Date: 20100120
Docket: CI 99-01-14589
(Winnipeg Centre)
Indexed as: Telecommunication Employees Association of Manitoba Inc. et al v. Manitoba Telecom Services Inc. et al
Cited as: 2010 MBQB 13

COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:	)	
	)	
TELECOMMUNICATION EMPLOYEES ASSOCIATION OF MANITOBA INC., COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA LOCAL 5 AND LOCAL 7, INTERNATIONAL BROTHERHOOD OF ELECTRIC WORKERS, LOCAL UNION 435, HARRY RESTALL, ON HIS OWN BEHALF AND ON BEHALF OF CERTAIN RETIRED EMPLOYEES OR THE WIDOWS/WIDOWERS THEREOF OF MANITOBA TELECOM SERVICES INC., MTS COMMUNICATIONS INC., MTS MOBILITY INC. AND MTS ADVANCED INC., AND LARRY TRACH, ON HIS OWN BEHALF AND ON BEHALF OF ALL UNIONIZED EMPLOYEES OF MANITOBA TELECOM SERVICES INC., MTS COMMUNICATIONS INC., MTS MOBILITY INC. AND MTS ADVANCED INC.,	)	Kris. M. Saxberg and Luke Bernas for the plaintiffs
plaintiffs,	)	
- and -	)	William S. Gange for the defendants
MANITOBA TELECOM SERVICES INC., MTS COMMUNICATIONS INC., MTS MOBILITY INC., MTS ADVANCED INC., JON SINGLETON AND CLIFFORD FOX,	)	
defendants.	)	JUDGMENT DELIVERED: January 20, 2010

MONNIN, C.J.Q.B.

[1] The plaintiffs bring a motion as a result of the adjournment of the trial of this matter claiming that substantial throw-away costs should be paid by the defendants. The defendants, while conceding the trial had to be adjourned, argue that the adjournment was necessary notwithstanding their best efforts to prepare for trial and would have been required in any event as a result of the trial judge not being able to proceed. In the alternative, they argue that plaintiffs' counsel did not incur the time and expense advanced for preparation of the trial, but for the other pre-trial matters which are not compensable.

BACKGROUND

[2] The plaintiffs represent employees or retired employees of Manitoba Telephone System ("MTS"). The litigation advanced against their current and former employer, the defendant MTS, arises from the privatization of the company in the summer of 1996 by the Manitoba government. Without delving at length into the trial, it involves whether the private pension plan created by MTS after privatization was comparable to the plan enjoyed by the employees prior to that time. The trial has proceeded and a decision rendered.

[3] Formal litigation was commenced in September of 1999. A number of pre-trial matters occurred, including summary judgment applications with respect to two of the defendants, which ultimately made their way to the Court of Appeal. In addition, substantial amendments to the pleadings were made. On

March 29, 2005, trial dates of October 16 to December 22, 2006 were set. Some time later, as a result of the summary judgment applications taking longer than anticipated, the trial dates were moved to January 15 to March 23, 2007, and on October 20, 2006 were rescheduled to October 9 to December 21, 2007. They were then moved in January 2007 to November 13, 2007 to February 1, 2008 to accommodate one of the defendants' counsel.

[4] In October 2004, defendants' trial counsel, Thompson Dorfman Sweatman ("TDS"), retained an actuarial expert, Mr. Donald M. Smith. They instructed him to review the large volume of material provided and to record his thoughts in memo form so they can be converted into an expert's report. He was instructed not to prepare a draft report at that time given that the defendants were unclear as to the theory of the plaintiffs' case and that the summary judgment applications then pending might result in a different opinion being required from him than at the outset.

[5] On October 12, 2006 after a pre-trial conference Mr. Perlmutter, one of the counsel from TDS, requested Mr. Smith to produce his report in light of the possibility that the defendants would not be successful in its appeal to the Court of Appeal. Mr. Smith was requested to produce a draft of his expert's report such that the report would be available within 60 days of the Court of Appeal decision being released. From that point on, Mr. Perlmutter continued to have conversations with Mr. Smith without any indication from the latter that the report was not being prepared.

[6] On June 25, 2007, the Court of Appeal released its decision and allowed the appeal of two defendants seeking to be removed from litigation, but dismissed the summary judgment applications. Counsel for MTS indicated that it would file its expert's report within 60 days. Mr. Smith advised counsel that he would have his draft report available by early August and TDS proceeded on that basis. Other issues remained the source of pre-trial discussions and meetings with the then trial judge who had been assigned to commence the trial in November. They included an agreed statement of facts, use of a document management system and witness lists from both parties.

[7] In early September, the report from Mr. Smith had not yet been received, but TDS was advised that it was as a result of personal matters relating to Mr. Smith's ailing mother and that it would be available shortly. It was not and Mr. Smith gave indications that again, as a result of family and business matters, it would not be ready until the end of October 2007.

[8] In late September, the parties had agreed to attempt mediation and the session was set for early November 2007. The mediation was not successful and the parties met with the trial judge on November 5, 2007 to discuss the situation. The plaintiffs proposed to the trial judge that the trial commence in early January 2008, to be continued later on that spring as time was available. The reason for the postponement was to accommodate the fact that the expert report from MTS still had not been produced. However, the trial judge, being committed to other matters after the expected trial dates and bearing in mind

the availability of counsel, was unable to agree to such a delay of the trial. She advised that it would mean the trial would be delayed for almost a year. However, she remained available for pre-trial evidence if necessary at that time. The trial was adjourned by consent for one week to await the status of the report.

[9] At a case management meeting before me, TDS still not having received their expert's report, advised that they had retained another expert whose report would be available by early January. The trial was adjourned to September 2008 subject to some pre-trial evidence to be heard in the next few months. The adjournment was on the understanding that the plaintiffs would be seeking their throw-away costs of the trial.

[10] Shortly before the commencement of the pre-trial evidence a few weeks later, the assigned trial judge recognized for the first time that one of the witnesses for the defendants was a long-time friend and concluded that it would not be appropriate for her to remain as the trial judge. A new trial judge was assigned to hear the pre-trial evidence and to continue with the trial proper.

[11] The plaintiffs then brought their motion for throw-away costs. The preliminary matter was the position of the defendants that they be entitled to rely upon evidence adduced by their counsel of discussions occurring and arising out of the mediation sessions in November.

EVIDENCE ARISING FROM THE MEDIATION

[12] Both counsel for the defendants from TDS, Mr. Olson and Mr. Perlmutter, filed affidavits seeking to introduce evidence of conversations occurring between themselves and counsel for the plaintiffs immediately prior to the mediation.

[13] The evidence was twofold, alleging that:

(a) Plaintiffs' counsel had conceded in conversations surrounding the mediation that they were not ready for trial and almost all of their effort was being concentrated on making the mediation work. In a conversation occurring as late as November 1, 2007, plaintiffs' counsel would have stated that the focus of the preparation was on the mediation and not trial and that if the matter did proceed, the trial could not start as scheduled and that the plaintiffs would be requesting from the Court that the trial start in January 2008;

(b) If MTS were to support a joint request for a delay of the trial to January, the plaintiffs would not seek any throw-away costs as a result of the delay.

[14] On November 5, 2007, a request was made to the then presiding judge who, after consultation with me as to her availability later on in the spring of 2008 if the matter did not proceed as scheduled, advised the parties that the matter could not be adjourned as suggested.

[15] The defendants seek to adduce this evidence notwithstanding the confidentiality provisions of the mediation agreement entered into between the

parties on the grounds that they amount to an agreement. As such they should be viewed as an exception to the privilege which attaches to settlement communications. They rely upon ***Dos Santos (Committee of) v. Sun Life Assurance Co. of Canada***, 2005 BCCA 4, [2005] B.C.J. No. 5 (QL) where the Court stated:

> 19. However, the test for discharging the burden to establish an exception should not be set too low. The public policy behind settlement privilege is a compelling one. It is so compelling that even threats arising in the context of settlement negotiations may not justify an exception: Unilever, supra at p. 2449-2450.
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> 20. To establish an exception in this case, the defendant must show that a competing public interest outweighs the public interest in encouraging settlement. An exception should only be found where the documents sought are both relevant, and necessary in the circumstances of the case to achieve either the agreement of the parties to the settlement, or another compelling or overriding interest of justice.

[16] The defendants argue that I can and should consider the comments attributed to plaintiffs' counsel as evidence of an agreement of plaintiffs' counsel not to seek throw-away costs. Secondly, they argue the comments are relevant as to the issue of whether any throw-away costs were actually incurred by the plaintiffs.

[17] The plaintiffs in response say that once they establish that the communications fall within settlement privilege, the onus rests upon the defendants to show that they need to be considered in the determination of the main motion. Plaintiffs' counsel concedes that the comments were made, but points out that the exchange was an effort to obtain the continuation of the trial in the spring of 2008. It was an attempt by the plaintiff's counsel to save the

trial dates or at least minimize the delay engendered by the fact that the defendants' expert's report had not yet been produced. They argue that, taking the comments in the best possible light for the defendants, plaintiffs' counsel was not promising that he would not seek throw-away costs in the event that the trial was adjourned because of the failure of the defendants to provide an expert's report in a timely fashion. It was limited to the situation of the trial being adjourned for a few weeks, always expecting that the report would be available.

[18] I have concluded that the statements attributed to plaintiffs' counsel do not lead to a conclusion that an agreement had been reached not to seek throw-away costs in the circumstances which eventually arose. Plaintiffs' counsel was agreeing to forego costs if the trial judge agreed to a short postponement of the trial to early spring and the matter could proceed on the basis of a report being obtained from the plaintiffs' new actuary. That did not occur.

[19] As to the comments with respect to the actual incurring of throw-away costs, I will deal with that later in these reasons.

ISSUES

(a) Are the plaintiffs entitled to their throw-away costs?

(b) If so, in what amount?

[20] The plaintiffs seek to be compensated for their costs thrown away as a result of the adjournment. They seek them on a solicitor and client scale, namely, a full indemnity for the steps which were "reasonably necessary to

proceed with the action but which [were] rendered useless by the other party's conduct in responding or not responding to the action" – per Steel J. in ***Royal Bank of Canada v. Blatt***, [1991] O.J. No. 688 (QL).

[21] Throw-away costs are also referred to as "costs of the day". Where the adjournment of trial is occasioned by the default of a party, then costs against that party would normally follow, although they are not as of right. (See Mark M. Orkin, ***The Law of Costs*** , 2d ed. (Aurora: Canada Law Book, 2003) at 2-307 and 2-308.)

[22] The plaintiffs allege that the defendants are at fault for the adjournment in that they failed to take reasonable steps to have their expert's report prepared on a timely basis. They deliberately chose to await the decision of the Court of Appeal prior to obtaining their expert's report, a move which the plaintiffs characterize as "rolling the dice". They also argue that not having received the report within 60 days of the Court of Appeal decision, a timeline which the defendants had indicated to the Court they would meet, it was incumbent upon them to take steps to obtain an alternate expert to have a report prepared in a manner which would allow the trial to proceed on the date that it was scheduled to commence.

[23] The defendants, on the other hand, argue that they exercised due diligence in attempting to obtain the report from Mr. Smith. Mr. Perlmutter's evidence is to the effect that he had instructed Mr. Smith to prepare the report almost a year before the trial was scheduled, although not to finalize it until after

the decision of the Court of Appeal had been rendered. Similarly, after the Court of Appeal decision dismissed the summary judgment applications, they were provided with explanations by Mr. Smith that the report was underway and would be available imminently. As well, explanations for the delay included a family illness and workload considerations, both of which were plausible.

[24] I am satisfied with the explanations given by the defendants' counsel as to why they delayed in seeking an alternate expert and the reasons why, notwithstanding reasonable efforts on their part, they were unable to obtain their expert's report on a timely basis. While they may be faulted for not having jumped to another expert sooner, given the issues at stake and the amount of preparatory work for the expert to come up to speed, it is in my view understandable. However, I do conclude that the reason for the trial not proceeding and being adjourned was the unavailability of the report. Other considerations, relating to documents and arranging for the trial judge to familiarize herself with the documentary computer program, are all matters which could have been resolved if not on the day of, then shortly after the time scheduled for the trial's commencement.

[25] Having concluded that the adjournment was as the result of the defendants' failure to provide an expert's report, although not through the fault of the defendants' counsel, the question still remains as to whether the plaintiffs are entitled to their throw-away costs. The defendants are nevertheless responsible for the adjournment.

[26] While most cases arise as a result of the fault of one or both of the parties, adjournments of trials are sometimes necessitated by scheduling or facility problems, in which case there is no party to award costs against. In his decision in ***Goddard v. Day***, 2000 ABQB 799, [2000] A.J. No. 1340 (QL), Justice Ritter referred to a third category of adjournment of cases, namely, adjournments sought by one of the parties as a result of no fault on their part. He says as follows:

> 20. I am satisfied that the third category of adjournment is really one of responsibility for the adjournment as opposed to fault or lack of fault. By that I mean situations where someone is responsible for an adjournment, but cannot be faulted for that responsibility. I conclude that an individual who comes before the Court and requests an adjournment because of the pressures of work is in such a position. That is, he is responsible for the adjournment. He is not to be faulted for the adjournment, but nevertheless his responsibility remains. It is hardly the responsibility of the system or the other party. Being responsible for an adjournment, in my view, carries with it a cost consequence. ...

[27] Ritter J. relied upon the decision of Madam Justice Veit in ***Incandescent Revolution Manufacturing Co. v. Gerling Global General Insurance Co.*** (1989), 96 A.R. 77, [1989] A.J. No. 216 (Q.B.) (QL) where a plaintiff's witness suffered a serious illness in the middle of the trial leading to an adjournment. The plaintiff asked that the costs be in the case as the adjournment was not the plaintiff's fault and he should not be punished for his physical condition. Madam Justice Veit stated as follows:

> 12. I am unable to agree with the plaintiff's characterization of costs for adjournment as "punishment." As I understand the jurisprudence, where the civil law is concerned to "punish" a litigant, it does so either by punitive damages, if the objectionable conduct occurred in connection with the substance of the claim, or by a higher standard of costs, such as costs between a solicitor and her own client, if the objectionable conduct occurred in the conduct of the litigation.

. . .

> 14. The plaintiff chose to bring this claim to trial, knowing of the heart condition of the witness Maierovitz and knowing, more particularly, that cross-examination might be uniquely difficult for him. In those circumstances, where the anticipated actually occurs, it appears to me that, as between the plaintiff and the defendant, the financial burden of the adjournment should be borne by the plaintiff.
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> 15. Indeed, I am not certain that the result should be different if the witness were unavailable because he had broken a leg. In such a case, as well, the defendant suffers prejudice because of the plaintiff's need to request an adjournment. The cost of that prejudice must be borne by the party requesting the adjournment. ...

She therefore awarded costs to the defendant in any event of the cause.

[28] A similar approach was followed by Madam Justice Duval in ***Albionex (Overseas) Ltd. v. Conagra Ltd.***, 2007 MBQB 199, [2007] M.J. No. 285 (QL) where as a result of the illness of counsel the trial had to be adjourned. She found that the defendant was entitled to costs, although not full solicitor and client costs, but an award greater than the tariff costs.

[29] Therefore, barring the other consideration which I will discuss further, I find that the plaintiffs are entitled to some form of compensation for their throw-away costs as a result of the failure of the defendants to provide the expert report on a timely basis.

[30] The next question is whether the trial would have had to be adjourned in any event for reasons not the fault of either party. It is common ground that the assigned trial judge came to the realization a few weeks after the adjournment of the trial proper that the relationship with one of the witnesses prevented her sitting as the trial judge in this matter. The trial would therefore not have

proceeded before her and another judge would have had to be brought in for this lengthy trial. This would have likely necessitated a lengthy adjournment in any case. Accordingly, the defendants say that if the trial would have had to be adjourned in any event, the plaintiffs would have incurred some throw-away costs. Since compensation is the goal, the plaintiffs should not be compensated for costs they would have had to incur in any event.

[31] While at first blush this argument is attractive as it is in keeping with the concept of compensation rather than punishment for the granting of costs, and if at the end of the day the plaintiffs would have been in the same situation, then where is the fairness in granting compensation for costs they would have incurred in any event?

[32] However, I am of the view that the time which is relevant for this assessment is the time of the adjournment. At the time of the adjournment, the plaintiffs advised that they would be bringing a motion for their costs thrown away. Although entitlement was not determined at that time given that the defendants indicated they would object, I believe that is the time at which I should consider entitlement in the normal course. At that time, the trial judge had not realized her conflict. The issue of whether those costs would have been incurred should be looked at in the issue of quantum.

AMOUNT OF COSTS

[33] The plaintiffs seek costs on a solicitor and client basis which they have quantified at $133,474.00, applying a formula of two-thirds of all fees charged in

connection with the trial preparation and all non-recoverable disbursements, inclusive of taxes and disbursements.

[34] Given my findings on the lack of fault on the part of the defendants' counsel, I am unable to agree that solicitor and client costs are warranted in these circumstances. This is not a situation where the defendants' conduct is so egregious as to award costs on a full indemnity. Rather, it is a situation which developed for which the defendants must bear some responsibility, but not on a full indemnity basis.

[35] To the extent that counsel for the plaintiffs were preparing for trial, it would presumably have been focused on the presentation of their case, including witnesses who did take the stand during the pre-trial evidence. Efforts in preparation of those witnesses would not have been lost. As well, I have taken into consideration as an aspect of fairness whether the trial would have had to be adjourned in order to assign a new trial judge.

[36] Taking these factors into consideration, I would assess an amount of $10,000.00 in throw-away costs for the plaintiffs, payable in any event of the cause. They are also entitled to the costs of this motion, which I fix at $1,000.00 plus reasonable disbursements.

Monnin, C.J.Q.B.