SUPREME COURT OF NOVA SCOTIA
Citation: JB Technologies Inc. v. Independent Armoured Transport Atlantic Inc., 2009 NSSC 183

Date: 20090610
Docket: Hfx. No. 293446
Registry: Halifax

Between:

JB Technologies Inc.

Plaintiff

-and-

Independent Armoured Transport Atlantic Inc.

Defendant

Costs Decision

Judge:	The Honourable Justice Robert W. Wright
Heard:	February 12, 2009 in Halifax, Nova Scotia
Last Submission on Costs:	April 16, 2009
Written Decision:	June 10, 2009
Counsel:	Counsel for the Plaintiff - Peter Coulthard Counsel for the Defendant - Tim Hill

Wright J.

[1] On February 12, 2009 the Court dismissed an application by the plaintiff for summary judgment made under Rule 13 of the Civil Procedure Rules (1972) in an action for recovery of alleged indebtedness in the amount of $40,000 plus interest. The court found that there were issues of material fact to be determined and credibility findings to be made, all of which should be left for the trial judge to decide.

[2] At the conclusion of the hearing, the Court awarded the defendant costs of the application in the amount of $1,000. Left open for discussion by the parties was the question of whether the defendant should also be entitled to recover any part of the professional fees charged by one of its witnesses, Peter Wilde, C.A. for his professional time spent preparing for and attending the hearing of the application. Counsel have been unable to reach agreement on this issue and the matter has been referred to the Court for a decision.

[3] The submission of the defendant is that Mr. Wilde, in being cross-examined on his affidavit, gave some opinion evidence and some fact evidence. On that footing, the defendant seeks recovery of all of Mr. Wilde's fees for preparation (i.e., $560) and 50% of his fees for attendance at the hearing (i.e., ½ of $1,000) for a total of $1,060.

[4] The submission of the plaintiff, on the other hand, is that Mr. Wilde was not put forward as an expert witness but rather as a fact witness who was required for cross-examination on his affidavit (no expert report having been filed), and that his fees for attendance at the hearing are therefore not recoverable as a disbursement. Plaintiff's counsel further submits that the application was not so complex as to require anything other than routine preparation and that the defendant therefore should not be compensated for any of Mr. Wilde's preparation time.

[5] Both counsel have referred to and rely upon the decision of the Nova Scotia Court of Appeal in **D.W. Matheson & Sons Contracting Ltd. v. Canada (Attorney General)** 2000 NSCA 44. In that case, the plaintiff claimed for recovery of fees paid to two engineers it called to testify as fact witnesses about their supervision of the plaintiff builder's work. The question for determination by the Nova Scotia Court of Appeal was whether an allowance for preparation time of a fact witness was permitted under the Civil Procedure Rules then in effect.

[6] After noting the distinction to be made between preparation time and time spent testifying in court, the Nova Scotia Court of Appeal concluded that the broad discretion conferred under s.2(13) of Tariff D and Rules 63.10A and 63.36 make it clear that the court does have a discretion to make an allowance for the preparation time spent by a fact witness. With that finding, the ultimate question in any given case is whether the discretion should be exercised.

[7] In writing the judgment of the court, Cromwell, J.A., summed up as follows

(at paras 88-89):

> In relation to the concern that such an allowance might tend to undermine the duty to testify, it is helpful to distinguish between preparation time and time spent in testifying. In our Tariff, it seems to me that the specification of particular fees for the attendance of witnesses, along with the different treatment of expert witnesses, supports the view that, generally, there should be no other recoverable attendance fees for fact witness attending trial pursuant to a subpoena to testify. However, allowing preparation fees as a disbursement in an appropriate case does not undermine the civic duty to answer to a subpoena but acknowledges the practical necessity of detailed preparation in complex matters. In my view, this underlines, rather than detracts from, the importance of the duty to testify. It also, as I have noted, recognizes the reality of the need for witness preparation in complex litigation, encourages trial preparation and supports the purpose of an award of costs.
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> I would conclude, therefore, that where an unusual amount of witness preparation is necessary as a practical matter, where it is reasonable to pay a fee to the witness in all of the circumstances for such preparation and where a fee is paid or liability for a fee is incurred, an allowance on account of the preparation fee may be allowed as a disbursement in an award of party and party costs. Both the allowance of such a disbursement and its amount are discretionary. I am concerned in this case with witnesses who are not parties or officers of parties and my reasons are restricted to that type of witness.

[8] Justice Cromwell then went on to set out some of the factors that would be relevant to the exercise of this discretion, notably, that such a disbursement should generally be allowed only in exceptional or unusual circumstances and should not be allowed for routine preparation by a fact witness, that such a disbursement must have been actually incurred, and that the amount of the allowance should reflect the nature of the preparation that was reasonably required and the nature of the evidence given.

[9] After making the ruling that the discretion to make such an allowance exists,

the Court of Appeal referred the matter back to the trial judge to decide the question of whether the discretion should be exercised in the plaintiff's favour.

[10] The fact scenario in the present case centres around the business operations of the defendant in the supply and management of automated cash machines in Prince Edward Island and elsewhere. This operation requires the defendant to maintain an inventory of cash to be used for the cash machines which is cycled within a closed system. The complicating fact here is that there was another company, Bullion Investments Inc., who was carrying on a similar business using its own cash machines within its closed system but with some of its cash inventory apparently being borrowed from the defendant. This parallel operation clouded the question of whether or not the subject $40,000 was properly characterized as some form of loan to the defendant from the plaintiff which flowed through the principal of Bullion, or whether it was money being repaid by Bullion to the defendant that had been supplied to it.

[11] Peter Wilde is a Chartered Accountant who has been providing services to the defendant ever since the company was incorporated. As such, he filed an affidavit on behalf of the defendant for purposes of this hearing, setting out the business relationships between the various companies and the results from his review of various financial records. He was required for cross-examination on that affidavit. I need not go into the detail of that evidence for purposes of this costs decision. Suffice it to say that Mr. Wilde was primarily a fact witness doing his best to reach conclusions based on very poorly documented transactions between

the parties.

[12] Mr. Wilde was not put forward by the defendant as an expert witness. No expert report was filed nor was any attempt made at the hearing of this application to qualify Mr. Wilde to be able to give expert opinion evidence. Because he was primarily a fact witness, albeit in his capacity as a chartered accountant, the defendant is not entitled to recover any of his fees that pertain to his attendance at the hearing of the application for cross-examination on his affidavit.

[13] The question that remains is whether the Court should exercise its discretion to permit the defendant to recover, as a disbursement, Mr. Wilde's professional fees of $560 incurred for preparation time of three hours.

[14] Bearing in mind the principles articulated by Justice Cromwell in **Matheson**, I conclude that the Court should exercise its discretion by permitting the defendant to recover Mr. Wilde's fees for this preparation time. The relationship between the three corporate players, their business methodology, and the manner in which cash inventory was supplied and cycled in the operation of automated cash machines, presents a complicated picture which is compounded by the fact that the transactions between them were very poorly documented. It would be an oversimplification to characterize Mr. Wilde's efforts as routine preparation by a fact witness. Rather, this is a situation where preparation time exceeding the routine was, practically speaking, necessary and Mr. Wilde's role in defending the summary judgment application was an instrumental one. I therefore conclude that

it is reasonable for the defendant to be compensated for the fees charged to it by Mr. Wilde for his preparation time.

[15] Accordingly, the defendant is entitled to recover its disbursement for that portion of Mr. Wilde's fees in the amount of $560 in addition to the party and party costs award of $1,000 earlier made.

J.