the plaintiff: ***Kepic*** at 223 [cited to CCEL].

[19] In ***Sturrock v Ancona Petroleums Ltd*** (1990), 111 AR 86, 75 Alta LR (2d) 216 (QB), Justice Lomas awarded punitive damages in favour of the plaintiffs. He also awarded solicitor and client costs as against the defendants in the view of their pre-litigation fraudulent conduct. The personal defendant was a discharged bankrupt. Justice Lomas noted:

> The order of discharge does not release [the personal defendant] from the obligation to pay costs and interest because costs and interest incurred in obtaining judgment against him fall within any debt or liability arising out of fraud while acting in a fiduciary capacity from which he is not released under s. 178(1)(d) of the [*Bankruptcy and Insolvency Act*, RSC 1985, c B-3].
>
> ***Sturrock*** at para 89 [cited to AR].

[20] In ***Pharand Ski Corp v Alberta*** (1991), 122 AR 81 at paras 6 and 7, 81 Alta LR (2d) 304 (QB), although Justice Mason awarded party-party costs, he recognized that solicitor and client costs could be awarded in cases involving a fiduciary relationship between the parties, an attempt to delay or hinder the proceedings on the part of one of the parties, evidence of an attempt to deceive or defeat justice, or fraud or untrue or scandalous charges.

[21] Thus, even in the case of pre-litigation misconduct and an award of punitive damages, this Court may award solicitor and client costs if the case fits within the nature of the pre-litigation misconduct articulated in the foregoing cases. It may also award such costs for litigation misconduct.

[22] This Court is also mindful of Bielby JA's exhortation that this Court cannot award full-indemnity costs based on pre-litigation conduct alone, independent of any other circumstance, such as litigation misconduct: ***Pillar*** at para 1. See also ***Haack v Secure Energy (Drilling Services) Inc***, 2021 ABQB 342 at para 28.

[23] This Court found Mr. Breen's pre-litigation conduct included a lack of forthrightness, making misrepresentations, exceeding his authorizations, acting in the face of conflicts of interest, and dishonesty: Trial Decision at para 328. He also breached his duties of honesty and good faith with a view to the Foremost Group's best interests: Trial Decision at para 329. He used the Foremost Group's funds for his personal benefit: Trial Decision at para 320. Finally, and importantly, it found that Mr. Breen obtained funds through embezzlement, misappropriation, or defalcation while he was acting in a fiduciary capacity in relation to the Foremost Group: Trial Decision at para 420. These findings fall within the various examples of the rare and exceptional cases that Justice Hutchinson provided in ***Jackson***.

[24] Was Mr. Breen also guilty of litigation misconduct? He argues that he was "entitled to defend himself against the allegations made by Foremost and was entitled to respond to all of the allegations made": Breen's Brief dated November 27, 2023, at para 16. While this Court agrees with Mr. Breen's position in a general sense, it is quite different from an approach that attempts to deceive the court and defeat justice. He required the Foremost Group to prove facts that

should have been admitted and concealed material information and documents from the Foremost Group and this Court. This Court made findings in the Trial Decision concerning his denial of knowledge of Alpheus Ltd and its role in the diversion of funds from the Foremost Group to Mr. Breen and Jim Chernyk: Trial Decision at paras 237-259. Mr. Breen challenged the disclosure of documents and records that showed such diversion. In so doing, this Court found that he swore an affidavit in the Cypriot action that contained falsehoods and inaccuracies: Trial Decision at para 242. This is the type of litigation misconduct contemplated in ***Jackson*** items 1, 3, 4, 7, and 9. This is not unlike the situation in which Justice Jerke found himself in ***Enoch Cree Nation v Prue***, 2014 ABQB 445 at para 25-26, 591 AR 87, 69 CPC (7th) 188, where he said:

> I find that the conduct of the Plaintiffs is reprehensible and was an attempt to delay or hinder these proceedings, or was an attempt to deceive or defeat justice. Such misconduct is blameworthy and must be deterred. The Plaintiffs should have admitted the answer as soon as it was known. The failure to do so was an effort to conceal material information. The matter was compounded when, in the face of a finding of contempt, the Plaintiffs provided a misleading answer.
>
> This case is one of those rare, exceptional, or unusual cases where an award of costs on a full indemnity basis is warranted.

[25] This Court finds that this case is also one of those rare, exceptional, or unusual circumstances in which full indemnity costs is warranted. But are full indemnity costs proportional in the case at bar? Mr. Breen argues that it is not appropriate for the Foremost Group "to weaponize this costs application in an effort to destroy Mr. Breen and his family" and this Court should not permit the Foremost Group "to use costs as a tool of oppression": Breen's Brief dated November 27, 2023, at paras 6 and 11. Mr. Breen's personal and financial situations are not relevant to the issue concerning costs. In ***Anderson v Canada Safeway Limited***, 2005 ABCA 6 at para 3, the court, in response to an argument that the unsuccessful party was unable to pay given her poor financial situation, said, "Impecuniosity ... is not a basis on which to refuse costs."

[26] In ***Barkwell v McDonald*** 2023 ABCA 87 at para 56, 479 DLR (4th) 560, 62 Alta LR (7th) 10 [***Barkwell #1***], the Alberta Court of Appeal addressed the issue of proportionality when it said, "[s]olicitor and client costs represent the costs that a reasonable client might be required to pay for the services rendered." It went on to say:

> The overriding issue is proportionality. The rules on costs aim to balance indemnity of the winner without unreasonably discouraging access to the court, or unduly penalizing the losing party ...
>
> ***Barkwell #1*** at para 57, citing ***McAllister v Calgary (City)***, 2021 ABCA 25 at para 45, 16 Alta LR (7th) 291.

[27] In ***Barkwell v McDonald***, 2023 ABCA 183 at para 74, 483 DLR (4th) 525, 62 Alta LR (7th) 27, a later decision involving the same parties, the Alberta Court of Appeal said:

> ... [A]n award of party and party costs based on solicitor and client costs must be justified ... The issue is not simply how much the successful party spent, but how much that party can reasonably expect the other party to pay. The amount actually charged to the client is not definitive. The rates and amount of time invested must be justified. The costs awarded must be proportionate to the amounts in issue.

[28] It is important to repeat at this stage that in the case at bar, an award of solicitor and client costs would not be disproportionate, given Mr. Breen's pre-litigation conduct and litigation conduct. In ***Barkwell #1*** the court provided trial courts with guidance on what it should consider when making such a costs award when it said:

> That includes the importance of the issues, the circumstances of the client, the manner in which the services were provided, the skill and responsibility involved, and other relevant considerations. Many of those same issues are also listed in [*Rules* r 10.33], which in addition to the amount in issue, refers to the complexity of the action and the conduct of the parties. Also relevant are things like the hourly rates being charged (including paralegal or administrative time), whether those rates were appropriate given the seniority and experience of counsel, whether the work was being done by lawyers of appropriate seniority, the number of counsel involved, whether the duration and intensity of pre-trial questioning was appropriate or excessive or disproportionate, whether unnecessary interlocutory proceedings were launched and the outcome of those proceedings, and whether the ultimate fee was proportionate to the issues.
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> ***Barkwell #1*** at para 60.

[29] There were two actions involved in the case at bar, being the Wrongful Dismissal Action and the Counterclaim. The Foremost Group included a Bill of Costs for each action. It says:

> ... [T]his Bill of Costs treats the [Wrongful Dismissal Action] as auxiliary (rather than the Counterclaim, which is the norm) and assumes the [Wrongful Dismissal Action] increased the cost of the proceedings by 50%. The Bill of Costs therefore seeks one set of costs in respect of the Counterclaim and a second set of costs at 50% in respect of the [Wrongful Dismissal Action.]
>
> Schedules to the Written Submissions of the Foremost Group, Tab 1, para 4.

[30] Furthermore, it provided its Bill of Costs under *Rules* Schedule C, Column 4. This Court finds that the amount of its judgment falls under Column 3.

[31] Having sat through the entirety of the trial (but not many of the pre-trial machinations), it was clear to this Court that many of the facts that proved Mr. Breen was not wrongfully dismissed also supported the damages that this Court awarded in the Foremost Group's favour pursuant to the Counterclaim. As a result, to award full indemnity costs on both would be double counting Mr. Breen's improprieties, even though his improprieties support this Court's findings against him in both actions. It would be impracticable for this Court to examine each fact and each witness's testimony to determine to which action such evidence related. A fairer way to deal with this is to allocate one-half of the party-party costs to one of the actions and one-half of the solicitor and client costs to the other. This Court will deal with the disbursements later in these reasons.

[32] The Foremost Group served a Formal Offer on February 22, 2022, for Mr. Breen to discontinue his wrongful dismissal action in exchange for the Foremost Group accepting reduced costs, and a Calderbank Offer on April 24, 2022, for both sides to discontinue their respective actions for $800,000 payable to the Foremost Group by Mr. Breen, inclusive of costs. The Foremost Group argues that even if this Court were to award only party-party costs, the Foremost Group beat both offers at trial.

[33] *Rules* r 4.29(1) provides:

> 4.29(1) Subject to subrule (4), if a plaintiff makes a formal offer to settle that is not accepted and subsequently obtains a judgment or order in the action that is equal to or more favourable to the plaintiff than the offer, the plaintiff is entitled to double the costs to which the plaintiff would otherwise have been entitled under rule 10.31(1)(a) or 10.32 for all steps taken in relation to the action or claim after service of the offer, excluding disbursements.

[34] In ***Whitford v Agrium Inc***, 2007 ABCA 109 at para 3, 409 AR 304, 72 Alta LR (4th) 208, Slatter JA for the court said:

> As a general rule, for the purposes of calculating costs, a judgment should be valued as if it included interest and costs up to the date of the offer only, not up to the date of trial. The plaintiff's offer can only be "more favourable than" the judgment if the defendant would, on the date of offer, have been better off to accept the offer than suffer the eventual judgment. It is inconsistent with the objectives of the *Rules* on formal offers to say that a plaintiff or a defendant can, by running up costs between the date of the offer and the trial, achieve a more favourable result. When the offer is inclusive of costs, the proper approach is to add costs (including disbursements) and interest to the date of the offer ... How the offeror came up with the amount of a lump sum offer, and what sub-components of the lump sum the offeror subjectively thought the offer contained, are not relevant to the assessment of whether the offer is "more favourable". In the end, the comparison is between the total amount of the offer, on the one hand, and on the other, the principal amount recovered on all heads of damage plus pre-judgment interest and costs (including disbursements) to the date of the offer.

[35] Under *Rules* r 4.29(4)(e), the court may order that *Rules* r 4.29(1) will not apply, if "special circumstances" are established. The burden of showing that *Rules* r 4.29(1) should not apply in the circumstances falls on Mr. Breen. See ***Union Square Apartments Ltd v Academy Contractors Inc***, 2017 ABQB 151 at para 14; ***Labbee v Peters***, 2000 ABCA 176 at para 15. Mr. Breen has the burden of showing that the Formal Offers were not offers that he should have reasonably accepted or that he should not be "blamed" or penalized because he did not accept the offer. He also argues that the offers were not, in all the circumstances, "genuine" offers.

[36] In ***Kozak Estate (Re)***, 2018 ABQB 272 at para 79, 40 ETR (4th) 71, 70 Alta LR (6th) 344, Justice Renke provides the following non-exhaustive list of factors relevant to determining whether the offers are genuine:

- whether (according to some authorities) the offer included an element of compromise;
- whether the offer approximated or matched the outcome or result at trial;
- the relationship of the offer to the relief claimed;
- the timing of the offer, its proximity to the commencement of litigation or the commencement of the trial;

- the reasonableness or “objective merit” of the offer, based on the information available to the parties at the time the offer was made and whether the offer reflected the relative strength of the parties' positions;
- the "subjective" honesty or good faith of the offering party or whether, as an inference from the foregoing or other factors, the offer cannot have been made with the expectation that it would never be accepted by the other party or was made solely to invoke the double costs provision as a “no-risk” litigation tactic.

[Citations excluded].

[37] Both of the Foremost Group’s offers were made nearing the commencement of the trial. The Foremost Group argues that it “beat both offers.” This Court does not see it that way. The calculation of the amounts that were offered are made at the time the offers were made, not after an almost five-week trial. Certainly, with respect to the first offer, the Foremost Group “beat” that offer inasmuch as now, Mr. Breen will be liable to pay the increased costs of the trial. However, that was not the end of the first offer. There was no compromise concerning the Counterclaim. It was going ahead. As a result, the Foremost Group and Mr. Breen would be incurring significant costs in dealing with the Counterclaim, in any event. Given these circumstances, objectively, Mr. Breen would not (and did not) accept the offer.

[38] As for the second offer, this Court questions whether the Foremost Group “beat” the offer. The total judgment, including interest, is $657,640.47. Based on Schedule C, Column 3 party-party costs, it appears to this Court that the total judgment did not “beat” the second offer, although it was close.

[39] Given these findings, Mr. Breen has satisfied his onus, and he will not be subjected to the double costs consequences under *Rules* r 4.29(1).

[40] What are the indemnity costs of which Mr. Breen should be held liable to pay. Mr. Breen argues that this Court is not able to assess costs and it should refer the question of costs to an assessment officer. The Foremost Group argues that because of this Court’s knowledge of “these complex proceedings,” for the sake of efficiency, this Court should perform the assessment. In ***McAllister***, the Alberta Court of Appeal contemplated that the trial judge could conduct the assessment provided they “consider the reasonableness of both the legal services performed and the amounts charged for those services”: ***McAllister*** at para 46. In ***Remington Development Corporation v Canadian Pacific Railway Company***, 2023 ABKB 591 at paras 19-20, Justice Woolley, as she then was, said:

> I am also satisfied that I ought to assess whether Remington's legal and expert fees were reasonable and proper, rather than referring those fees to assessment. It would not be wrong to refer the matter to assessment. However, the parties have already provided extensive evidence and materials ... Further, I have existing knowledge of the conduct of the trial and its relationship to the substantive decision. These factors make it fair and efficient for me to assess Remington's cost claim.
>
> In particular, the factors set out in [*Rules* rr] 10.33 and 10.2 can be analyzed by me based on my existing knowledge as the trial judge; it would be considerably more complicated and difficult for an assessment officer to conduct that analysis,

> particularly in relation to assessing the complexity of the action, the manner in which the services were performed, the skill, work and responsibility involved and especially the overriding question: "whether the ultimate fee was proportionate to the issues": [***Barkwell #1*** at paras 60, 57].

[41] This Court is in the same situation. This matter was relatively complex. It involved hundreds of exhibits, and the proceedings themselves extended over a period of more than eight years. There were numerous interlocutory steps, including steps taken overseas. As mentioned earlier, the trial itself took over four weeks and involved a number of witnesses, and extensive argument, both interlocutory and final. The parties provided this Court with extensive written submissions. Ultimately, this Court rendered the 107-page Trial Decision.

[42] Both parties had multiple primary counsel. Mr. Breen had two partners and one associate. The Foremost Group had one partner, one associate, and an articling student for the evidence portion. This speaks to the complexity of the issues and the steps taken to establish them.

[43] The trial itself was run in an orderly manner. The Foremost Group was required to establish its case systematically, dealing first with Mr. Breen's shortcomings, then his various improprieties, and culminating in establishing Mr. Breen's use of the Transneft transaction and Mr. Chernyk for his own benefit. This added to the complexity of this matter, but these steps were necessary to establish the foundation on which Mr. Breen's liability was built. Mr. Breen did not capitulate on any issue that might have shortened the proceedings, and the Foremost Group was required to prove everything it was seeking.

[44] Ultimately, the Foremost Group was successful. This Court dismissed the Wrongful Dismissal Action and, although the Foremost Group did not recover all the damages it was seeking in the Counterclaim, it did recover a substantial portion of them. It substantially succeeded on many of its factual and legal arguments.

[45] It should also be mentioned at this stage that Mr. Breen's counsel showed the civility, respect, knowledge, and preparedness that one would expect of trial counsel in a complex and lengthy trial. This Court commends them for their approach to these proceedings.

[46] In ***Remington***, Justice Woolley made an observation similar to this Court's observation concerning the case at bar. She said (substituting the parties in the case at bar):

> [Mr. Breen] could have provided information about the fees [he] incurred in this litigation to support [his] position that [the Foremost Group]'s fees were excessive. [Mr. Breen] had no obligation to do so but that [he] did not, when combined with [Mr. Breen's] failure to identify specific examples of work performed by [the Foremost Group]'s counsel that was unreasonable or improper (except as discussed below), supports the overall impression provided from reviewing [the Foremost Group]'s invoices, which is that the fees incurred to advance this matter were reasonable and proper.

[47] Again, this Court will discuss the disbursements that the Foremost Group is claiming later in these reasons.

[48] The Foremost Group's counsel did not provide this Court with its detailed statements of account or invoices. It did, however, provide this Court with a summary of the amounts that various individuals in its firm incurred. The lion's share of the time was incurred by the partner and associate involved in this case. This Court takes no issue with these charges. Their fees and

charges were reasonable and proper. Little information was provided concerning the role undertaken by the articling students, the summer student, and the paralegal. These charges amount to $145,415.50, which is not insubstantial. Remembering that this Court is allowing recovery of 50% of this amount, the total will be $72,707.75. Without more detail on the tasks undertaken by these individuals, this Court has difficulty approving the total amount of these charges. It will reduce them a further one-third to $48,471.83.

[49] As for the other fees, they amount to $1,155,587.50, which, reduced by 50% total $577,793.75.

[50] This Court has the authority to add a multiplier to the fee portion of the *Rules* Schedule C party-party costs: ***Grimes v Governors of the University of Lethbridge***, 2023 ABKB 432 at paras 88-89. It chooses to apply a 1.25% multiplier.

[51] As a result, the fee portion of the costs (excluding GST, which must be added) will be as follows:

One-half of Schedule C, Column 3	
plus 1.25% multiplier	$88,987.50
Indemnity costs	$625,943.66
Total	$714,931.16

[52] As far as disbursements, this Court will not allow the TOM Capital's in-house counsel fees. In ***Murphy Oil Canada Ltd v Predator Corp***, 2005 ABQB 134, 379 AR 388 at paras 41-43, Justice McMahon said:

> The general principle was stated in *Sidorsky v. CFCN Communications Ltd.* (1998), 216 A.R. 151 (Alta. C.A.), at para 4:
>
> > Disbursements should not be used as a means, even unintentionally, of distorting the cost scheme by allowing, as a disbursement, fees for work normally considered part of the cost of litigation to which Schedule C applies. Taken to the extreme, preparation for trial could be subcontracted to another firm and reimbursement of that firm's account sought as a disbursement.
>
> There has been no evidence presented regarding what was done by the outside law firms or in-house counsel. Apache's only evidence is that outside counsel was hired "because of the magnitude of the counterclaim" and because they believed that it was in their "best interests to engage counsel on various issues".
>
> It may very well have been appropriate for the Plaintiffs to hire outside counsel and to rely on in-house counsel. That does not, however, mean that such costs are recoverable. It is quite possible that the work done by those lawyers, was work that is generally intended to be undertaken by the lead law firm hired by the party. If that is the case, then those amounts are already contemplated and included in Schedule C. There may be instances in which such fees may be an allowable disbursement ... However, in those instances great care must be taken in order to ensure that there is no duplication of costs between the tariff and those allowed as disbursements. In light of the lack evidence before me in this regard I decline to make a separate award of costs for outside or in-house counsel.

[53] The Foremost Group provided this Court with a chart that showed, in general terms, the tasks that the TOM Capital in-house counsel undertook. This Court has difficulty in seeing why TOM Capital's lawyers needed to undertake those tasks given the role that lead counsel was undertaking. This Court has concern that the TOM Capital's lawyers were undertaking duplicative work.

[54] As for the work undertaken by Blake Cassels & Graydon LLP, this Court was provided with the invoices, which contained detailed time entries. This Court has difficulty understanding why Blake, Cassels & Graydon LLP had to undertake these tasks when the Foremost Group's counsel had the ability to undertake those same tasks. Be that as it may, had the Foremost Group's lead counsel undertaken that task, the fees would have been included in the indemnity portion of their fees. As a result, this Court will allow 50% of the fees charged by Blake, Cassels & Graydon LLP, which is $9,411.94 (inclusive of GST).

[55] The tasks undertaken by Cyprus counsel were helpful to this Court. Those tasks helped to establish the nexus between monies that were disappearing from the Foremost Group's coffers. Similar to what Justice Brown found in ***Fairhurst v Anglo American PLC***, 2014 BCSC 827 at para 20, the Cyprus legal proceedings concerned Alberta litigation and were necessary in furtherance of the Alberta litigation. As a result, Cyprus counsel's charges in the amount of $101,603.64 will be an allowable disbursement.

[56] As for the miscellaneous disbursements, this Court finds that some of them are in the nature of capital recovery, and it will not allow them. Those include:

50% of Copy Costs
Laser Printing
Colour Reprographic Services
Supplies

[57] Furthermore, it will not allow JP's trips to Ottawa to swear affidavits, but it will allow the services involving translation of Greek to English. Thus, the total taxable disbursements are $23,832.64 (plus GST of $1,191.63) and the total non-taxable disbursements are $102,034.19.

IV. Summary and Conclusion

[58] In summary, the Foremost Group is entitled to recover the following costs from Mr. Breen:

Fees	$714,931.16
Taxable Disbursements	$23,832.64
Non-taxable Disbursements	$102,034.19
GST	$36,938.19
Total	$877,736.18

Dated at the City of Calgary, Alberta this 5th day of January, 2024.

K.D. Yamauchi
J.C.K.B.A.

Appearances:

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for the Plaintiff/Defendant by Counterclaim

Thomas W.R. Ross, K.C. & Alex MacDonald
McLennan Ross LLP
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