Date: 20241009
Docket: CI 23-02-04190
(Brandon Centre)
Indexed as: Schaworski v. Unrau
Cited as: 2024 MBKB 150

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

STANLEY JAMES SCHAWORSKI,	)	Rhea P. Majewski
	)	for the plaintiff
plaintiff,	)	
	)	
- and -	)	
	)	
	)	
RICK UNRAU,	)	Jennifer A. Sokal
	)	for the defendant
defendant.	)	
	)	
	)	
	)	Judgment delivered:
	)	October 9, 2024

ASSOCIATE JUDGE PATTERSON

INTRODUCTION

[1] Pursuant to the Supreme Court of Canada's seminal decision in ***Hyrniak v. Mauldin***, 2014 SCC 7 ("***Hyrniak***"), and in accordance with statutes and regulations such as but not limited to *The Court of King's Bench Rules*, Man. Reg. 553/88 (the "*Rules*"), this Court has embraced the principle of proportionality and encouraged timely access to justice.

[2] Despite both parties being represented by well prepared and able counsel, the issue of setting aside default judgment and resulting dispute with respect to costs in this case has, unfortunately, become the antithesis of proportionality and practicality (with multiple affidavits, comprehensive motions briefs and fulsome submissions of counsel).

BACKGROUND

[3] The Plaintiff, Stanley James Schaworski ("Schaworski") filed a statement of claim (the "Claim") against the Defendant, Rick Unrau ("Unrau"), on May 15, 2023.

[4] Ms. Majewski ("Majewski") represents Schaworski.

[5] Within the Claim, Schaworski sought judgment against Unrau for the sum of $67,885.37, or in the alternative, general damages in an amount to be determined at trial as well as interest and costs.

[6] On July 18, 2023, default was noted and Schaworski obtained judgment against Unrau (the "Default Judgment") for a total amount of $74,032.92.

[7] Upon receipt of a copy of the Default Judgment on July 27, 2023, Unrau retained Ms. Sokal ("Sokal").

[8] The motion prepared on behalf of Unrau to set aside the Default Judgment ("Unrau's Motion") was sent for filing by Sokal on August 4, 2023 (with an unfiled copy of Unrau's Motion forwarded contemporaneously to Majewski).

[9] Unrau's Motion set forth that it was made returnable for first appearance upon the Master's Civil List (now Associate Judge's Civil List) at the Brandon Centre on August 14, 2023 (prior to expiry of the 30-day appeal period in connection with the Default

Judgment). By the time it was filed by Registry, however, the first appearance for Unrau's Motion was on August 21, 2024.

[10] Majewski had sought an adjournment of Unrau's Motion from August 14, 2024 to August 21, 2023 pursuant to correspondence sent to my attention directly dated August 7, 2023 (the "Majewski Letter").

[11] Correspondence in reply dated August 7, 2024 was then forwarded to my attention directly by Sokal (the "Sokal Letter").

[12] As Schaworski was initially opposed to the relief requested within Unrau's Motion, cross-examinations on affidavits were eventually held on January 19, 2024.

[13] The Default Judgment was subsequently set aside in accordance with the Consent Order which I pronounced on June 3, 2024 (a contested hearing was not scheduled for Unrau's Motion).

[14] A statement of defence (the "Defence") was filed on behalf of Unrau on June 7, 2024.

[15] Counsel were encouraged at the conclusion of this hearing to coordinate a first case conference (which has not been confirmed according to my recent review of Registry).

CONTESTED COSTS ISSUE

[16] The only remaining issue to be determined pursuant to Unrau's Motion is whether costs should be payable by Schaworski, or by Unrau, and if so, upon what basis and for what amount.

SUMMARY OF UNRAU'S POSITION AS TO COSTS

[17] Unrau is requesting that costs be awarded against Schaworski, on a solicitor and client basis, or in the alternative, that elevated or tariff costs be granted, payable forthwith, and in any event of the cause.

[18] In particular, Unrau requests that the Court order Schaworski to pay costs on a solicitor and client basis for an amount of $15,674.23 (which includes disbursements, GST and RST, as well as the sum of $2,500.00 with respect to costs concerning the Unrau Motion from "March 1, 2024 onwards").

[19] Should an award for solicitor and client costs not be granted, however, Unrau is seeking costs of an amount that is elevated beyond or follows the prescribed sums set forth within the Tariff of Recoverable Costs ("Tariff A") to the *Rules*.

[20] For a Class II proceeding, Unrau is requesting costs from Schaworski, at a minimum, in an amount of $3,735.00, plus disbursements totaling $1,382.06, as well as GST and RST, for a total of $5,610.06.

[21] Ultimately, it was submitted on behalf of Unrau that the Court should denounce Schaworski's conduct, with para. 86 of Unrau's Motion Brief encapsulating his sentiments:

> "He [Schaworski] unnecessarily opposed the motion seemingly as a tactic to prevent Unrau from proceeding by attempting to make justice cost prohibitive for Unrau, require disproportionate procedures, declined a more favourable settlement offer, and allowed his counsel to send to the trier fact, without any reasonable basis and for no apparent reason other than to prejudice Unrau, an unaffirmed letter alleging that Unrau was intoxicated during the phone call."

SUMMARY OF SCHAWORKSI'S POSITION AS TO COSTS

[22] Schaworski disputes the allegation that his position and conduct, prior to the Default Judgment being set aside by consent, should result in the Court determining that he was attempting to "make justice cost-prohibitive" for Unrau. The Default Judgment was set aside by consent without Unrau's Motion being scheduled for hearing.

[23] Fundamentally, it is submitted on behalf of Schaworski that he utilized the procedures available to litigants pursuant to the *Rules*, and that no other procedure was available to Schaworski other than relenting and not opposing Unrau's Motion.

[24] As a result, Schaworski requests costs against Unrau, or in the alternative, that only reduced tariff costs be awarded in favour of Unrau.

[25] In the event the Court determines that Schaworski was not justified in proceeding with cross-examinations on affidavits prior to consenting to set aside the Default Judgment, it is submitted on behalf of Schaworski that Unrau should only be entitled to claim a maximum amount for costs of $1,875.00 plus reasonable disbursements and GST as well as RST ($1,250.00 for the cross-examinations on affidavits and $625.00 in relation to this contested hearing concerning costs).

STATUTORY AUTHORITY FOR COSTS

[26] ***The Court of King's Bench Act***, C.C.S.M. c. C280 (the "***KB Act***") provides the

authority and confirms the wide discretion available to the Court with respect to awarding costs:

> ***Costs***
>
> **96(1)** Subject to the provisions of an Act or the rules, the costs of or incidental to, a proceeding, or a step in a proceeding, are in the discretion of the court and the court shall determine liability for costs and the amount of the costs or the manner in which the costs shall be assessed.

[27] Pursuant to the *Rules*, the following factors may be considered by the Court when determining whether to award costs, and if so, for how much:

> ***Factors in discretion***
>
> **57.01(1)** In exercising its **discretion** under section 96 of *The Court of King's Bench Act*, to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle made in writing:
>
> (a) the **amount** claimed and the amount recovered in the proceeding;
> (b) the **complexity** of the proceeding;
> I the **importance** of the issues;
> (d) **the conduct of any party which tended to shorten or lengthen unnecessarily the duration of the proceeding**;
> (d.1) **the conduct of any party which unnecessarily complicated the proceeding**;
> (d.2) the **failure of a party to meet a filing deadline**;
> (e) **whether any step in the proceeding was improper, vexatious or unnecessary**;
> (f) **a party's denial or refusal to admit anything which should have been admitted**;
> (f.1) **the relative success of a party** on one or more issues in a proceeding in relation to all matters put in issue by that party;
> (g) whether it is appropriate to award any costs or more than one set of costs where there are several parties with identical interests who are unnecessarily represented by more than one counsel; and
> (h) **any other matter relevant** to the question of costs.
>
> ***Costs against successful party***
>
> **57.01(2)** The fact that a party is successful in a proceeding or a step in a proceeding does not prevent the court from awarding costs against the party in a proper case.

Court may fix costs

57.01(3) In awarding costs, the court may fix all or part of the costs, with or without reference to Tariff A or B, instead of referring them for assessment, but in exercising its discretion to fix costs the court will not consider any tariff as establishing a minimum level for costs.

Disbursements

57.01(4) The court may disallow a disbursement in whole or in part where, based on all circumstances of the case, it is satisfied that a disbursement claimed by a party was not reasonably necessary for the conduct of the proceeding or was for an unreasonable amount.

Costs may be assessed

57.01(5) Where the costs are not fixed, they may be assessed under Rule 58.

Authority of court

57.01(6) Nothing in this Rule affects the authority of the court,

(a) **to award or refuse costs** in respect of a particular issue or part of a proceeding;

(b) to award a percentage of assessed costs or award assessed costs up to or from a particular stage of a proceeding; or

(c) **to award all or part of the costs on a lawyer and client basis**.

[emphasis added]

ANALYSIS

Setting Aside the Default Judgment

[28] For purposes of determining the issue of costs in this case, the Court's review must include consideration of what transpired with respect to Unrau's Motion in the context of applicable law.

[29] As addressed by counsel, the frequently referenced decision of the Honourable Justice Greenberg in ***MPIC v. Landry***, 2005 MBQB 141 ("***Landry***") contains a non-

exhaustive list of factors for the Court to assess when determining whether default should be aside (commencing at para. 11):

> [11] **Queen's Bench Rule 19.03(1) provides that the noting of default may be set aside by the court on such terms as are just. There are no criteria set out in the rule to guide the court's discretion. A review of the cases under this rule indicates that courts in Manitoba have looked at a variety of factors in determining whether or not to set aside default, including:**
>
> 1) **whether the defendant had an ongoing intention to defend**;
> 2) **whether the defendant adequately explained why there was delay in filing a defence**;
> 3) **whether the delay in filing a defence was willful**;
> 4) **whether the motion to set aside the noting of default was brought with dispatch**; and
> 5) **whether the delay in filing a defence caused prejudice to the plaintiff**.

[12] Counsel for the defendant argued that there is no requirement for the court to find that the defendant has a meritorious defence in order to set aside the noting of default. In fact, that was the clear statement of the Court of Appeal in ***Beardy v. Sass*** (1997), 1997 CanLII 22937 (MB CA), 118 Man.R. (2d) 99 (C.A.). However, in the more recent decision of the Court of Appeal in ***Protect-A-Home Services Inc. v. Heber***, [2001] MBCA 171, Twaddle J.A., writing for the Court, referred to ***Beardy v. Sass***, but held that, **although proof of a meritorious defence was not a pre-condition to the exercise of discretion to set aside default, it is a relevant factor for the court to consider**. And it was one of the factors upon which Twaddle J.A. relied in upholding the noting of default in that case.

[13] Twaddle J.A. held that the factors which the court should consider will vary from case to case. He stated further:

> [18] The factors to be taken into consideration in the exercise of the court's discretion to set aside a noting of default are not to be considered each in isolation from the others. As the *Sinclair* decision shows, a factor which may otherwise be dominant may lose its dominance when considered in conjunction with another. It is equally true that several factors which individually might not warrant a refusal to set aside a default may in combination do so.
>
> [emphasis added]

[30] The above noted factors from ***Landry*** were recently applied by the Honourable Justice Toews in ***Pathak v. Sinha***, 2024 MBKB 28. I had also relied upon this non-exhaustive list of factors in ***Neepawa-Gladstone Cooperative Ltd. v. Ehr***, 2019 MBQB 65.

[31] While recognizing that the circumstances of every case must be carefully analysed, generally speaking, the onus or threshold to satisfy is considered to be low when it comes to setting aside default.

[32] Upon review of the evidence and submissions of counsel, as well as the relevant factors contained within ***Landry***, I have reached the following determinations:

a) An ongoing intention to defend was demonstrated by Unrau:

i) Despite disputing that he was properly served with the Claim on June 22, 2023, Unrau contacted Dale Beynon ("Beynon"), a lawyer at D'Arcy and Deacon LLP ("D'Arcy").

ii) Beynon talked with Majewski on June 29, 2023. In response to Beynon's request that no steps be taken to note default while it was being determined if D'Arcy would be representing Unrau, Majewski requested that Beynon confirm if D'Arcy had been retained within twenty days (and if so, timelines could be discussed for filing a defence).

iii) Unrau also emailed Majewski directly on June 30, 2023, advising that RU Mechanical (a business of which he is a principal) would "vigorously defend" the Claim as well as "countersue".

iv) Sokal submits that there was a "miscommunication" between Beynon and Majewski, such that Majewski advised Beynon on July 12, 2023 that "in light of the confusion, I will give you until Friday at 4 PM to firm the retainer but will note default on Monday [being July 17, 2023] and proceed".

v) Beynon informed Majewski on July 13, 2023 that D'Arcy was not going to be retained by Unrau, at which time he provided confirmation of Unrau's email address to Majewski (Unrau was copied with this email).

vi) It is Unrau's evidence that he believed Beynon had requested an extension to file a defence, and that he would be contacted by Majewski to discuss the Claim (as D'Arcy would not be representing him). Unrau did not understand there was an approaching deadline to file a defence, and that default would be noted if a defence had not been filed.

vii) Shortly following his receipt of a copy of the Default Judgment by regular mail on July 27, 2023, Unrau retained Sokal. On August 2, 2023, Sokal contacted Majewski. Sokal advised that Unrau's Motion would be forthcoming and requested that enforcement measures be held in abeyance while Unrau's Motion was pending. Majewski stated she did not have instructions to refrain from enforcement after the applicable 30 day appeal period had elapsed.

viii) Unrau's Motion was prepared and sent for filing on August 4, 2023 (an unfiled copy was provided contemporaneously to Majewski).

ix) Sokal submits that Schaworski's focus upon the merits of Unrau's defence was conflated with assessing the low threshold to be satisfied for purposes of setting aside the Default Judgment.

x) With respect, I do not disagree with Unrau's position. Regardless if Schaworski had doubts about Unrau's expressed intention to present a defence, Sokal contacted Majewski on August 2, 2023. Reasonable arrangements could have been structured between counsel at that juncture, which would have required Unrau to file a defence promptly, failing which the Default Judgment would not be set aside.

xi) Even though D'Arcy had not been retained at the outset, I accept Sokal's assertion that this did not conclusively mean that Unrau was no longer intent upon making arrangements to retain counsel and defend the Claim.

xii) Based upon the foregoing efforts undertaken by or on behalf of Unrau, I find that there has been sufficient evidence presented, on a balance of probabilities, to satisfy Unrau's onus and establish that he had an ongoing intention to defend the Claim.

b) An adequate explanation was provided by Unrau as to why there was a delay in filing a defence:

i) Within Unrau's Brief, Sokal submits that default was noted "a mere 26 days from the Statement of Claim allegedly being served on Unrau and a mere 3 business days from the date that Beynon advised Majewski his

firm would not be retained". She notes that it was with there being "no further contact" from Majewski with Unrau when default was noted and Schaworski obtained the Default Judgment.

ii) Quite frankly, it is not as if a lengthy extension was initially granted on behalf of Schaworski for Unrau to confirm whether D'Arcy would be retained. Schaworski contends that service of the Claim was properly affected on June 22, 2023, such that the twenty-day period in which to file a defence expired as of July 12, 2023 (absent an extension being permitted). Default was noted the following week, with the Default Judgment pronounced only six days later on July 18, 2023.

iii) The Law Society of Manitoba's Code of Professional Conduct (the "Code"), at Chapter 7 – Relationship to the Society, section 7.2-9(a) provides as follows in relation to counsel dealing with a self-represented litigant (which was the case once Beynon confirmed that D'Arcy was not going to be retained by Unrau):

> 7.2-9 When a lawyer deals on a client's behalf with an unrepresented person, the lawyer must:
>
> (a) urge the unrepresented person to obtain independent legal representation;

iv) There is no evidence that Unrau was encouraged to retain other counsel once it had been confirmed that D'Arcy was not going to be retained.

v) Had noting default been held in abeyance while Unrau made arrangements to retain Sokal, a defence could have been filed far sooner

than what ultimately occurred (the defence being filed approximately eleven months following pronouncement of the Default Judgment).

vi) In the circumstances, I find there to have been a reasonable explanation and a minimum of delay on the part of Unrau with respect to retaining counsel and filing a defence to the Claim.

c) The delay in filing a defence was not "willful":

i) With Unrau being self-represented (upon it being confirmed by Beynon that D'Arcy was not going to be retained), and especially when there was a prior "misunderstanding" between Beynon and Majewski, a letter or email could have been sent to Unrau (his contact particulars had been supplied by Beynon), providing notice that default would be noted as of a specific date should there be no defence filed or other satisfactory arrangements made.

ii) When Beynon informed Majewski on July 13, 2023 that D'Arcy was not going to be retained by Unrau, a period of only twenty-one days had elapsed since Unrau was served with the Claim (properly according to Schaworski) on June 22, 2023. In other words, just one day had elapsed beyond the minimum period of time which had to expire before default could be noted.

iii) In light of all that I have referenced and concluded thus far, I do not find that the failure by Unrau to file a defence initially was or should be categorized as wilful.

d) The motion to set aside default was filed with reasonable dispatch:

i) A period of only fifteen days elapsed from the date of pronouncement of the Default Judgment until the date when Sokal advised Majewski that Unrau's Motion was being filed (July 18, 2023 to August 2, 2023).

ii) Unrau's Motion was sent for filing on August 4, 2023. While the first appearance for Unrau's Motion was stated to be upon the Master's (Associate Judge's) Civil List on Monday, August 14, 2023, the first appearance was scheduled for August 21, 2023 (by the time Unrau's Motion was filed by Registry, it was subsequent to August 14, 2023).

iii) Considering the foregoing, I do not find that there was undue delay on the part of Unrau insofar as moving to set aside the Default Judgment.

e) The delay in filing a defence did not cause material prejudice to Schaworski:

i) It is submitted within Schaworski's Motion Brief that "Schaworski had a reasonable belief, in all the circumstances, based on Unrau's past and ongoing conduct, that Unrau was attempting to delay an inevitable judgment against him".

ii) While Schaworski has alleged that Unrau prepared a "fake invoice" once he was confronted with the Claim, and points out that a copy of the draft intended defence on behalf of Unrau was not included with his affidavit material, there was no evidence presented to the effect that Unrau was

attempting to make himself "judgment proof" or was planning to complicate available enforcement remedies in favour of Schaworski.

iii) At the end of the day, I find that it was Schaworski's own decision (to resist setting aside the Default Judgment and insist upon cross-examinations on affidavits) which was the genesis for there being additional time and considerable further legal expenses incurred by both parties.

[33] Upon reviewing all of the above noted factors and evidence of Unrau's conduct, I find that there was a reasonable foundation established for Unrau to request that Schaworski consent to setting aside the Default Judgment.

[34] Had Schaworski concurred initially, and Unrau's Motion was not required to be filed, default could have been set aside upon condition that there be payment by Unrau of an agreed sum for "throw away costs" in favour of Schaworski. Should this have transpired, the parties could have attended at least one but likely multiple case conferences by now (trial dates would have been scheduled at the initial case conference).

[35] The Court does not dispute the contention of Schaworski that he should be entitled to consider and utilize all procedures available to litigants pursuant to the *Rules*, including but not limited to convening cross-examinations on affidavits to test Unrau's evidence before there is any contemplation of consenting to the Default Judgment being set aside.

[36] Support for Schaworski's approach is contained within the Code (which was last amended in December of 2023) at Part 5 – The Lawyer as an Advocate, within the "Commentary" portion to section 5.1-1, where it reads as follows:

> **Role in Adversarial Proceedings** – "In adversarial proceedings, the lawyer has a duty to the client to raise fearlessly every issue, advance every argument, and ask every question, however distasteful, which the lawyer thinks will help the client's case and endeavor to obtain for the client every remedy and defence authorized by law."

[37] There are consequences, however, for litigation strategies employed in furtherance of a client's interests, and in this case, further time and legal expenditures were incurred by both parties before Schaworski consented to setting aside the Default Judgment. This reality cannot be ignored in the context of Unrau's present request for costs against Schaworski.

[38] Accordingly, I have determined that the request for costs made by Unrau has merit (the amount and whether such costs will be of a solicitor and client, elevated or tariff amount will be set forth within the balance of this decision).

Majewski Letter

[39] Because Unrau's Motion set forth that it was to be returnable on August 14, 2023 at 9:00 a.m., Majewski requested an adjournment for one week to August 21, 2023. Sokal confirmed for Majewski that there would be no opposition to an adjournment "if there is an agreement on a commensurate period of forbearance on enforcement".

[40] Majewski interpreted the reply from Sokal to mean that there was a request for an indefinite forbearance upon enforcement, to which she had no instructions from Schaworski to consent. She categorized this as being a case of an innocent misunderstanding, similar to Sokal inadvertently misrepresenting that Unrau's Motion had

been filed and would be returnable on August 14, 2023 (when Registry but did not file the pleadings until following August 14, 2023).

[41] Sokal contends that the Majewski Letter went far beyond seeking an adjournment of one week to August 21, 2023.

[42] The portion of the Majewski Letter which was of primary concern to Sokal, and where it is argued that Majewski inappropriately provided "unaffirmed evidence" (which should be rebuked by the Court), read as follows:

> "The defendant had called my office and we spoke. In our conversation the defendant seemed agitated, possibly intoxicated and generally did not speak logically. He repeatedly called me a criminal and indicated a fraud had been committed".

[43] Sokal also pointed out that from her perspective, there were two further errors contained within the Majewski Letter:

> a) "D'Arcy [sic] and Deacon … had previously indicated an intention to defend the proceeding; D'Arcy and Deacon confirmed in writing no such intention going forward prior to my noting default"; and
>
> b) "Sokal refused to grant a one-week adjournment unless I agreed to indefinitely forebear on collections".

[44] While Sokal's Letter confirmed for the Court that the parties had eventually agreed to adjourn Unrau's Motion (to August 21, 2023), it also stated as follows:

> "We do not agree with the characterization in Ms. Majewski's letter of the correspondence between our offices and we dispute the relevance and propriety of certain of the letter's allegations about our client. Given the contents of the letter, we deem it necessary to advise the Court that it is our position that various allegations in the letter are irrelevant and highly prejudicial".

[45] Simply put, counsel should not put themselves in a situation where they could become a witness.

[46] The Code provides the following guidance at Chapter 5 - The Lawyer as Witness, section 5.2-1:

> **A lawyer who appears as advocate must not testify or submit his or her own affidavit evidence before the tribunal unless permitted to do so by law, the tribunal, the rules of court or the rules of procedure of the tribunal, or unless the matter is purely formal or uncontroverted.**
>
> **Commentary [1] A lawyer should not express personal opinions or beliefs or assert as a fact anything that is properly subject to legal proof, cross-examination or challenge. The lawyer should not, in effect, appear as an unsworn witness or put the lawyer's own credibility in issue.** The lawyer who is a necessary witness should testify and entrust the conduct of the case to another lawyer. There are no restrictions on the advocate's right to cross-examine another lawyer, however, and the lawyer who does appear as a witness should not expect to receive special treatment because of professional status.
>
> [emphasis added]

[47] ***Shearer v. Hood***, 2007 MBQB 214 ("***Shearer***") is a Manitoba decision where one of the lawyers involved in that case filed their own affidavit. The Honourable Master Sharp expunged the affidavit of counsel in its entirety. In addition to referring to the Code (as it then existed), a passage from a well-recognized and regarded authority was included at para. 5 of this decision:

> [5] *The Law of Evidence in Canada*, *2nd ed. Sopinka, Lederman and Bryant*, have the following comments on the issue:
>
> > **§13.42** Lawyers stand on a somewhat different footing. They are competent in law to appear as witnesses in an action in which they act as counsel. **Nevertheless**, **courts have been reluctant to allow a lawyer who has sworn an affidavit to appear as counsel in that matter. It would place the court in the untenable position of having to assess the credibility of a counsel who has given evidence. Accordingly, the practice has developed of forbidding a lawyer to appear as both counsel and witness in a motion or an action.**
> >
> > [emphasis added]

[48] In reliance upon the aforementioned excerpts from the Code and the reasoning from ***Shearer***, as well as the guidance from what is an authoritative treatise on evidence, the comments within the Majewski Letter in relation to her discussion with Unrau (and that Unrau appeared to be "intoxicated") placed Majewski in a situation where she could be cross-examined upon these statements and observations. Had Schaworski continued to oppose setting aside the Default Judgment, a motion could have been filed on behalf of Unrau requesting that the Court direct Majewski to withdraw as counsel for Schaworski (because she had become a witness concerning the issue of Unrau's intentions to defend the Claim).

[49] It is acknowledged that "hindsight is 20-20", and there is obviously more opportunity at this stage to consider potential options versus being in the heat of the moment and preparing for an upcoming hearing. Regardless, there were other avenues available when seeking an adjournment on behalf of Schaworski, such as but not limited to the following:

a) Restrict any correspondence or email to the Court (which should be addressed to the attention of the trial co-ordinator) to make a request for an adjournment, based upon the inability to attend before the Court on the returnable date for the motion (being away on holidays and the necessity to prepare responding material).

b) Provide a telephone number and email address to the trial co-ordinator, so that arrangements for an adjournment can be confirmed, or alternatively, the

request for an adjournment can be facilitated through a teleconference with other counsel and the presiding judicial officer.

c) Alternatively, arrange for a partner or associate of the firm to attend before the Court and request an adjournment. Even if the partner or associate does not practice civil litigation and is unfamiliar with the file, a short adjournment could be sought, or alternatively, a hearing could be scheduled for a time when counsel with conduct of the file would be available (such as upon return to the office from holidays).

d) Should there be no partner or associate available or willing to attend before the Court upon the returnable date for the motion (which is unfortunate, as receiving assistance from a partner or colleague from time to time is one of the perceived benefits to working in a firm with other lawyers), arrangements could be made with another local lawyer to serve as agent and seek an adjournment.

e) Clear communication with other counsel is critical (instead of trading volleys through email exchanges, there is something to be said for the "old school" approach of picking up the phone to have a direct discussion and minimize the prospect for any uncertainty).

[50] While the above noted options may not be ideal, any of these courses of action would have been preferable to sending correspondence to my attention (which, at a minimum, triggered a response on behalf of Unrau via the Sokal Letter).

[51] The Court does not wish to be receiving a series of letters from counsel, especially where there are details included to such an extent that it is tantamount to provision of

unsworn or unaffirmed evidence. If evidence is to be presented, it should properly be contained within an affidavit or provided on a *viva voce* basis.

[52] In consideration of the foregoing, I could direct that the Majewski Letter (and by extension, the Sokal Letter) be removed from the file, akin to what occurs in the event an affidavit or document is expunged. That being stated, it is not absolutely necessary to do so as the Court has an appreciation of what is or is not appropriate evidence.

[53] This case should serve as guidance to counsel in that sending correspondence to a presiding justice or associate judge should be the exception and not the rule. Where there is something so critical to convey to the Court, request that the trial co-ordinator schedule an emergent hearing. In the event the issue in question is within the jurisdiction of an associate judge, time could be set aside for discussion and directions most weeks (an example would be at the conclusion of the weekly Associate Judge's Civil List).

[54] While there are no guarantees, there should nonetheless be a measure of comfort for counsel knowing that in the event the lawyer for a responding party is away from work for whatever reason (holidays, family, illness or otherwise), the other lawyer (who filed a motion and does attend on the returnable date) is an officer of the Court, and should explain why the lawyer representing the responding party is not present. If it is confirmed that the lawyer acting for the responding party had requested an adjournment, the Court could authorize arrangements to be made so that the responding lawyer would be able to participate and speak to the adjournment request (if not in-person, through teleconference or video).

[55] Taking all of the above noted factors and considerations into account, and even though Majewski has explained her focus or intent behind providing certain further details (to secure an adjournment), I find that the circumstances surrounding the Majewski Letter are relevant as it relates to determining an appropriate award for costs.

Cross-Examinations

[56] It is asserted on behalf of Schaworski that the grounds set forth within Unrau's Motion were "predicated on the credibility of Unrau and the reliability of his evidence". By extension, it is submitted that it was wholly inappropriate to suggest that Schaworski not be able to challenge what had been alleged by Unrau.

[57] When Majewski informed Sokal that Schaworski was opposed to Unrau's Motion, and had instructed her to proceed with cross-examinations on affidavits, Sokal requested that the cross-examinations be held virtually. Majewski responded by advising that it was her preference for Unrau to be cross-examined in person at her firm's Brandon office.

[58] Sokal provided notice to Majewski via email dated November 27, 2023 that additional costs would be sought against Schaworski given the unwillingness to consent to virtual cross-examinations on affidavits.

[59] It has been articulated on behalf of Schaworski that the Brandon Judicial Centre is nearest to where the cause of action arose, with both Unrau and Schaworski residing in rural communities that are somewhat similar in distance from Brandon.

[60] Within Schaworski's Brief, it is submitted that (para. 51):

> "It is our respectful submission that there is a qualitative difference between in person and virtual questioning. It should not be the norm that examinations take place virtually. It should not be a case that because party hires counsel from Winnipeg that they are entitled to be virtually examined".

[61] Even though Sokal intimated that it could be categorized as "irresponsible" to permit Unrau to be questioned in-person, should Sokal be participating virtually, Majewski noted that a similar arrangement was exactly what Sokal had contemplated at the outset (questioning would be conducted virtually, but Sokal would not be present in the same location as Unrau). In addition, Majewski pointed out that Sokal cross-examined Schaworski, resulting in further time and expense to Unrau.

[62] The *Rules* do not specifically preclude examinations for discovery or cross-examinations on affidavits being conducted virtually.

[63] Flexibility and accommodation insofar as the procedures for discoveries or cross-examinations on affidavits is demonstrated by Rule 34.19, which provides as follows:

> **34.19** On consent of the parties, an examination may be conducted by telephone conference or other electronic means.

[64] From the Court's perspective, one impact of the global pandemic has been the reality that access to justice can be facilitated through processes which can be implemented in a timely, practical manner where necessary. Video was utilized to conduct trials, pre-trials, motions, examination of witnesses who work and reside a considerable distance away, or otherwise, and this practice continues to this day. The Court has adapted, with practice directions having been issued that permit virtual proceedings in certain situations.

[65] As I reviewed previously in ***Kutryk v. Ehr***, 2023 MBKB 124, there are a number of decisions where accommodations for examining a party or witness were considered, and approved, including but not limited to the cases of ***G.S. v. K.C.***, 2020 ONSC 210,

York University v. Markicevic, 2012 ONSC 5325, ***A.B. v. Henry,*** 2021 BCSC 2562 and ***A.O. v. D.J.M,*** 2021 BCSC 1690.

[66] Critical to the discovery or cross-examination process is that there be a record or transcript. Rule 34.18(1) confirms as follows:

> **34.18(1)** On consent of the parties or by order of the court, an examination may be recorded by videotape or other similar means and the tape or other recording may be filed for the use of the court along with the transcript.

[67] From Schaworski's standpoint, I accept that discoveries or cross-examinations on affidavits are a means by which to test the evidence of the other party and observe their conduct during questioning. By exercising the foregoing litigation rights, however, further time and were expenses incurred for both Schaworski and Unrau (including travel time when virtual discoveries were opposed by Schaworski), all of which represents factors that are relevant for the Court's consideration when exercising its discretion concerning costs.

Basis for Pronouncement of the Default Judgment

[68] Within the requisition to note default and obtain the Default Judgment, Schaworski represented that the Claim was for a debt or liquidated demand in money. This is not correct.

[69] The Manitoba Court of Appeal, within its decision of ***GRH Ventures Ltd. v. De Neve***, 1987 CanLII 5271 ("***GRH***"), confirmed the following (commencing at paragraph 17):

> [17] **The requirement that the claim be a "debt or liquidated demand" is also a prerequisite to obtaining final as opposed to interlocutory judgment in default of a statement of defence being filed**.
>
> …

> [18] The import of these cases is synthesized in *Odgers' Principles of Pleading and Practice*, 21st ed. (1975), at p. 44, in these terms:
>
> > **When the amount to which the plaintiff is entitled can be ascertained by calculation or fixed by any scale of charges or other positive data, it is said to be 'liquidated' or made clear provided that it is expressed in sterling. But when the amount to be recovered depends upon the circumstances of the case and is fixed by opinion or by assessment or by what might be judged reasonable, the claim is generally unliquidated.**
> >
> > [emphasis added]

[70] As a result, it is submitted on behalf of Unrau that Schaworski was never entitled to obtain the Default Judgment. In addition, Unrau takes the position that there was no basis for the commencement date used within the interest calculations prepared on behalf of Schaworski.

[71] According to Majewski, it was at the cross-examinations on affidavits when, "for the first time", it was alleged on behalf of Unrau that Registry should not have granted the Default Judgment (because the sum sought pursuant to the Claim was not properly liquidated).

[72] Upon becoming aware of what was described by Majewski as a "procedural irregularity" in obtaining the Default Judgment, and it then being recognized on behalf of Schaworski that there was a reasonable prospect for the Default Judgment to be challenged (concerning quantum but not necessarily liability), Schaworski consented to the Default Judgment being set aside.

[73] While the Default Judgment was set aside by consent, Schaworski strongly disputes the contention advanced on behalf of Unrau that the Claim has "no reasonable

expectation of success". Schaworski argues that Unrau is exaggerating the merits of his case.

[74] Even though there may have been an innocent or inadvertent procedural error when obtaining the Default Judgment, Unrau's Motion was nonetheless required. Further time and expenses were incurred by Unrau, all of which is relevant to the issue of costs.

Offers

[75] Neither party is specifically relying upon Rule 49 (Offers to Settle) but have disclosed the contents of the settlement proposals which were previously exchanged.

[76] On August 22, 2023, Unrau offered to pay "throw away" costs in an amount of $200.00 to Schaworski in exchange for his consent to set aside the Default Judgment (a defence was to be filed promptly thereafter). Schaworski rejected this offer.

[77] Following the cross-examinations on affidavits, Schaworski proposed on February 1, 2024 that he would agree to the Default Judgment being set aside, upon condition that Unrau pay costs in an amount of $1,000.00. Unrau declined this proposal.

[78] The same day (February 1, 2024), Unrau proposed that Schaworski pay costs in an amount of $8,500.00. Schaworski did not agree.

[79] Later on February 1, 2024, Schaworski offered to set aside the Default Judgment, and proposed that each party bear responsibility for their own costs in connection with Unrau's Motion. Unrau disagreed, explaining why this hearing concerning costs was scheduled.

[80] When considering the proposals which were traded between the parties, and the reality that the Default Judgment was eventually set aside, by consent, I find that in these

circumstances Schaworski ought to have more carefully considered Unrau's offer made August 22, 2023 (to receive a nominal sum for costs of $200.00 from Unrau, with there to be no necessity for cross-examination on affidavits to be conducted in connection with the Default Judgment). Schaworski's unwillingness to accept what now appears to have been a reasonable settlement proposal cannot be ignored when it comes to determining an award for costs.

[81] As was concisely stated by the Honourable Justice Chief Justice Scott in ***Gabb v. Gabb***, 2001 MBCA 19 (at paragraph 12), "… costs normally follow the event" (which, in this case, is the Default Judgment being set aside in accordance with Unrau's Motion).

Solicitor and Client Costs

[82] It is submitted on behalf of Unrau that the evidence in this case and applicable law supports an award of solicitor and client costs being made against Schaworski.

[83] With reliance upon the Manitoba Court of Appeal decision in ***Judges of the Provincial Court (Man.) v. Manitoba et al.***, 2013 MBCA 74 ("***Provincial Judges MB***"), it is confirmed as follows within Unrau's Brief:

> "Solicitor-client costs may be awarded in exceptional circumstances as a result of reprehensible, scandalous or outrageous conduct by one of the parties to the litigation. They are awarded where the conduct is so outrageous that the Court wishes to express its disapproval of that conduct by an award of costs".

[84] I note that ***Provincial Judges MB*** was revisited, and applied, by the Court of Appeal in ***Ultracuts v Magicuts***, 2024 MBCA 45 ("***Ultracuts***"), wherein it was stated as follows (at para. 12):

> [12] **Next, on the issue of solicitor and client costs, this Court has stated that solicitor and client costs should not be the rule but should be awarded only in rare and exceptional circumstances, which arise when conduct is "scandalous, outrageous or reprehensible"** (*Judges of the*

> *Provincial Court (Man) v Manitoba*, 2013 MBCA 74 at para 177). **These are separate standards that need not all arise (see *ibid* at para 181).**
>
> [emphasis added]

[85] Within Schaworski's Brief, it is submitted that nothing Schaworski did should be described as being disproportionate (at para. 53):

> "He [Schaworski] had a good faith belief that Unrau was not being truthful and wished to test his evidence. After testing his evidence and being alerted to a procedural irregularity, Schaworski consented to set aside the Default Judgment. This is not an 'extreme' process or one that is outside of the rules of court procedure".

[86] It has also been articulated on behalf of Schaworski that the time expended and resulting legal expenses for Unrau are disproportionate to what was in issue between the parties. For illustration, Majewski noted that Sokal claims to have committed "more than 10 hours preparing" for the cross-examinations, which Majewski says in total "were less than 5 hours", with Sokal's portion of the cross-examinations being "less than two hours" (there were seven affidavits were filed in support of the Unrau Motion).

[87] Schaworski asserts that even if the Court was to determine that the cross-examinations of affidavits were unwarranted, an award of costs in favour of Unrau should only apply for that portion of the process, and would not justify departing from the Tariff. Unrau had to file a motion to set aside the Default Judgment, and it is argued that Unrau should not be entitled to costs towards any expenses associated with such efforts.

[88] It was further discussed in ***Ultracuts*** (at paras. 13 and 14, recognizing that the case at bar is distinct from the other decisions mentioned which involve fraud allegations):

> [13] **This Court has released several decisions that address the awarding of solicitor and client costs where fraud has been alleged but not proven** (see e.g., *Brown & Root Inc v Aerotech Herman Nelson Inc*, 2004 MBCA 63; *Manitoba Keewatinowi Okimakanak Inc v McIvor*, 2007 MBCA 134;

> *Tregobov v Paradis*, 2017 MBCA 60; *Bibeau v Chartier*, 2022 MBCA 2 at paras 109-110; and *Loeppky v Taylor McCaffrey LLP*, 2023 MBCA 101 at paras 108-24).
>
> [14] **It is clear from these decisions that unsuccessful claims of fraud or dishonesty do not necessarily lead to an award of solicitor and client costs; rather, such awards should be rare and exceptional** (see *Brown & Root* at para 113; *Bibeau* at para 89).
>
> …
>
> [emphasis added]

[89] Sokal has directed the Court's attention to two decisions attached to Unrau's Brief, namely, ***Mayer v. Osborne Contracting Ltd.***, 2011 BCSC 914 ("***Mayer***"), at paragraphs 11(a), (c), (d) and (f), and ***Centrury Custom Brokers Ltd. v. P.C.B. Freight Services Ltd.***, 1985 CarswellOnt 486 ("***Century***"). As set forth within Unrau's Brief, Sokal submits that the takeaway from ***Mayer*** and ***Century*** is that solicitor and client costs have been granted in situations where there was opposition to a motion which was bound to succeed.

[90] Majewski disagrees, and has provided the British Columbia Court of Appeal decision in ***Vassilaki v. Vassilakakis***, [2024] B.C.J. No. 64 ("***Vassilaki***"), wherein it was held at paragraph 48 that "... something more is required than a meritless case that the plaintiff ought to have recognized was deficient."

[91] Exercising procedures available pursuant to the *Rules*, and aggressively advancing the Claim, does not necessarily give rise to a basis for awarding solicitor and client costs, which are to be awarded only in exceptional circumstances.

[92] In these circumstances, I am not sufficiently convinced that the conduct of Schaworski was to the level or extent of being categorized as scandalous, outrageous or reprehensible so as to warrant imposition of solicitor and client costs.

Party and Party Costs

[93] In accordance with Rule 57.01(1), I have reached the following conclusions based upon the evidence before the Court:

(a) the amount claimed and the amount recovered in the proceeding;

(i) With this being a Class II proceeding, the amount sought by Schaworski pursuant to the Claim is not a substantial sum.

ii) Any costs award should be reflective of the above noted reality, as well as the extent of legal and other expenses involved (although the legal fees incurred by Unrau are not entirely proportionate to the issue that was being disputed or the status of this litigation thus far).

(b) the complexity of the proceeding;

(i) The deficiencies in Unrau's construction work that have been alleged by Schaworski, and Unrau's responses, should not give rise to a complex case.

(c) the importance of the issues;

(i) The issues raised by Schaworski, and the defences presented by Unrau, are obviously of importance to the parties, but not necessarily for the public at large.

(d) the conduct of any party which tended to shorten or lengthen unnecessarily the duration of the proceeding;

(i) While Schaworski is entitled to avail himself of all legal recourse in furtherance of the Claim, his refusal to set aside the Default Judgment

shortly following Unrau retaining Sokal, and insisting upon cross-examination on affidavits, are decisions which are inexplicably linked to the additional time and expenses incurred by Unrau.

(d.1) the conduct of any party which unnecessarily complicated the proceeding;

(i) There is no uncertainty that Schaworski's litigation conduct served to complicate and delay these proceedings moving forward to trial, such that an award of costs is an appropriate remedy for Unrau.

(e) whether any step in the proceeding was improper, vexatious or unnecessary;

(i) I am not persuaded that Schaworski's litigation conduct has been to such an extent to be described or portrayed as improper. Rather, what has unfolded in these proceedings could more fairly be described as assertive advocacy by Majewski on behalf of Schaworski.

(f.1) the relative success of a party on one or more issues in a proceeding in relation to all matters put in issue by that party;

(i) Unrau has been successful with respect to the relief sought within the Unrau's Motion.

[94] Given the totality of these circumstances, Unrau should be entitled to costs, at a minimum, on a party and party basis.

Tariff A

[95] In accordance with section 5(2) of Tariff A, the costs which are permissible in connection with the specific steps undertaken in this Class II proceeding are as follows:

a) s.5(2)(e): Examination for Discovery: Class II - $625.00 per half-day ($1,250.00 for full day of cross-examinations on affidavits on January 19, 2024);

b) s.5(2)(l): Preparing Motion: Class II - $1,250.00;

c) s.5(2)(j): Attendance at Uncontested Hearing (for adjournment on August 21, 2024) – $250.00; and

d) s.5(2)(v): Contested Assessment of Costs: Class II - $625.00.

Total: $3,375.00

[96] Within Unrau's Brief, there is also reference to s. 5(2)(p) from Tariff A in relation to preparing and responding to offers to settle in August of 2023 and February of 2024 (for a Class II proceeding, the allowable sum is $400.00). I am not including this component in the request for costs by Unrau as neither party has argued that the various proposals (which have now been disclosed) should be considered as offers to settle so as to attract the potential for a greater award of costs in accordance with Rule 49.

Tariff B

[97] Unrau should also recover for reasonably incurred disbursements, as well as for GST and RST as applicable.

[98] From the statement of account summary included within Unrau's Brief, the total for disbursements incurred is an amount of $1,382.06. I find that the amount confirmed in relation to disbursements is acceptable.

Elevated Costs

[99] I acknowledge that the foregoing sums pursuant to Tariff A and Tariff B ($3,375.00 plus $1,382.06 for a total of $4,757.06 plus GST and RST) pale in comparison to the legal expenses incurred by Unrau (over $15,000.00).

[100] Pursuant to section 96(1) of the ***KB Act***, as well as Rule 57.01(3), I have a discretion to award costs "with or without reference to Tariff A or Tariff B".

[101] There is Manitoba case law which supports an award for costs that is of an amount which is elevated beyond the sums prescribed pursuant to Tariff A (but does not equate to full indemnification on a solicitor and client basis), such as in ***Ultracuts***, where it was stated as follows commencing at para. 17:

> [17] **The defendants argue, in the alternative, that there should be an order for elevated costs. This Court has recognized that, where unproven claims do not rise to the level of reprehensible, scandalous or outrageous conduct, they can still lead to an award of elevated costs (see *McIvor* at para 10; *Tregobov* at paras 22-27; see also *Bibeau* at para 92).**
>
> [emphasis added]

[102] When reflecting upon my analysis herein, and considering the insistence that cross-examinations on affidavits be in-person, as well as the content of the Majewski Letter (in addition to initial opposition to setting aside default where a low threshold generally applies), there is certainly a basis upon which I could conclude that an elevated cost award would be just in this case.

[103] By deviating from Tariff A, a measure of deterrence as well as encouragement to embrace proportionality and best efforts at settlement could also possibly be achieved for the litigants and counsel.

[104] As alluded to previously, however, the legal expenses incurred by Unrau are disproportionate to the complexity of the issue that had been in dispute (setting aside the Default Judgment).

[105] When making the above noted observation, I should clarify that I am in no way making any negative comment with respect to the quality of the legal services provided to Unrau.

[106] Ultimately, both counsel are skilled and committed to advancing the interests of their respective clients. That being stated, the efforts committed to the Default Judgment eventually being set aside were not proportionate or cost effective.

[107] After balancing these considerations, I am prepared to award a total sum for costs to Unrau that is slightly elevated above the amounts that are available as recovery for costs in accordance with Tariff A.

CONCLUSION

[108] Schaworski shall pay costs to Unrau in an amount of $6,500.00, inclusive of disbursements, GST and RST, concerning the Unrau Motion.

[109] The costs award herein shall be payable in full by Schaworski on or before January 31, 2025.

_____

R. L. Patterson
Associate Judge