Court of King's Bench of Alberta

Citation: Southwest Design & Construction Ltd v Janssens, 2024 ABKB 698

Date: 20241126
Docket: 2306 00891
Registry: Lethbridge

Between:

Southwest Design & Construction Ltd and Mid-West Design & Construction Ltd

Plaintiffs/Applicants

- and -

Blayne Janssens, David Mathieu, Anthony Gibson, Greg Klassen, Ryan Olsen, John James, JC James Properties Ltd, Chris Murray, and Elevate Construction Partners Inc

Defendants/Respondents

Ruling on Costs
of the
Honourable Justice M.H. Bourque

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[1] I dismissed Southwest's application for an interim injunction against the Respondents (***Southwest Design & Construction Ltd v Janssens***, 2024 ABKB 502 (**Injunction Decision**). I invited the parties to make submissions on costs if they could not agree.

[2] In brief, the Respondents seek an award of 50% of their solicitor and client fees, plus disbursements. The Respondents also ask that I determine the costs arising from applications before Justice Johnston and Applications Judge Park. Southwest argues that costs should be (i) awarded in the cause; alternatively, (ii) Schedule C costs; (iii) in the further alternative, a percentage award of the Respondents' reasonable solicitor and client costs.

[3] For the following reasons, I award the Respondents approximately 45% of their reasonable solicitor and client costs, which I fix at $92,500, plus disbursements.

[4] Southwest makes several arguments that the factors in Rule 10.33 weigh in favour of costs in the cause or reduced costs: the importance of the issues, the necessity of bringing the application, and the absence of any misconduct by Southwest in the application proceedings. Southwest advances several propositions to support its position; however, none of Southwest's submissions rise to the level that persuades me to depart from the presumptive rule that a successful party to an application is entitled to a costs award against the unsuccessful party and

that the unsuccessful party must pay the costs forthwith (Rule 10.29; ***PricewaterhouseCoopers Inc v Perpetual Energy Inc***, 2021 ABCA 92 at para 6).

[5] While I accept Southwest's broad proposition that it was reasonable for Southwest to commence the action and apply for the injunction, the mere reasonability of Southwest's litigation objectives is not a good enough reason to depart from the presumptive rule. Nor generally are the events that precipitated the commencement of the action. I find nothing unique about the fact that Southwest commenced this action because 11 of its employees, including some of the Respondents, left and started a competing construction business. Regarding the submission that "Southwest was fighting for its life," little was presented in evidence other than self-serving statements. Similarly, Southwest's evidence regarding any Misuse of Business Opportunities was "lacking in several material respects, the least of which is the lack of tangible evidence of any misuse of confidential information or breaches of the Confidentiality Agreements" (Injunction Decision, para 36).

[6] Southwest also argues that a percentage indemnity based on ***McAllister v Calgary (City)***, 2021 ABCA 25 is inappropriate in this proceeding. It cites several cases for that proposition: ***BFL Canada Risk and Insurance Services Inc v Le***, 2024 ABKB 338; ***Plastk Financial & Rewards Inc. v Digital Commerce Bank***, 2024 ABKB 4; ***Ehli v Lamanator Coatings Ltd***, 2024 ABKB 339.

[7] ***BFL*** presents several distinguishing facts: the parties resolved the application on the courthouse steps; the consent injunction order reflected largely what was sought in the originating application, but not all relief sought was obtained; the amounts in issue appear to have been under $75,000 given Justice Rothwell's indication that indemnification greater than column 1 would be inappropriate.

[8] In ***Plastk***, Justice Little appears to have declined to award costs based on a percentage because it was unclear whether the entire amount of solicitor and client costs submitted by the successful party related solely to the hearing or whether they included additional services.

[9] Lastly, I do not read Justice Renke's decision in ***Ehli*** as supporting the broad proposition that so-called ***McAllister*** costs are only appropriate for matters arising from a trial. Neither ***McAllister*** nor subsequent decisions of the Court of Appeal suggest the same: ***Barkwell v McDonald***, 2023 ABCA 87; ***Sunridge Nissan Inc v McRuer***, 2023 ABCA 128. Rather, the appellate decisions, ***Ehli***, and the Rules confirm the inherent discretionary nature of costs awards. That said, I agree with Southwest's submission that a percentage indemnity should be based on the Respondents' *reasonable* costs in the application and not the action as a whole.

[10] In this case, the Respondents submit that they incurred solicitor and client costs in excess of $205,000. As directed, the Respondents submitted a draft Bill of Costs prepared based on Column 5 of Schedule C, totalling $10,825 plus disbursements and other charges (which totaled, excluding GST, approximately $3,500). The Respondents also submitted an unredacted solicitor and client account from October 27, 2023 to May 23, 2024, plus two relatively insignificant time entries in August 2024 following the release of the Injunction Decision. I have reviewed the detailed entries and am satisfied that the time entries relate solely to matters dealing with the injunction application. Southwest notes that the time entries include time spent by Counsel Vernon after he took over the file from Rob Rakochey and that Southwest should not have to pay for Mr. Rakochey's departure, which had nothing to do with Southwest. I agree with Southwest's submission, though I note that Counsel Vernon's time entries total 27.4 hours, including the one-

day oral hearing (likely accounting for over 6 hours out of that total). The preparation time (21 hours) vis-à-vis the attendance time (6 or 7 hours) at the one-day hearing does not seem overly disproportional. In response to my inquiry, Southwest confirmed that "its solicitor-client costs were in the same range as the Respondents' solicitor-client costs." I am satisfied that the Respondents reasonably and properly incurred the amount of $205,000 to defend against the injunction application.

[11] Regarding the factors in Rule 10.33, I note that the Respondents were wholly successful in the Injunction Decision. While it is true that Southwest successfully demonstrated a strong *prima facie* case about discrete elements of the applicable legal tests, the relief sought was dismissed in its entirety. Moreover, it was only when filing briefs that Southwest abandoned or circumscribed the relief sought in its original application, thus putting the Respondents at the expense of resisting the application on relief no longer being sought. Although the subject matter of the application is not uncommon, this application presented additional complexity given the large number of Respondents, each of whom was required to present evidence by way of affidavit and be subject to questioning, in several cases, on more than one occasion.

[12] Rule 10.31(3) provides alternatives for fashioning an award of reasonable and proper costs, including fashioning an award by reference to Schedule C costs (including through the use of multiples), awarding all or part of the reasonable and proper costs for any part of an action, and awarding a percentage of assessed costs. In my view, an award of Schedule C costs would be inadequate, representing only approximately 5% of the Respondents' solicitor and client costs. Instead, I am satisfied that it is appropriate in the circumstances of this application to award a lump sum award of $92,500, representing approximately 45% of the Respondents' reasonable and proper costs. The Respondents are also entitled to recover their modest disbursements and other charges.

[13] The Respondents also sought a determination of costs regarding preliminary applications before Justice Johnston and Applications Judge Park. In both cases, the preliminary applications were resolved through consent orders. In the application before Justice Johnston, the parties agreed to transfer the action from the judicial centre of Calgary to the judicial centre of Lethbridge. The application before AJ Park was largely concerned with procedural and technical compliance matters and was resolved by a consent order. I am satisfied that the award in paragraph [12] adequately compensates the Respondents for all services, including these two applications.

Written representations received on October 4, 2024 and October 11, 2024.
Dated at Lethbridge, Alberta this 26th day of November, 2024.

M.H. Bourque
J.C.K.B.A.

Written Representations submitted by:

G. Vogeli KC
for the Plaintiffs/Applicants

M. Vernon
for the Defendants/Respondents