CITATION: Bruno-Manser-Fonds v. Royal Bank of Canada, 2018 ONSC 1952
COURT FILE NO.: CV-17-578681-00CL
DATE: 20180323

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: BRUNO-MANSER-FONDS, ASSOCIATION FOR THE PEOPLES OF THE RAINFOREST AND MUTANG URUD, Applicants

AND:

ROYAL BANK OF CANADA, TORONTO-DOMINION BANK, MANULIFE FINANCIAL CORPORATION and DELOITTE & TOUCHE, Respondents

BEFORE: S.F. Dunphy J.

COUNSEL: *Lincoln Caylor, Maureen M. Ward and Nathan Shaheen*, for the Applicants

Marie-Andrée Vermette and Anastasija Sumakova, for the Sakto Group Respondents

Junior Sirivar and Vladimira Ivanov, for Respondents Royal Bank of Canada and Toronto Dominion Bank

Andrew Gray and Stacey Danis, for Respondent Manulife Financial Corporation

Lara Jackson and Jed Blackburn for Respondent Deloitte & Touche

HEARD: In writing

REASONS FOR DECISION: COSTS

[1] I released reasons on February 7, 2018 dismissing this application for a *Norwich Pharmacal* order in this case. The parties were invited to make written submissions regarding costs if they were unable to resolve this matter between themselves. They have not been able to resolve it and they have accordingly filed written submissions for me to review. My decision and reasons follow.

Background facts

[2] I shall not repeat the factual background set forth in my earlier ruling except in a very summary way.

[3] The applicants are a Swiss-based non-profit organization advocating for rain forest conservation in Malaysia and a Canadian citizen who was born in the Malaysian state of Sarawak and is a member of a tribe indigenous to that state.

[4] The applicants brought an application seeking a *Norwich Pharmacal* order as against the respondents Royal Bank of Canada, Toronto-Dominion Bank, Manulife Financial Corporation and Deloitte & Touche. That application was originally brought *ex parte* before F.L. Myers J. on August 21, 2017. The applicants were ordered to give notice both to the respondents and to the target of their intended proceeding, the Sakto Group. They did so and the matter returned before me on February 5, 2018 scheduled for a two day hearing. I dismissed the matter from the bench with reasons to follow that were issued on February 7, 2018.

[5] The application was novel in a number of respects. While the "typical" *Norwich Pharmacal* order is sought to discover critical information needed for a civil suit (such as the name of the party who stole funds or published a libel) or to identify stolen assets to better preserve them before the thief can further hide them, this order was sought in aid of a possible future private criminal prosecution. The applicants were advancing the theory that a certain Malaysian official had been guilty of massive and systematic corruption over a period of a great many years and that he had arranged to secrete a portion of his allegedly ill-gotten gains in one or more Canadian entities affiliated with his daughter (collectively, the Sakto Group). It was alleged that an investigation would determine whether there was sufficient evidence to warrant bringing a private criminal prosecution for money laundering offenses. The applicants admitted that their investigation had not yet revealed sufficient information to sustain an application for a search warrant under the Criminal Code if police were conducting the investigation.

Position of the parties

[6] The applicants took the position that they should be considered as public interest litigants and exempted from paying any costs at all. They sought to investigate a possible crime in Canada that was not being investigated by public authorities and did so for no personal gain on their part. In the alternative, they claim that the originally-named institutional respondents could easily have chosen to take no position on the hearing given the appearance of the Sakto Group respondents after they were served on the order of Myers J. As such, the applicants suggest that those respondents should be deprived of any costs while the Sakto Group respondents ought to be restricted to a claim of $22,500 out of the $161,742.81 in costs claimed by them.

[7] The successful respondents take an entirely different view. The Sakto Group respondents seek substantial indemnity costs, pointing to what they view as reckless and baseless allegations of improper or illegal conduct on their part. The three named institutional respondents faced no such allegations but submit that they were required to stay in this proceeding even after the Sakto Group appeared by reason of choices made by the applicants and incurred considerable and unnecessary expenses as a result. Two of them (Deloitte & Touche and Manulife) claim partial indemnity costs while TD Bank and Royal Bank (represented by the same counsel) claim substantial indemnity costs.

Analysis and discussion

[8] At the conclusion of my reasons for dismissing the application, I wrote the following regarding costs:

> 43. I have not yet made a decision regarding costs. Any decision I do make will have to consider and take into account, among other things, the novelty of the issues raised and the public interest in their airing and resolution. My reference to "public interest" is not limited to the interests advanced by any party as there were and are important public policy issues touching upon the positions of all of the parties.

[9] All parties appear to have read into that non-decision an indication of support for one or the other of the propositions advanced by them. My words were intended to convey exactly what they say – I had made no decision as to costs and any decision would have to consider a number of factors including the ones listed. All of those issues were and are open for consideration and decision.

(i) Institutional respondents

[10] The applicants expended very considerable efforts in pursuing this application with the aid of sophisticated counsel. Whatever payment arrangements the applicants made vis-à-vis their own counsel, they cannot have been taken by surprise by the degree of effort and expense the responding institutions undertook in responding.

[11] The applicants chose to pursue multiple institutional targets for disclosure of information, they cannot be heard to complain that some of them chose to be separately represented instead of pooling their resources for a common response. In fact, two of them (TD Bank and Royal Bank) did pool resources and retained a single counsel.

[12] The actual costs of the three groups of institutional respondents were:

a. TD/RBC: $60,936.74

b. Manulife: $41,486.12

c. Deloitte & Touche: $76,153.04

[13] The applicants suggest that the comparative financial consequences of a costs award must be borne in mind and urge upon me the significant capacity of financial institutions such as these respondents to absorb legal expenses.

[14] Financial institutions are not exempt from paying or receiving costs. If relative financial strength were the measure, I should have required detailed financial disclosure of the financial capacity of the applicants. I have no reliable information on that subject. I cannot assume the applicants are impecunious or unable to sustain a costs award of the magnitude at stake in these proceedings. To the contrary, the intensity of the long-running, multi-front battles undertaken by Bruno-Manser-Fonds (of which this application

is but one chapter) strongly suggest very considerable financial resources have been devoted to this project. I cannot infer impecuniosity from the record before me.

[15] The applicants object that they sought to negotiate a means for these respondents to withdraw by undertaking not to seek proprietary information or "irrelevant internal communications". They miss the point.

[16] The information sought by the applicants was broad and sweeping. It affected important privacy interests, interests not confined to those of the third parties notified of this proceeding pursuant to the direction of Myers J. Recognizing the test nature of the application, the applicants might, for example, have started with a more restrained "ask" that might have permitted the institutional respondents room to bow out while still pursuing the desired precedent.

[17] I do not mean thereby to comment on either the good faith or the strategic sense of the applicants. The choice was theirs to make, but choices have consequences. They chose to ask for everything they wanted and to ask for it in a manner that did not permit the institutional respondents, in the exercise of their reasonable judgment, to decline to defend their institutional interests. Obviously, the applicants do not have the statutory and common law duties of confidentiality to clients that banks, insurance companies or accounting firms must contend with. Banks, insurance companies and accounting firms do have such responsibilities. In my view, they reasonably chose to ensure those obligations as well as the potential impact of the orders sought upon those obligations were both firmly fixed on this court's radar.

[18] In this regard, they point to the novelty of the issues and allege that they should be considered as public interest litigants. They rely on the decision of Sharpe J. (as he then was) in *Mahar v. Rogers Cablesystems Ltd*., 1995 CanLII 7129 (ON SC). I do not agree.

[19] The application before me implicitly sought to establish the legitimacy of a means of conducting a criminal investigation and prosecution unhindered by the strictures of s. 8 of the *Charter*. If there was a public interest in that question, it ran in quite the opposite direction from that espoused by the applicants. While there was no law on the precise points raised by the applicants, the entire weight of the law was against them. Theirs was a sufficiently uphill climb that the respondents were not required to take the floor at the hearing.

[20] While the ultimate aims of the applicants – the protection of endangered rainforest eco-systems in Borneo – are clearly worthy ones, this particular application was a chapter in a very long-running battle against the Sakto Group and the Malaysian official they accuse of corruption. The merits of that dispute and its relationship to the overall goal of rainforest protection is not something that can be presumed by me in assessing costs here.

[21] I cannot find that the applicants are entitled to be considered as public interest litigants in all of the circumstances of this case. I see no reason to depart from the rule that costs follow the event in this case and shall not do so.

[22] While I have not agreed with the applicants' primary argument that they ought to pay *no* costs, my conclusion does not extend to departing from the "usual" partial indemnity scale of costs.

[23] There certainly were opportunities offered to the applicants to minimize costs. That being said, I cannot find that their failure to pursue these ought to lead to the imposition of a higher scale of costs in all of the circumstances of this case. There was nothing in the conduct of this case that ought to have led the unsuccessful applicants to expect that they were opening themselves up to potential exposure for substantial indemnity costs vis-à-vis any of the institutional respondents at least.

[24] I have reviewed the outline of costs on a partial indemnity basis of each of the institutional respondents. There has been no granular challenge of individual line items. Rather, the objection of the applicants was to the overall reasonableness of the amounts sought. Having reviewed the outlines of costs of each, I concur with that approach.

[25] By way of summary they break down as follows:

a. TD/RBC: $36,951.27;

b. Manulife: $25,181.72

c. Deloitte & Touche: $52,443.68

[26] These three institutions had very similar interests to defend and yet incurred quite different amounts of legal costs. There was no material difference in the burden carried by each – this was not a case where one took the lead and the others maintained a "me too" watching brief. Each filed a detailed factum.

[27] The fixing of costs is necessarily arbitrary to some degree. Was one lawyer or two necessary? Should more or less partner time have been used? There are hundreds of judgment calls that are made by lawyers and clients in the course of a case and a court is generally ill-suited to second guess these decisions on a micro level, particularly in hindsight. However, a judge exercising discretion to fix costs applies the criteria in Rule 57.01 of the *Rules of Civil Procedure*. The review is broader than simply considering the indemnity principle or what costs were reasonable as between the solicitor and his or her own client. A number of competing factors must be balanced in a process that is always highly specific to the facts of the case.

[28] In undertaking that balancing, I think it is reasonable for me to have regard to the costs claimed by all three of these similarly situated respondents. Without engaging in a critique of staffing levels or other strategic decisions made by the parties along the way, it seems fair for me to observe that this large a discrepancy (more than 100%) as among the claims advanced by similarly situated parties raises issues. In comparing these, I think the criterion of the reasonable expectations of the unsuccessful party in particular comes to the fore.

[29] In my view, it would not be fair to ask the unsuccessful party to pay more than 125% of the $25,181.72 claimed by Manulife, being the lowest of the three. That amount is $31,477.15. It would not be reasonable for the unsuccessful party to expect the same claim to come from each of the defendants, but this large a swing must be addressed by me. Having regard to all of the principles listed in Rule 57.01 of the *Rules of Civil Procedure*, the resulting figures appear quite reasonable and appropriate to me.

[30] Accordingly, I order the applicants to pay the following costs of these three respondents:

a. RBC/TD: $31,477.15;

b. Manulife $25,181.72;

c. Deloitte & Touche: $31,477.15.

(ii) Sakto Group respondents

[31] I have separated out the Sakto Group respondents for separate consideration for a number of reasons. They were not named respondents (initially) although they were ordered to be served by Myers J. The applicants had them in their cross-hairs for a possible private criminal prosecution. They had vital interests at stake. That their response should be different in kind and by an order of magnitude when compared to the other respondents was to be expected.

[32] I have already found in relation to the named institutional respondents that the applicants cannot claim the mantle of public interest litigants to avoid the costs consequences of their unsuccessful application. There is nothing on the facts of this case that would justify me depriving the Sakto Group respondents of their costs either. The only real issue in relation to the Sakto Group respondents is whether there is a basis for me to depart from the “usual” scale of costs (partial indemnity) in favour of the claimed substantial indemnity scale.

[33] The Sakto Group respondents point to the allegations of corruption, knowing participation in money laundering and other similar allegations advanced by the applicants as constituting very serious allegations with significant potential to impact professional and business reputations. Furthermore, they claim the allegations were advanced recklessly particularly given their history of unsuccessful complaints in other fora.

[34] The Sakto Group respondents do not allege a financial interest of the applicants in seeking the relief sought but point to the long and adversarial history between them as a factor that indicates a rationale other than altruism for making such serious and they say reckless claims. Criminal prosecutions and investigations are serious matters and belong to the state and police for a reason.

[35] There is some force to these arguments. The evidence of the applicants included direct allegations of criminal activity by the Sakto Group respondents that went beyond

the corruption allegations leveled against the Malaysian official. The applicants' evidence alleged that the "flow of funds" described (involving the Sakto Group respondents) represented proceeds of corrupt activity and "constitutes money laundering". That amounts to a direct allegation of criminal intent on the part of the Sakto Group respondents implicated.

[36] The applicants respond that the application did not seek any finding of wrong-doing as against the Sakto Group respondents. They were, to the contrary seeking information from which they could *decide* whether a criminal prosecution was warranted. That objection is a distinction without a difference in my view. This application was only brought because the applicants had at least a subjective belief that the criminal charges were well-founded and sought to persuade the court to share that view to some degree failing which the application had no basis *at all*. The entire foundation of the application was the criminal allegations and the strength (or lack thereof) of the evidence of those allegations.

[37] The award of substantial indemnity costs is a discretionary decision. The Sakto Group respondents have made a very strong case in favour of substantial indemnity costs. There are two factors that move me to turn them down.

[38] Firstly, the amount of costs claimed is very high relative to the other respondents. The partial indemnity costs claimed by the Sakto Group respondents is $110,206.34 while the claim for substantial indemnity is $161,742.81. Even on a partial indemnity scale, the claimed amount is more than the amount of partial indemnity costs I have allowed for all of the other respondents together. I fully appreciate that the Sakto Group respondents had more at stake. All allowances being made, the numbers are still very high and considerably higher than I can reasonably impose on the unsuccessful litigant. The indemnity principle is important, but it is not the only factor I must balance.

[39] Secondly, the parties have a long and acrimonious history with each other. In prior proceedings, neither side has shown a significant degree of restraint. Perspective and clarity of focus on the true issues becomes blurred when litigants have their blood up. It is clear to me that both sides to this long-running dispute have had their blood up for a while. The relatively high costs of the Sakto Group relative to the other respondents reflects this reality at least to some degree.

[40] In my view, fixing partial indemnity costs of the Sakto Group respondents at a level equal to the sum of the other four respondents' combined costs achieves a fair and reasonable balance in all the circumstances of this difficult case. I am accordingly ordering the applicants to pay the Sakto Group respondents their partial indemnity costs that I am fixing at $88,136.02.

Disposition

[41] The applicants are therefore ordered to pay the partial indemnity costs of the respondents in the following amounts plus post-judgment interest:

a. RBC/TD: $31,477.15;

b. Manulife $25,181.72;

c. Deloitte & Touche: $31,477.15.

d. Sakto Group: $88,136.02

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S.F. Dunphy J.

Date: March 23, 2018