SUPREME COURT OF NOVA SCOTIA
Citation: Matheson v. CIBC Wood Gundy, 2014 NSSC 340

Date: 20140918
Docket: Syd No. 317830
Registry: Sydney

Between:

Donald Matheson and Carolyn Matheson

Applicants

v.

CIBC World Markets Inc./Marches Mondiaux CIBC Inc. carrying on business as CIBC Wood Gundy

Respondent

DECISION ON COSTS

Judge:	The Honourable Justice Arthur W.D. Pickup
Heard:	By Written Submissions
Final Written Submissions:	Applicants' Brief on Costs – June 11, 2014 Respondent's Brief on Costs – June 10, 2014 Applicants' Reply Brief – June 13, 2014 Respondent's Reply Brief – June 13, 2014
Counsel:	George W. MacDonald, Q.C. and Jane O'Neill, for the Applicants John A. Keith and Jack Townsend, for the Respondent

By the Court:

[1] This matter was heard in Sydney, Nova Scotia on September 10, 11, 12 and 16, 2013. A decision was rendered January 21, 2014 and is found at *Matheson v. CIBC Wood Gundy*, 2014 NSSC 18.

[2] At the conclusion of my decision I indicated that I would hear the parties in the event that they were unable to agree on the issue of costs.

[3] I have been advised by the parties that they have reached partial agreement on costs, but two issues remain unresolved:

(a) whether the Mathesons are entitled to recover travel costs incurred by their legal counsel as disbursements; and

(b) the amounts which the Mathesons are entitled to recover as disbursements for the fees and expenses charged by their expert witness, Richard Croft.

[4] The parties have requested that I provide a costs decision on these two issues.

[5] The parties provided submissions on June 10, 2014 and reply submissions on July 13, 2014.

Issues:

1. Are the Mathesons entitled to recover disbursements incurred for the purpose of their Halifax legal counsel attending the hearing in Sydney, Nova Scotia?
2. Are the Mathesons entitled to recover disbursements incurred in relation to the preparation of Mr. Croft's expert report and his attendance at the hearing?

Analysis:

1. Are the Mathesons entitled to recover disbursements incurred for the purpose of their Halifax legal counsel attending the hearing in Sydney, Nova Scotia?

[6] Both counsel have set out the law and there is no apparent disagreement between the parties. The principles governing this issue can be summarized as follows:

1. Generally, a successful party will not be entitled to recover travel expenses incurred by out-of-town counsel as disbursements.
2. The only exceptions to this general principle arise where:
   (a) the court specifically orders the disbursement as part of its reasons; or
   (b) where the party is able to establish, either from the nature of the case, or the parties involved, or for some other good and valid reason, that the retention of local counsel would not be appropriate.

[7] Justice MacAdam explained these principles in *Wall v. Haney*, 2007 NSSC 153:

> 15 There is, in my view, nothing in either Section 2(6) or Section 2(13) of Tariff D to support an interpretation that disbursements for counsel to travel to attend at discovery or a trial are now within the discretion of a taxing officer. The judicial authority predating these provisions, primarily decisions by Judge McLellan, specify that disbursements for counsel travelling from one jurisdiction to another to attend a trial are not recoverable, and indeed that is supported by the Court of Appeal decision in *Western Nova Consultants Limited. Canadian Mortgage Brokers and Consultants Limited, supra*, repeating that there is no authority in the *Costs and Fees Act*, or any rule of court, which permits an allowance for costs of travel by counsel for the purposes of an Appeal.
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> **…**
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> 17 There are clearly two exceptions to the rule. In the one is the circumstance where the court specifically orders the disbursement as part of its reasons, such as was apparently ordered by Justice Simon MacDonald in the taxation conducted by Adjudicator Giles and noted by the adjudicator in his reasons and referenced earlier herein. <u>The second exception is where the party is able to establish, either from the nature of the case, or the parties involved, or for some other good and valid reason, the retention of local counsel would not be appropriate</u>…

[Emphasis added]

[8] As I did not authorize recovery of these expenses in my post-hearing reasons for judgment, the applicants can only recover these expenses under the second exception.

[9] Was it necessary for the Mathesons to retain out-of-town counsel? Have the Mathesons established from the nature of this case "or for some other good and valuable reason", that the retention of local counsel would not be appropriate? For the reasons which follow, I am satisfied they have.

[10] CIBC Wood Gundy's position is set out in their June 10, 2014 submission as follows:

> With respect, the Applicants cannot have their cake and eat it too. They cannot retain Halifax counsel to represent them in a manner which is most closely connected to Halifax and then insist that the matter be heard in Sydney while, at the same time, recover their counsel's travel expenses for attending at the hearing. On this issue, it bears noting that the parties implicitly acknowledged through their conduct that Halifax was the more efficient and economical forum for this litigation. In particular:
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> 1. The motion to convert the proceeding to an action was heard before Justice LeBlanc in Halifax, not Sydney (2011 NSSC 85);
> 2. all discoveries (including the Mathesons) occurred in Halifax; and
> 3. the request for a reconsideration was heard in Halifax. Your Lordship originally proposed that the parties travel back to Sydney for the motion. On March 3, 2014, Mr. MacDonald wrote to Your Lordship and indicated that both counsel agreed that having the motion heard by teleconference instead "would save our clients considerable expense". During the teleconference that took place shortly after on March 12, 2014, it was determined that the motion would be heard in Halifax.
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> The Respondent submits that this aspect of the Applicants' claim for disbursements must be denied.

[11] The Mathesons are residents of Sydney. Under the *Civil Procedure Rules* they are entitled to have the matter set down for hearing in that jurisdiction: see generally Rule 32.

[12] The proceedings being heard in Halifax was a reflection of counsel attempting to limit costs to their clients. The respondents also retained Halifax

counsel and there were economies for both parties in hearing some of the proceedings in Halifax.

[13] I have considered the issue of the venue of the trial, and the arguments put forward by CIBC Wood Gundy in determining whether the disbursements for travel should be approved. I am not satisfied that the venue chosen should determine this issue. The question is whether the applicants have established that the retention of McInnes Cooper was justified and, therefore, their disbursements for travel should be paid.

[14] The applicants' counsel, George MacDonald, Q.C., filed an affidavit dated June 10, 2014 which set out the following justification for his retainer by the Mathesons:

> 6. Beginning in October, 2008, I have been retained by a number of individuals affected by the Respondent's margin calculation error. In particular, I am counsel to a class of approximately 120 account holders affected by the EEM error. In addition, I was counsel to Frederick Saturley, the investment advisor to the affected clients whose employment was terminated after he discovered the error. The Halifax office of Cox and Palmer has acted, and continues to act for the Defendants in each of these matters.
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> 7. The Applicants informed me and I do believe that they did not want to be members of the class but rather, that they wanted to pursue their own individual claims against the Respondent. I am informed by the Applicants and do believe that they retained McInnes Cooper and not counsel in Sydney, Nova Scotia in part, because of McInnes Cooper's knowledge of the EEM error and because counsel for the Respondent was also in Halifax.

[15] CIBC Wood Gundy's counsel objected to these statements, arguing that they were hearsay. Mr. MacDonald agreed and requested leave to file an affidavit from the Mathesons. Leave was granted.

[16] Donald Matheson filed an affidavit dated June 25, 2014 which confirmed Mr. MacDonald's hearsay statements in his affidavit. The relevant paragraphs of Mr. Matheson's affidavit are as follows:

> 3. In or about October 2008 I became aware of an error which had been committed in calculating the margin available in my investment accounts which had led to my suffering losses. In or about December 2008 I had discussions with Fredrick Saturley and Per Humle, employees of the Respondent and advised that I would be suing the Respondent.

4. In December 2008 I was aware that legal proceedings involving the EEM error issue were commenced or threatened between Saturley and the Respondent. Further I was aware that a Class Action proceeding involving all clients of Mr. Saturley who had suffered losses as a result of the EEM error was contemplated to be commenced, and that I and my wife Carolyn would be entitled to be members of such Class.
5. I wanted to proceed directly against the Respondent and not become a member of the Class. I was aware that George W. MacDonald, Q.C. was solicitor for Fredrick Saturley, and also for the potential Class members, and that he had knowledge of the EEM error, the trading options, and the necessity of having sufficient margin availability when carrying out such trades.
6. In January 2009 I contacted Mr. MacDonald who confirmed his involvement in the Saturley matter. We also discussed the potential Class action proceeding, and he considered lawyers involved in that case would have to fully understand the EEM error, the impact such error could have on the accounts of the relevant clients of the Respondent, and also have experience dealing with options contracts, securities regulations and trading issues. I then spoke to my own lawyer, Lee Anne MacLeod-Archer, now Justice MacLeod-Archer, of my desire to have Mr. MacDonald represent me and Carolyn in our contemplated action against the Respondent and she told me and I believed her, that she understood my desire to have Mr. MacDonald represent me and Carolyn in this matter.

[17] The crux of the applicants' position, with which I agree, is that the decision to retain McInnes Cooper was because of their familiarity with the issues. For example, Mr. MacDonald and McInnes Cooper were acting against CIBC in related proceedings. They represented Mr. Saturley in a wrongful termination action and numerous plaintiffs in a class-action proceeding, which received certification on May 11, 2011. The Mathesons opted out of the class and brought this proceeding.

[18] In all of these proceedings, including this one, the specialized and complex options trading investment strategy employed by Mr. Saturley, and the EEM error, have been fundamental issues with which Mr. MacDonald has been previously involved.

[19] It is noted that CIBC Wood Gundy retained the same Halifax counsel who represents them in the same matters.

[20] I am satisfied that this is one of those cases where an exception to the general rule should apply and the retention of local counsel would not be appropriate for the foregoing reasons.

[21] I allow the sum of $2,485.10 for counsel's travel expenses.

2. Are the Mathesons entitled to recover disbursements incurred in relation to the preparation of Mr. Croft's expert report and his attendance at the hearing?

[22] The Mathesons' position is that they are entitled to recover disbursements incurred in relation to Mr. Croft's written opinion and attendance at the hearing because "it was reasonable and prudent at the time the decision was made for the applicants to retain Mr. Croft to provide an opinion on the issues which he addressed".

[23] CIBC Wood Gundy's position is set out in their submission as follows:

> Thus, in light of the above authorities, Your Lordship's rejection of the crux of Mr. Croft's opinion, and the lack of particularity in the redacted version of the invoice for his report, the Respondent submits that "reasonable" disbursement in connection with Mr. Croft's evidence would consist of:
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> 1. 25% of the amount of his invoice for his report (or $7,062.50); and
> 2. regular witness fees and expenses in connection with his attendance at trial, consisting of:
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> (a) $35.00 in witness fees for a single day of attendance at the hearing;
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> (b) airfare, in the amount claimed of $538.24;
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> (c) accommodation, in the amount claimed of $271.10;
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> (d) ground transportation, in the amount claimed of $100.00;
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> (e) meals, in the amount claimed of $124.36; and
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> (f) HST in connection with the above items.

[24] Are the disbursements in the amount of $33,034.08 claimed for Mr. Croft's services reasonable?

[25] CIBC Wood Gundy's position, as I have noted, is that these disbursements are only partially recoverable because Mr. Croft's evidence was not accepted by this court at trial. At p. 12 of their submission, the respondents explain:

> In any event, the Respondent submits that the amounts being sought by the Applicants in this regard (i.e. $28,250.00 in connection with Mr. Croft's report and $4,784.08 in connection with his attendance at the hearing) are unreasonable in light of the limited utility of his evidence. The crux of Mr. Croft's evidence was that the Applicants' unregistered investment accounts should effectively be reset to their values as of July 24, 2008 because they had been unable to give their "informed consent" to investment decisions and recommendations during the EEM period. Your Lordship rejected Mr. Croft's opinion and accept the evidence of Eric Kirzner (the Respondent's expert witness) on this point.

[26] And further at p. 13 of their submission:

> The respondent acknowledges that other limited aspects of Mr. Croft's evidence were of assistance to the Court and the parties. However, it bears emphasizing that each of Mr. Croft's key findings and opinions (i.e. his comments and opinions regarding the Applicants' damages, which include those set out at paras. 14-21 and 24-28 of his report) were rejected and were ultimately of no utility. As such, and in light of the lack of particularity in the invoice for Mr. Croft's report, the Respondent submits that the Applicants should only recover a fraction of their expenses related to Mr. Croft's evidence. This is consistent with Justice Goodfellow's comments in *Cashen, supra*, where he noted (at para. 10(6)) that one factor to consider in determining the reasonableness of a disbursement for expert evidence is whether "the expert's report was of any assistance to the court" and that:
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> > If only part of the report is useful at trial, then only part of the claim will be allowed: *Knox v. Interprovinicial Engineering Ltd.,* [1993] 120 N.S.R. (2d) 288 at 302…

[27] As to the position by CIBC Wood Gundy that these disbursements are not recoverable because the court did not accept Mr. Croft's evidence, the Mathesons say that the court did rely upon Mr. Croft's evidence, and secondly that the law is clear that the use ultimately made of expert evidence at trial is immaterial to the recoverability of the disbursements related to obtaining and presenting that expert evidence.

[28] The Mathesons advance caselaw to support their position that it is immaterial to the recovery of the disbursements what use is ultimately made of expert evidence. Paragraphs 23 – 25 of their submission say:

> 23. Hood, J. in [*Maritime Travel* v. *Go Travel Direct.Com Inc.,* 2008 NSSC 306, affirmed at 2009 NSCA 42], affirmed that the reasonableness of retaining an expert will be assessed in light of the circumstances existing at the time that decision was made prior to trial and that it will not be impacted by hindsight (see

para. 12). In a similar vein, Hood, J. affirmed the decision in *Claussen Walters & Associates Ltd. v. Murphy*, [2002] N.S.J. No. 44 (NSCA), for the rule that it is immaterial what use was actually made of the expert report at trial. In *Claussen*, an expert report had been prepared to support an alternative plea of unjust enrichment. The report was ultimately unnecessary and not relied upon because the primary plea of contractual breach was successful, yet the disbursement was allowed. Hood, J. stated as follows in respect of the *Claussen* decision:

> [14] The Court of appeal in *Claussen Walters & Associates Ltd. v. Murphy*, [2002] N.S.J. No. 44 (N.S.C.A.) cautioned that the court's use of the report of the expert is immaterial. Saunders, J.A. said in paras. 15 and 16:
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> > We cannot accept counsel for the appellants' submission that all or a significant proportion of the Hardy invoices ought not to be recoverable because no use was made of the Hardy reports by the trial judge in his ultimate determination. In our view, this is immaterial. The particular 'use' to which an expert's report or opinion may be put by a trial judge may never be discerned. The only question is, as we have noted, whether in fact the disbursement is a 'just' and 'reasonable' charge against the opposing party.
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> > We also reject counsel for the appellants' submission that by the time of trial the respondent did not 'need' the Hardy report in order to quantify his damages. On the contrary, having regard to the relief sought and the defences raised, we are perfectly satisfied that retaining Mr. Hardy to prepare a report and to testify at the trial was prudent and necessary…

24. In *Maritime Travel* the plaintiff alleged that the defendant was liable for economic losses resulting from the defendant's competition practices. The losses were quantified by the plaintiff's claim was allowed only in respect of damages arising from *false* or *misleading* competitive practices by the defendant, therefore the Court ruled that the expert report was not helpful (see para. 15.). After trial the plaintiff sought to recover all of the expert disbursements it incurred. Hood, J. determined that the plaintiff was entitled to recover because, in light of the position advanced by the plaintiff in the litigation, it was prudent and reasonable to retain the expert at the time that the decision to do so was made, that the expert's evidence was relevant to the issues raised by the plaintiff (albeit unsuccessfully), and that it was important to have the expert opinion before the Court even if all of the conclusions therein were not accepted (see paras. 16, 18 and 19). The disbursement was reduced from $71,384.63 to $50,000 due to the

> fact of decided success on the issues in dispute (see para. 28 and the addendum indexed as 2008 NSSC 328 [tab 1]).
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> 25. *Maritime Travel*, and the passage from *Claussen, supra,* illustrate that the ultimate use made of an expert report at trial is immaterial to the recoverability of the disbursements. The cases below illustrate the application of this principle in more extreme scenarios.

[29] Given the technical nature of the issues involved in this proceeding, I am satisfied it was reasonable and prudent at the time for the Mathesons to retain expert evidence. In fact, CIBC Wood Gundy retained its own expert to respond to Mr. Croft's affidavit, which, as the Mathesons argue, indicates the reasonableness and necessity to secure expert evidence on these technical issues.

The use of Mr. Croft's evidence:

[30] Mr. Croft's affidavit evidence was admitted at trial, but not relied on as to the issue of the proof of reliance. However, Mr. Croft's evidence was referred to and relied upon for other purposes such as for definitions and explaining the issue of margin and options trading (Decision – paras. 8, 9 and 10), and to quantify the amount of "clawback" (Decision – para. 132).

[31] Justice Hood in *Maritime Travel Inc., supra*, reduced the amount claimed by the plaintiff in that case (approximately 30%) to take into account "the mixed success of the overall outcome" (para. 28).

[32] The Mathesons had mixed success, as a number of the Mathesons causes of action against CIBC Wood Gundy were rejected. I therefore allow the disbursement from Mr. Croft in the amount of $28,250.00 in connection with Mr. Croft's preparation of his report, less 25% ($7,062.50), for a total allowable disbursement in the amount of $21,187.50. I also allow the amount of $4,784.08 to cover Mr. Croft's attendance to court in Sydney, airline, accommodations, ground transportation and meals, for a total allowable disbursement of $25,971.58.

[33] In summary, I allow disbursements in the amount of $2,485.10 for counsel's travel expenses, and $25,971.58 for Mr. Croft's disbursements, for a total of $28,456.68.

Pickup, J.