In the Court of Appeal of Alberta

Citation: Hill v Hill, 2013 ABCA 313

Date: 20130927
Docket: 1201-0333-AC
Registry: Calgary

Between:

Daniel Walter Hill

Appellant/Cross-Respondent
(Plaintiff)

- and -

**Paul James Hill, Richard P. Rendek, Rand Flynn,
Famhill Investments Limited and Harvard Developments Inc.**

Respondents/Cross-Appellants
(Defendants)

The Court:

**The Honourable Mr. Justice Jean Côté
The Honourable Mr. Justice Peter Costigan
The Honourable Madam Justice Elizabeth Hughes**

Memorandum of Judgment Regarding Costs

Appeal from the Judgment by
The Honourable Mr. Justice E.C. Wilson
Dated the 7th day of November, 2012
Filed the 4th day of December, 2012
(2012 ABQB 694, Docket: 0501-00476)

Memorandum of Judgment Regarding Costs

The Court:

A. Introduction

[1] This is an appeal and a cross-appeal from a costs decision given after a long trial. The trial judge's decision on the merits is 2012 ABQB 256, and his decision on costs is 2012 ABQB 694. They set out the facts in great detail, but these brief details will introduce the basic situation, and state a few facts in general terms.

[2] The appellant's late father built up a very successful valuable set of businesses. Ownership depended upon a discretionary trust made long ago, partly for tax reasons. The appellant (who later became legally trained) had little to do with the business. His brother did, and ultimately the trustees appointed him as beneficiary. The appellant formed the fixed belief that years before, four of the children had been appointed, and so the appellant (as one of them) had a 1/4 interest in the business. The trial judge found that that was not so.

[3] The appellant was the plaintiff, and his statement of claim raised many other causes of action and allegations. It also sought disgorgement of profits on a host of grounds. The appellant alleged that almost everyone on the other side had been guilty of a variety of types and instances of fraud, dishonesty, and other misconduct.

[4] The trial judge gave two separate sets of costs, one to the corporate defendants and one to the individual defendants. They had been separately represented for some years before the trial. They are the respondents.

[5] The judge gave the respondent defendants costs calculated on 4 times column 5 of Schedule C up to the close of the appellant plaintiff's case at trial, and on single column 5 thereafter.

[6] The appellant plaintiff has appealed costs (separately from his unsuccessful appeal on the merits of the lawsuit). The respondent defendants cross-appeal the restriction of costs to single column 5 for the last part of the trial.

[7] There is an outstanding motion to fix certain aspects of the costs of the main appeal, but we have been asked not to decide that until this trial costs appeal is decided.

[8] We will discuss the main appeal first, then the cross-appeal.

B. Exceeding Column Five

[9] On the main appeal, the appellant first objects to any fees which exceed single column 5 of Schedule C.

[10] His ground for this first objection alleges that some of the matters which the trial judge considered are entirely irrelevant to costs.

[11] The first matter said to be irrelevant is how much the winning parties' legal fees were. But party-party costs are not plucked out of the ether; they are designed to be somewhere around half a reasonable legal bill, or a little under. And Schedule C does not bind a judge in any respect, and is not even presumed correct. See R 10.31(3)(a) and Part D below. So actual legal bills are relevant. That the actual bills might be too high goes to weight, not to relevance. And the appellant never argued that the respondents' legal bills were too high, says the trial judge. The respondents say that the appellant did not object to looking at these bills at any time in the Court of Queen's Bench. And the amount of actual legal bills is only one of many factors. This factor is a useful cross-check: ***Caterpillar Tractor v Ed Miller Sales***, 1998 ABCA 118, 216 AR 304, [1998] 10 WWR 736 (paras 8, 9).

[12] The second objection in the appellant's list is not really relevance. It is that someone else paid some of the legal bills. But the legal test to recover party-party costs is not what has been paid; it is whether the party was liable to pay his lawyer. The respondents were liable. Payment of fees by an insurer, relative, or friend is not a bar to recovering costs: ***Jacobi v Aqueduct Roman Catholic Separate School District*** (1994) 153 AR 241, 246-47 (paras 17-24); ***Armand v Carr*** [1927] SCR 348, [1927] 2 DLR 720.

[13] In any event, this question is academic here. No one else paid the legal bills; there was simply an unequal distribution from a purely discretionary trust. Nor was this objection ever made to the trial judge. The appellant's suggestion that his father used money that had been held back for this suit is not founded in the evidence.

[14] The third factor to whose relevance the appellant objects is that the appellant had brought many wasteful motions. This cannot be irrelevant, in light of R 10.33, paras (1)(d), (f) and (2)(a), (d). The appellant and his ever-evolving claims were moving targets throughout, and he was so ingenious, persistent, technical and unpredictable, that the respondents needed the utmost care. That topic of prolonged interlocutory warfare cannot possibly be irrelevant. Rule 10.33(2)(a) expressly makes relevant unnecessary conduct or conduct lengthening or delaying the action or steps in it. There was a plethora of that. As for the size of the evidence, the number of witnesses is not the only measure. Five hundred and ninety records, totalling over 6500 pages, were marked as exhibits.

[15] The appellant now suggests that looking at the numerous motions in the suit is double counting. But it is not; the trial judge considered the motions from the point of view of complexity. This lawsuit was complex from any point of view. The trial judge was entitled to take notice of the contents of the court file, and did not need evidence of such motions made before he performed duties in this suit.

[16] The fourth irrelevant factor which the appellant suggests the trial judge relied on was the previous similar lawsuits. That situation is rare in ordinary litigation. It adds complexity, adds

volume to the relevant paperwork, and adds issues of *res judicata*; so we have trouble in seeing that that is irrelevant to costs. In any event, the trial judge expressly did **not** weigh this independently (para 19). He merely mentioned it in his preliminary survey of the background (para 16). So this is academic too.

[17] The fifth irrelevant factor allegedly relied on was the appellant's unshakeable belief in a valid trust in his favor. But the trial judge's point was not the appellant's motivation; it was his extraordinary persistence, and continual searching for new reasons to reach the same old conclusion. The courts' experience with many indefatigable litigants shows how much that multiplies litigation expenses for opponents. Whatever the appellant's actual motivation or beliefs, his conduct had a certain manner. A reasonable bystander (or opponent) would have concluded that as a result, caution and sufficient resources were called for. See the trial judge's Reasons on costs, para 17, and note the past tense at the end. The test was not subjective.

[18] The appellant also complains that two parts of the trial got a different costs scale (some column 5, some four times that). But that is the obverse side of the cross-appeal. We will discuss that below, under Part D.

[19] The sixth factor which the appellant calls irrelevant was accusing the respondents of serious impropriety, with little or no evidence to support those accusations. The appellant's pleadings and arguments at every step were studded with examples of that. One could cite a dozen modern Alberta cases (some in the Court of Appeal) increasing costs for that reason. See also the ***Caterpillar*** case, *supra*, at para 12. Recent high authority is ***Hamilton v Open Window Bakery***, 2004 SCC 9, [2004] 1 SCR 303, 316 NR 265 (para 26). We are aware of no Canadian authority questioning the relevance of that factor. Indeed it is mandated by R 10.33(2)(a), (d), (e). The fact that the appellant withdrew many of these allegations halfway through trial is a repeat of the issues on the cross-appeal. Again, see Part D for a discussion.

[20] There is no validity to any of the first ground of appeal. And even if one were to ignore the standard of review, single column 5 would have been patently insufficient. That is explained in Part D below.

C. Separate Sets of Costs

[21] The respondents say that this objection by the appellant is new in the Court of Appeal, and was not made in the Court of Queen's Bench, as was pointed out there to the trial judge. The topic is not discussed in the trial judge's reserved written costs Reasons.

[22] The appellant now argues that the two groups of defendants, separately represented, should share a single set of costs. This overlaps with the earlier appeal on the merits, which we decided. There the appellant argued that for the same reasons, the Court of Appeal should not hear separate counsel. The Court of Appeal rejected that argument.

[23] One test may be "whether a party unnecessarily separated that party's defence from that of another party": R 10.33(2)(c).

[24] Obviously there is some overlap in the various defendants' interests, but the issue is slightly different: whether separate counsel or defences were necessary, or reasonably appeared to be needed. The test is not how the suit turned out; it is what was possible a long time before trial: ***Lamport v Thompson***, *infra*. If the identity of the various parties' interests and positions did not apply all across the board, then obviously separate counsel were needed. The central and original contest was over who in effect owned one of the companies. How could the individuals who were the rival owners have identical positions to the companies owned? The companies were accused of oppression and of knowing breaches of trust because of matters of which the companies and their officers had no personal knowledge, and did not believe had happened. Knowledge is relevant, so the companies had a defence not open to the family members.

[25] The fact that the appellant kept alleging misconduct by certain parties, and changing his grounds of suit, made separate counsel even more important.

[26] In any event, a party accused of individual bad and dishonest conduct such as fraud, is entitled to his or her own counsel: ***Keystone Shingles & Lumber v Royal Plate Glass etc Insurance*** (1955) 15 WWR 283, 285 (BC); ***Valley Salvage v Molson Brewery*** [1976] 3 WWR 673 (BC); ***Lamport v Thompson*** [1942] 2 DLR 65, 69 (Ont).

[27] The appellant kept adding to his list of alleged instances and types of misconduct. The allegations were usually against one or two individuals, and usually not all parties were alleged guilty of a single accusation. That alone shows diversity of interest. Nor were the respondent defendants obliged to laugh off the allegations in this suit by a persistent litigant involving both huge sums of money, and the reputations of many, including a lawyer and a chartered accountant.

[28] There is some resemblance to the separate-costs awards in ***599291 Alta (Three River Rentals) v Luff***, 2008 ABCA 57, 429 AR 215.

[29] The appellant alone had three trial counsel.

[30] No unnecessary duplication of work is alleged between the two sets of counsel for the respondent defendants. Obviously the trial judge thought there was no significant unnecessary duplication. The only example of the respondents' allegedly unnecessary duplication mentioned in the appellant's factum on costs is some portions of their statements of defence. The same factum mentions adoption of certain arguments of the co-defendants. That is the opposite of duplication of work.

[31] The Court should be slow to second-guess counsel's decision as to when interests conflict: ***Kurian v Administrator of Motor Vehicle Accident etc Act (#2)***, 2004 ABCA 217, Edm. 0203-0078-AC, [2004] AUD 2039 (June 28, with corrigenda) (para 10).

[32] This second ground of appeal must fail.

D. Cross-Appeal as to Scale of Costs for Latter Part of Trial

[33] The respondents cross-appeal. The trial judge gave them quadruple column 5 only up to the close of the appellant plaintiff's case. The respondents say that they should not have been restricted to single column 5 after the close of the appellant's case. That reduction extends over 29 half-days of oral proceedings, which is much longer than most whole trials. The judge said that he lowered the scale of costs after that point for one reason only: because the appellant then dropped one of his claims (after some cajoling). The parties could not know then that the trial judge would dismiss the entire suit.

[34] However, the appellant dropped no factual allegations; the allegations all remained as the foundation for other causes of action. The only change was that the facts were no longer said to lead to oppression. For example, the head of the company was still accused of breach of trust, and the company still accused of knowing assistance, in respect of the same transactions which had been the foundation for the oppression claims dropped at the end of the plaintiff's case. Claims to repay salary were dropped against the company's head, but not claims to reimburse 22 transactions in that office. And at the same time as oppression was withdrawn, read-ins about the other transactions were entered as exhibits. The respondents led evidence to rebut that, and were cross-examined on that by the appellant.

[35] Only once during the case of the respondent defendants did the appellant object to an item of their evidence on grounds of irrelevance. The appellant's challenge to the 1995 conveyance which gave the head of the company his ownership was **not** withdrawn at the close of the plaintiff's case; it persisted until final oral argument.

[36] That the appellant plaintiff called only two live witnesses may sound relevant, but it leaves a mistaken impression, because most of the evidence went in by admissions, read-ins, and cross-examination. Indeed, since much of the evidence was never given out loud, length of oral proceedings is misleading.

[37] The pleas of misconduct were never formally withdrawn by amendment, discontinuance, or otherwise. The respondents (appellants by cross-appeal) and the trial judge both point that out. The closing argument of the appellant at trial repeated an allegation of dishonesty, and more surfaced on appeal.

[38] We must keep in mind that Schedule C is a purely-optional rubber stamp for a judge, who may use it or not, or amend it, as he or she sees fit. See ***Caterpillar v Ed Miller***, *supra* (paras 6, 8), and R 10.31(3)(a).

[39] One must note the huge sums of money in issue: capital of one quarter of $70,000,000 assets (according to trial evidence), plus disgorgement of profits or income for over 30 years. So the amounts in issue were far higher than column 5 involves. That column is for suits over $1.5 million. Alberta courts routinely multiply it several fold.

[40] On top of that, Schedule C's amounts did not change with the new Rules. It was drafted by an *ad hoc* committee about 16 years ago.

[41] One might wonder whether the standard of review on appeal bars the Court of Appeal from interfering with this reduction of column. There were some palpable factual and legal errors by the trial judge on this point. We itemize some below.

[42] One error is simple. The trial judge calculated the period of lower costs during the respondents' case as including five one-half days of oral argument. But that argument covered the appellant plaintiff's case too; it included his evidence which was all given before he withdrew any allegation. The trial judge overlooked that point, and his Reasons do not contain anything which would justify reducing the costs for that step. Costs for those five half days must be put back up to quadruple column 5.

[43] As for the other 22 days of trial and after the plaintiff's case closed, it is true that the trial judge had some discretion, and that the Court of Appeal owes him deference. He reduced costs for one sole unusual and very discrete reason, which he described. The entire discussion is in para 29 of his Reasons:

> I agree with the plaintiff that regard must be had to the fact that even a late narrowing of the issues, thereby reducing the length of a trial should be encouraged. Awarding enhanced costs for trial time thereafter would serve to discourage counsel from continuously reassessing their case during a trial. Counsel fairly observes that awarding enhanced costs in such a circumstance would mean there is no incentive for litigants to have regard to the principles enunciated in Rule 1.2.

[44] The trial judge cannot have meant that there would have been no incentive if any costs were above Schedule C after a claim was withdrawn. That would make no sense. The trial judge must have meant that the same full multiple of Schedule C after the withdrawal as before, would offer no incentive.

[45] But reducing the last part of the trial from 4 times column 5 to single column 5 is a 75% discount in the fee part of costs, estimated to be $400,000. Even after putting argument costs back up to quadruple (about 1/6 of that) it will still be a huge discount off quadruple column 5. No one suggests that this particular incentive to drop claims should or could have any effect on costs before claims are dropped. (To do that would produce backwards incentives.)

[46] The trial judge's discretion to give some reduction after withdrawing a claim as an incentive, should be respected on appeal. But can a 3/4 (or 2/3) reduction be justified? (It is about 2/3 after putting argument back to 4 times column 5.) Is the reduction proportional to the size of incentive necessary? The Reasons do not reveal that the trial judge considered this aspect, let alone calculated it.

[47] Four aspects of holding fees to single column 5 for the respondent defendants' part of the trial are disturbing.

[48] First, the appellant (respondent by cross-appeal) does not point to any evidence which the respondent defendants led at trial which they should not have, or was unnecessary. (Only one bit was objected to at trial as irrelevant.)

[49] Even more striking, the trial judge's Reasons on the merits show that the respondent defendants won the trial largely because of witnesses whom they called. A striking example is that of the surviving tax lawyer involved in the supposed 1976 appointment of beneficiaries. And some of the respondent defendants testified on those topics. Indeed another of the respondents' witnesses not only gave important eyewitness evidence, but prepared spreadsheets which the trial judge found "particularly useful".

[50] The second aspect is amount in issue. We have noted above the reasons why single column 5 would be clearly inadequate for any suit over assets and income of this size, even if it ran smoothly and without misconduct, and were not of unusual complexity.

[51] That factor got no weight whatever, as the trial judge put costs down to single column 5 (at the end of the trial) without any misconduct by the respondent defendants, nor any divided success.

[52] Third, we have noted above the undoubted incessant misconduct by the appellant plaintiff: a host of grave but unfounded allegations of misconduct. Similarly that got no weight at all during the second part of the trial when the defendants defended themselves against those allegations. That is baffling.

[53] Fourth, the trial judge noted the great complexity of the suit. Similarly it got no weight at all for the second part of the trial.

[54] For over 70 years, Courts of Appeal have had and used the power to interfere with discretionary decisions (such as costs) where improper weights are given (or not given) to irrelevant (or relevant) factors.

[55] The seminal case is ***Evans v Bartlam*** [1937] AC 473, [1937] 2 All ER 646 (HL(E)). The power of an appeal court to interfere was held to cover a case where not nearly enough weight had been given to an important factor, in ***Charles Osenton & Co v Johnston*** [1942] AC 130, [1941] 2 All ER 245, 250, 253, 256, 261 (HL(E)). That was approved in ***Friends of the Oldman River Society v R*** [1992] 1 SCR 3, 132 NR 321, [1992] 2 WWR 193, 246-47 (paras 104-05). It overturned a discretionary decision on grounds that it had given insufficient weight to an important question: p 249 (WWR (para 108)). See also ***Dufault v Stevens*** (1978) 86 DLR (3d) 671, 678 (BC CA), and ***Campbell v Campbell*** (1955) 14 WWR 690 (BC CA).

[56] A discretionary costs order was upset on appeal for giving no weight to two important factors, in ***Minister of National Health v Apotex*** (2000) 194 DLR (4th) 483, 265 NR 90, 94-95 (FCA).

[57] One must be careful; that is not a license to reweigh afresh on appeal every weight given by a trial judge to every factor. The precise limits of the power to upset on grounds of weight need not be settled here.

[58] But when a factor to weigh is clearly relevant, clearly exists, is clearly important, and gets no weight whatever (has no effect on the result), then the Court of Appeal should look closely at the matter. Here the trial judge's Reasons clearly show that four undoubted and important factors got no weight at all. That allows us to intervene.

[59] If the disputed part of the costs were a few thousand dollars, or a few per cent, probably we would not tinker. But where it is well over $300,000 and is 65 to 75% of the fees for half the trial, we must intervene.

[60] We increase the fee costs for the latter part of the trial where the defendants led evidence, from single column 5 to treble column 5. (That includes any trial time consumed by rebuttal evidence by the appellant.) That leaves a drop in scale from quadruple to treble (i.e. a discount of single column 5) to respect the trial judge's decision to give an incentive for withdrawing claims, and to respect his choice of the type of incentive to give.

E. Conclusion

[61] The appeal is dismissed, the cross-appeal allowed, costs for the five half days of argument are restored to quadruple column 5, and the column of Schedule C after the close of the plaintiff's case is increased to 3 times column 5.

[62] We award each set of respondents costs of this costs appeal fixed at $68,000, plus disbursements fixed at $600.

Appeal heard on September 11, 2013

Memorandum filed at Calgary, Alberta
this 27th day of September, 2013

Côté J.A.

Authorized to sign for: Costigan J.A.

Hughes J.

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