DATE: 20041116
DOCKET: C40322

COURT OF APPEAL FOR ONTARIO

BORINS, LANG and JURIANSZ JJ.A.

B E T W E E N :	)	
	)	
GARRY T. MOON	)	**Charles M. Campbell and Kumail Karimji for the appellant**
Plaintiff (Appellant)	)	
	)	
- and -	)	
	)	
JONATHAN SHER, THE LONDON FREE PRESS, THOMAS LAWSON, ESTATE OF GUY LOMBARDO, THE GUY LOMBARDO ORCHESTRA, INC., represented by GINA LOMBARDO CUDAHY, AL PIERSON, NANCY PIERSON, ANNE MARIE DeCICCO and THE CORPORATION OF THE CITY OF LONDON, PETER MANSBRIDGE, KAREN HASLAM, DOUGLAS FLOOD, NICK PANASEIKO, TYRONE TRAHER, THE CORPORATION OF THE CITY OF STRATFORD, and DAVE ROCK, BRUCE MUNGAR and THE CORPORATION OF THE MUNICIPALITY OF CENTRAL ELGIN	)	**Jamie Trimble for the respondents Estate of Guy Lombardo and the Guy Lombardo Orchestra, Inc.**
	)	
	)	**Rosemary A. Fisher for the respondents Al Pierson and Nancy Pierson**
	)	
Defendants (Respondents)	)	
	)	
	)	**Heard: September 8, 2004**

On appeal from the judgment of Justice Keith A. Hoilett of the Superior Court of Justice dated June 16, 2003, reported at [2003] O.J. No. 2463, and the order as to costs of Justice Hoilett dated February 4, 2004.

BORINS J.A.:

I

[1] In this appeal Garry Moon appeals the order of Hoilett J. staying his action against The Guy Lombardo Orchestra, Inc. (the "GLOI") and Al Pierson and Nancy Pierson (the "Piersons"). He also seeks leave to appeal from the motion judge's costs order, and if leave is granted, appeals from the award of costs to the GLOI and the Piersons, respectively, in the amounts of $85,000 and $46,000. On September 29, 2004, in dismissing Moon's appeal from the stay order, the court indicated that it would release its reasons in the costs appeal separately: [2004] O.J. No. 3942. I would grant leave to appeal costs, and for the reasons that follow I would allow the appeal.

II

[2] The GLOI and the Piersons are three of 17 defendants in an action brought by Moon, who describes himself as a businessman residing in London, Ontario. The GLOI is a corporation situated in the state of Florida that is managed by Gina Lombardo Cudahy, who resides in Florida. The Piersons reside in the state of Texas. Al Pierson is a bandleader and owner of "Guy Lombardo's Royal Canadians with Al Pierson". The remaining defendants are situated or reside in the province of Ontario.

[3] Moon's claim against the GLOI is for damages for breach of contract. He also seeks an injunction prohibiting the defendants, or any on them, from violating his contractual rights. Moon's claim against the Piersons is for damages from intentional interference with his contractual rights, unlawful interference with his economic relations and conspiracy to induce the GLOI to breach its contract with him. The claims against the other defendants seek damages for defamation. With respect to the defendant Sher, a journalist with the defendant The London Free Press, Moon alleges that he wrote a number of defamatory articles for the purpose of interfering with his contract with the GLOI. As a result of "the tortious conduct of the defendants", Moon claims to have suffered damages for which the defendants, "jointly and severally", are liable. He claims against all the defendants general damages of $1,300,000, aggravated damages of $500,000, punitive damages of $1,000,000 and unspecified special damages. Based on the pleadings, it is not possible to determine the amount of damages that might be assessed against the GLOI and the Piersons if Moon succeeds against them.

III

[4] At the invitation of the motion judge, each defendant delivered a bill of costs and written submissions. The GLOI sought costs of $100,938.38 for fees and disbursements plus GST. The Piersons' bill of costs came to $48,519.25. In addition, the parties provided submissions and supporting materials. The material before the motion judge was extensive, comprising about 200 pages. In particular, in his written submissions counsel for Moon conducted a detailed analysis of the bills of costs and raised what in my view were several serious concerns.

[5] In calculating their bill of costs, each party took into account Moon's rejection of their offer to settle their motions by consenting to an order staying the action against them without costs. Thus, in each bill, up to January 24, 2003, solicitor's, law student's and law clerk's fees are calculated on a partial indemnity scale, and thereafter, on a substantial indemnity scale. Moon takes no issue with this method of calculation.

[6] What follows is a summary of the GLOI's detailed bill of costs. It's lawyer, Mr. Trimble, was called to the bar in 1989. Until January 24, 2003 his fees are calculated using an hourly rate of $250, and thereafter, $300. Similarly, the law clerk's fees are $80 and $100 respectively, and those of the law student, $60 and $90 respectively.

Bill of Costs of the Guy Lombardo Orchestra, Inc.

1.	***Initial steps***		$	11,949.00
	Trimble	34.9 hours		
	Clerk	39.1 hours		
	Student	1.6 hours		
2.	***Case conferences***		$	1,450.00
	Trimble	5.8 hours		
3.	***Cross-examination of Moon***		$	7,850.00
	Trimble	31.4 hours		
4.	***Research for Motion***		$	4,352.00
	Trimble	5.8 hours		
	Clerk	8.3 hours		
	Student	37.3 hours		
5.	***Preparation for Motion***		$	11,875.00
	Trimble	47.5 hours		

6.	*Offer to settle*		$	975.00
	Trimble	3.9 hours		
	The following services were rendered after the rejection of the offer to settle			
7.	*Case conference*		$	930.00
	Trimble	3.1 hours		
8.	*Cross-examination of representative of the GLOI and of the Piersons*		$	7,650.00
	Trimble	25.5 hours		
9.	*Research for motion*		$	780.00
	Trimble	.2 hours		
	Clerk	7.2 hours		
10.	*Preparation for motion*		$	18,166.00
	Trimble	55.2 hours		
	Clerk	.9 hours		
	Student	21.6 hours		
11.	*Attendance at Motion*		$	9,750.00
	Trimble	32.5 hours		
12.	*Preparation of written Submission in Reply*		$	3,300.00
	Trimble	11 hours		
13.	*Reviewing Hoilett J.'s reasons for judgment*		$	1,290.00
	Trimble	4.3 hours		
14.	*Preparing Bill of Costs*		$	5,230.00
	Trimble	9.8 hours		
	Clerk	22.9 hours		
			$	85,547.00
		G.S.T.		5,988.29
			$	91,535.29
15.	*Total disbursements, including G.S.T.*		$	9,403.09
	Total fees, disbursements and G.S.T.		*$*	*100,938.38*

[7] I will now summarize the detailed bill of costs of Al Pierson and Nancy Pierson. Their lawyer, Mr. Emery, was called to the bar in 1981 in British Columbia and in 1985 in Ontario. He calculated his fees on a partial indemnity scale at an hourly rate of $250, and on a substantial indemnity scale at an hourly rate of $300. He was the only person who performed services on the motion. He served the same offer to settle on behalf of the Piersons as the offer to settle on behalf of the GLOI.

[8] The following is a summary of the Piersons' bill of costs:

Bill of Costs of Al Pierson and Nancy Pierson
(Services rendered after rejection of the offer to settle are in italics)

1.	***Initial steps***			
	24.8 hours	$6,125.00		
	5 hours	*1,500.00*		
		7,625.00	$	7.625.00
2.	***Preparation for motion***			
	10.9 hours	$2,725.00		
	25.2 hours	*7,560.00*		
		10,285.00	$	10,285.00
3.	***Cross-examination of Moon***			
	13.5 hours		$	3,375.00
4.	***Cross-examination of the Piersons***		$	3,750.00
	12.5 hours			
5.	***Case conferences***			
	1.1 hours	$ 275.00		
	1.4 hours	*420.00*		
		695.00	$	675.00
6.	***Attendance at the motion***		$	12,000.00
	4 days @$3,000			
7.	***Preparing bill of costs***		$	3,600.00
	12 hours			

		$	41,405.00
	G.S.T.		2,898.35
		$	44,303.35
8.	***Total disbursements including G.S.T.***	$	4,215.90
	Total fees, disbursements and G.S.T.	$	48,519.25

[9] Thus, the combined bills of costs of the GLOI and the Piersons totalled $149,457.63.

[10] In detailed submissions, counsel for Moon critically analyzed the bills of costs of both the defendants. His bottom line was that the total amount claimed in each bill of costs was not justifiable. However, he focused on the GLOI's bill of costs and pointed to the 427.6 hours spent by its lawyer and his staff on the motion, which represents over ten weeks of full time work at 40 hours a week with no interruptions. In particular, he challenged the 184 hours spent by its lawyer and his staff for research and preparation for the motion, of which 108.7 hours, or over 13 days, were spent by the lawyer, on the ground that as the motion was for a recognized remedy based on established legal principles, it could not be said to be complex. Counsel for Mr. Moon took the position, relative to the nature of the motion and the issues that it raised, that the time spent was grossly excessive and resulted in an amount claimed for costs that was neither fair nor reasonable. He added that whether or not the GLOI's lawyer is an "expert" in the issues that normally arise on a motion to stay an action on the grounds of jurisdiction *simpliciter* or *forum non conveniens*, he is an experienced lawyer who, one would reasonably expect, should have been able to do the work required to prepare for the motion in considerably less time.

[11] In addition, counsel for Moon submitted that the GLOI's lawyer claimed excessive amounts of time in respect to the following:

- cross-examination of Mr. Moon – 31.4 hours, which included about 27 hours of preparation and 4.5 hours of cross-examination.
- attending the cross-examinations of Ms. Cudahy and Mr. Pierson – 25.5 hours.
- attending to argue the motion – 32.5 hours. It was submitted that the motion was argued for 2½ days and not for 4 days.
- case conferences – 8.9 hours.

VI

[24] Since the costs grid came into effect on January 1, 2002, it has resulted in a significant change to the manner in which the amount of costs payable by an unsuccessful party to the successful party to a proceeding is determined. The costs grid established hourly rates on either a partial indemnity or a substantial indemnity scale for lawyers of differing experience, as well as counsel fees on each scale for appearing on different types of proceedings based on the length of the proceeding. Under rule 57.01(3), when a court awards costs, "it shall fix them in accordance with subrule (1) and the Tariffs", although under rule 57.01(3.1) the court may refer costs for assessment in an "exceptional case". Rule 57.01(1) contains a number of factors that the court may consider in "exercising its discretion under section 131 of the *Courts of Justice Act* to award costs". Tariff A, that applies to solicitor's fees and disbursements is in two parts: Part I contains the costs grid and Part II contains the disbursements that a party may recover.

[25] Not, surprisingly, since its introduction the cost grid has produced a considerable volume of case law, mostly from the Superior Court of Justice[1], discussing the role of the judge in fixing costs. In addition, judges have expressed concerns about the mechanism, or process, of fixing costs. In an article written before the decision of this court in *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 48 C.P.C. (5th) 56, Robert D. Malen reached the following conclusion:

> It is apparent that, with the rule change that shifted the burden of dealing with costs back onto judicial shoulders, the cases have come full circle. The "summary" approach to the fixing of costs epitomized in *Apotex*, which was modified in *Murano* on the basis that there must be a "critical examination of the parts" in order to make a proper determination, has come back into judicial favour. As well, there appears to be a judicial reaction to the sometimes staggering amounts that are being claimed for costs, even in uncomplicated matters. Judges are saying, in effect, that they are not prepared to sign a blank cheque, even if the hours are there, and that there must be limits based on the principles of "standardization", "predictability" or the "reasonable expectations" of the parties. It is apparent that the judiciary is concerned with access to the courts and that litigants with

---

[1] A recent Quicklaw search has produced over 325 decisions in which Superior Court justices have engaged in a critical analysis of a bill of costs in the exercise of fixing costs.

> legitimate claims should not be cowed by the possibility that the bringing of a simple motion might have catastrophic financial consequences should they lose. At this point, only time will tell whether these principles take hold, and a pattern whereby hard numbers (or a range) is established for particular kinds of motions or applications etc., which will then provide for the predictability that the legal profession requires to guide its decision-making and advice to clients. [2]

[26] In *Boucher* this court was concerned with an appeal from a judge of the Divisional Court who, in fixing the costs of an abandoned application for judicial review, fixed the combined costs of three respondents at $187,682, which totalled the precise amounts set out in their bills of costs.

[27] In considering the approach to be taken in fixing costs calculated on the basis of the costs grid, Armstrong, J.A., on behalf of the court, said at paras. 24-26:

> The appellants submit that the motions judge accepted the bills of costs that were presented to her without any deductions. The bills were prepared in accordance with the calculation of hours times dollar rates provided by the costs grid. While it is appropriate to do the costs grid calculation, it is also necessary to step back and consider the result produced and question whether, in all the circumstances, the result is fair and reasonable. This approach was sanctioned by this court in *Zesta Engineering Ltd. v. Cloutier* (2002), 21 C.C.E.L. (3d) 161 (Ont. C.A.) at para. 4 where it said:
>
> > In our view, the costs award should reflect more what the court views as a fair and reasonable amount that should be paid by the unsuccessful parties rather than any exact measure of the actual costs to the successful litigant.
>
> See also *Stellarbridge Management Inc. v. Magna International (Canada) Inc.*, [2004] O.J. No. 2102 (C.A.) para. 97.

---

[2] Robert D. Malen, "The New Costs Rules: Theory Versus Practice" (2004) Advocates' Q. 432 at 447.

Zesta Engineering and *Stellarbridge* simply confirmed a well settled approach to the fixing of costs prior to the establishment of the costs grid as articulated by Morden A.C.J.O. in *Murano v. Bank of Montreal* at p. 249:

> The short point is that the total amount to be awarded in a protracted proceeding of some complexity cannot be reasonably determined without some critical examination of the parts which comprised the proceeding. This does not mean, of course, that the award must necessarily equal the sum of the parts. An overall sense of what is reasonable may be factored in to determine the ultimate award. This overall sense, however, cannot be a properly informed one before the parts are critically examined.

It is important to bear in mind that rule 57.01(3), which established the costs grid, provides:

> When the court awards costs, it shall fix them in accordance with subrule (1) and the Tariffs.

Subrule (1) lists a broad range of factors that the court may consider in exercising its discretion to award costs under s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43. The express language of rule 57.01(3) makes it clear that the fixing of costs is not simply a mechanical exercise. In particular, the rule makes clear that the fixing of costs does not begin and end with a calculation of hours times rates. The introduction of a costs grid was not meant to produce that result, but rather to signal that this is one factor in the assessment process, together with the other factors in rule 57.01. Overall, as this court has said, the objective is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding, rather than an amount fixed by the actual costs incurred by the successful litigant.

[28] At paras. 37 and 38, Armstrong J.A. added:

> The failure to refer, in assessing costs, to the overriding principle of reasonableness, can produce a result that is contrary to the fundamental objective of access to justice. The costs system is incorporated into the *Rules of Civil Procedure*, which exist to facilitate access to justice. There are obviously cases where the prospect of an award of costs against the losing party will operate as a reality check for the litigant and assist in discouraging frivolous or unnecessary litigation. However, in my view, the chilling effect of a costs award of the magnitude of the award in this case generally exceeds any fair and reasonable expectation of the parties.
>
> In deciding what is fair and reasonable, as suggested above, the expectation of the parties concerning the quantum of a costs award is a relevant factor. See *City of Toronto v. First Ontario Realty Corporation* (2002), 59 O.R. (3d) 568 at 574 (S.C.). I refrain from attempting to articulate a more detailed or formulaic approach. The notions of fairness and reasonableness are embedded in the common law. Judges have been applying these notions for centuries to the factual matrix of particular cases.

[29] Considering a number of factors unique to the case, Armstrong J.A. concluded that the total amount of $187,682.51 was not a fair and reasonable sum to award in the circumstances of the case, even though each of the three respondents presented its own bill of costs. He held that the costs awards were so excessive as to call for appellate interference. In the result, he found that a fair and reasonable award of costs would be a total of $63,000.

[30] Similar views were expressed by the Divisional Court in *Gratton-Masuy Environmental Technologies Inc.(c.o.b. Ecolfo Ontario) v. Building Materials Evaluation Commission*, [2003] O.J. No. 1658 in fixing costs of the successful party on a judicial review application who had claimed costs of $113,017.43 on a partial indemnity scale. At paras. 16 and 17, the court said:

> ...The *Zesta* decision is not simply one of the factors to be considered [in fixing costs] along with a combination of factors. It is more than that. The case stands for the proposition that the award must reflect "more what the court views as a fair and reasonable amount that should be paid by the unsuccessful parties rather than any exact measure of the

> actual costs to the successful litigant." This is a fundamental concept in fixing or assessing costs.
>
> The amount at which costs are to be fixed is not simply an arithmetic function dependent on the number of hours worked and the hourly rates employed but, rather, the party paying the costs should be subjected to an order which is fair and predictable. In other words, the party required to pay costs must not be faced with an award that does not reasonably reflect the amount of time and effort that was warranted by the proceedings....

[31] This decision is also instructive for the court's critical examination of the bill of costs in the course of which it reduced the hourly rates for senior and junior counsel as being too high, noting in para. 25 that "maximum rates should be reserved for maximum cases". In addition, the court found that the time spent on certain items was clearly excessive. In finding the amount claimed to be excessive, unfair and unreasonable, the court observed in para. 24:

> The unsuccessful party cannot be expected to pay anything near the amount claimed, nor should it have anticipated when the Application was commenced that, if unsuccessful, it would be faced with a claim for costs anywhere near the amount now being sought by the Applicants.

The court fixed the successful party's costs in the amount of $25,681.93, inclusive of disbursements.

VII

[32] Turning to the costs fixed by the motion judge, it is my view that the amounts claimed against Moon by the GLOI and the Piersons, although more so by the GLOI, were excessive and greatly exceed what is fair and reasonable. While I accept that the bills of costs accurately reflect the time spent by all of the lawyers and their staff in connection with the motions, like Armstrong J.A. in *Boucher*, it is inconceivable to me that the total time spent on the motion claimed against Moon was justifiable. Although in fixing costs in the total amount of $131,000 the motion judge reduced the bills of costs, in my view the costs awards are nevertheless so excessive as to call for appellate intervention. In this regard, I accept Moon's submission that the time claimed for this motion, particularly by the GLOI, was clearly excessive.

- reading the 18-page reasons for judgment of the motion judge – 4.3 hours.

- preparation of bill of costs and submissions – 9.8 hours.

[12] With respect to the cross-examination of Moon, his principle position is that pursuant to rule 39.02(4), the GLOI is not entitled to costs. The rule provides, in part, that "... a party who cross-examines on an affidavit ... is liable for the partial indemnity costs of every adverse party on the motion in respect of the cross-examination, regardless of the outcome of the proceeding, unless the court orders otherwise."

[13] Finally, counsel for Moon attacked several disbursements. In particular, he attacked as excessive the net disbursements of $3,620.23 for photocopies, representing 16,207 pages @ 25¢ a page. In addition, it was submitted that the following are not recoverable as they are not contained in the disbursements found in Tariff A, Part II: Quicklaw services – $708.51; courier – $688.47; stationary supplies – $251.00; postage – $119.56. Including copies, it was submitted that $5,242.71 should be deducted from disbursements.

[14] In summary, counsel submitted that there should be a substantial reduction in counsel fees on the ground of over-preparation. It was submitted that the GLOI's lawyer be allowed 130 hours for preparation and a 2½ day counsel fee for the hearing of the motion. It was also submitted that his counsel fees of $250 an hour and $300 an hour on the partial and substantial indemnity scale are excessive and should be reduced to $200 an hour and $275 an hour. (The maximum fee permitted by the costs grid for a lawyer with Mr. Trimble's experience is $300 an hour and $400 an hour on the two scales.) It was also submitted that the counsel fee on the motion on a substantial indemnity scale should be calculated at $2,500 a day for 2½ days, the maximum allowable by the costs grid being $3,500 a day.

[15] Based on these submissions, Moon asked the motion judge to fix the GLOI's fees at $38,118.75 and its disbursements at $3,796.92, for a total of $41,915.67, inclusive of GST.

[16] As for the Piersons' billing costs, Moon disputed three items:

- a full week to prepare the motion is excessive.

- the actual time for attendance to argue the motion was 2½ days, not four days.

- there is no entitlement to costs for cross-examining Moon pursuant to rule 39.02(4).

He also contested certain disbursements. As well, he raised the same issues about the hourly rates of the Piersons' lawyer as he raised about those of the GLOI's lawyer and submitted that the Piersons' lawyer should be allowed 80 hours for preparation.

[17] Moon submitted that the motion judge should fix the Piersons' fees at $26,685.50 and its disbursements at $1,812.09 for a total of $28,497.59, inclusive of GST.

[18] In submissions delivered in reply to Moon's submissions, counsel for the GLOI disputed Moon's contention that the motion was not complex and that he had engaged in excessive preparation. He pointed to the significance of the successful result of the motion, given the amount of damages and the injunctive relief claimed in the action. As well, he disputed the application of rule 39.02(4)(b) to Moon's cross-examination. As I read the submissions in reply, it appears that the GLOI's central argument is that its motion would not have been necessary had Moon not ignored the "advice" given by counsel for the GLOI and the Piersons at the outset of the action that the terms of the contract between the GLOI and Moon contained an arbitration clause to be carried out in Florida, or had he accepted the offer to settle and consented to a stay of the action without costs. Counsel concluded by submitting: "While Moon is entitled to take a hard position on the motion ... he cannot then complain that the party bringing the motion was put to additional expenses by virtue of the hard positions taken."

IV

[19] In considering the GLOI's bill of costs, the motion judge began by saying that his reasons must be read in the context of his reasons for judgment granting a stay of the action against the GLOI. With respect to the complexity of the motions, he said that "the issues raised made the matters raised ones of above average complexity".

[20] The motion judge concluded his endorsement as follows:

> Although I find some merit in the argument that there may have been some degrees of over preparation on the part of the moving parties, more so in the case of the GLOI, one should avoid the slippery slope of establishing [any] rule of thumb whereby there is some formula for correlating the amount of preparation time to the time taken up presenting argument in court. The fact is it may very well be an inverse ratio so that the more time spent in preparation the greater the distillation of the argument. In other words, it would be dangerous to conclude that because argument was only one hour therefore preparation time could not be more than "X" hours.

> Counsel for GLOI bore the main burden of the argument for the moving parties, the GLOI and the Piersons, given the commonality of many of the issues which is not, of course, to diminish the role played or burden assumed by counsel for the Piersons. It is a fact, however, which should be reflected in the costs awarded; as indeed it is in the Bills of Costs tendered. *The fixing of costs is, as in the exercise of any judicial discretion, of a fine balancing act which must have regard as well to the reasonable expectations of the party having to pay.* The GLOI's claim for costs in the amount of $100,938.38 should, in my view, *be moderated to reflect not only many of the factors reasonably highlighted by its counsel but also what the unsuccessful party may reasonably expect to pay if so required.* In all the circumstances, I fix those costs as $85,000.00, inclusive of disbursements and G.S.T. where applicable [emphasis added].

[21] He went on to fix the Piersons' costs in a separate endorsement:

> In the case of Piersons, the costs are fixed in the amount of $46,00.00 inclusive of disbursements and G.S.T. where applicable. See endorsement on the Brief filed on behalf of the GLOI which should form part of the rationale of the conclusion here arrived at.

V

[22] Before this court, counsel for Moon submitted that the costs awarded by the motion judge were so excessive as to warrant appellate interference. Counsel further contends that the motion judge's failure to critically examine the components of the bills of costs resulted in an award that so far exceeds the reasonable expectation of the parties as to represent an error in principle.

[23] Counsel for the GLOI and the Piersons took the position that there were no grounds for interfering with the motion judge's exercise of discretion in fixing costs. They argued that the motion judge considered the factors set out in rule 57.01(1), including each of their offers to settle, balanced all the factors and ultimately fixed their costs in amounts that in the circumstances of the motions, which he characterized as being above average in complexity, were fair and reasonable.

[33] If a lawyer wants to spend four weeks in preparing for a motion when one week would be reasonable, this may be an issue between the client and his or her lawyer. However, the client, in whose favour a costs award is made, should not expect the court in fixing costs to require the losing party to pay for over-preparation, nor should the losing party reasonably expect to have to do so.

[34] In addition, I agree with Moon's counsel that the motion was not complex. There were three issues that were common to both motions: (1) determining as a jurisdictional fact whether there was an agreement between Moon and the GLOI and, if so, its terms; (2) whether a letter was inadmissible on the ground of solicitor-client privilege; and (3) whether the action should be stayed on the grounds of jurisdiction *simpliciter* or *forum non conveniens*. Indeed, the presence of factual and evidentiary issues is not unusual in motions of this nature where it is often necessary for the court to determine jurisdictional facts. Once the motion judge found that there was an agreement between Moon and the GLOI that contained a clause that "any controversy or claim, relating to, arising out of or in connection with [the] agreement... shall be determined by arbitration in Fort Myers, Florida", the result of the motions was obvious. Motions of this nature are becoming common place. At the time the motions were heard, the law in respect to jurisdiction *simpliciter* had been explained by this court in *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20 and the legal principles in respect to *forum non conveniens* were well settled.

[35] For counsel to spend almost 270 hours, or nearly seven full weeks, on this motion, and for his law clerk and articling student to spend almost the same amount of time, must surely exceed the losing party's reasonable expectations. This expenditure of time, in my view, bears no relationship to the amount of time that reasonably would have been contemplated by the parties, or would reasonably be required to deal with all aspects of the motion. It could not have been the reasonable expectation of Moon that if he were to be the losing party that he would be liable in costs of $141,000 to the GLOI and the Piersons. I say this mindful of the fact that Moon could have reduced his costs exposure had he not rejected the twin offers to settle the motions by consenting to an order to stay the action without costs. However, Moon's rejection of the offers to settle does not justify an unreasonable and excessive bill of costs.

[36] Moon challenged the GLOI's disbursements for Quicklaw services, courier services, stationary supplies and postage, as not recoverable on the ground that they are not in the list of disbursements in Tariff A, Part II. While it is correct that these items are not specifically listed in the tariff, in the appropriate circumstances resort can be had to Tariff item 35:

> Where ordered by the presiding judge or officer, for any other disbursement reasonably necessary for the conduct of the

> proceeding, a reasonable amount in the discretion of the assessment officer

In addition, Moon challenged the amount for making copies as being an excessive number of copies. Under Tariff item 31, a "reasonable amount" may be awarded for copies of the documents or authorities for the use of the court and supplied to the opposite party.

[37] In commenting on somewhat similar disbursements in *Banihashem-Bakhtiari v. Axes Investments Inc.* (2003), 66 O.R. (3d) 284 (S.C.J.), at para. 52 Lane J. stated:

> There are over $200,000 in disbursements claimed. The defendants objected to several categories as falling outside the tariff. These included faxes, long distance, couriers and legal research (i.e., Quicklaw etc.). These omissions merely illustrate the degree to which the tariff of disbursements has lost touch with modern legal practice. All of these items are everyday costs in running any litigation and are case-specific, rather than mere overhead, as for example, the cost of local telephone service is. If they are not included expressly, they are certainly disbursements "reasonably necessary for the conduct of the proceeding" within Tariff item 35, and I so order.

An appeal to this court from Lane J.'s costs order was dismissed without comment on disbursements: [2004] O.J. No. 1090 (C.A.).

[38] In *3664902 Canada Inc. v. Hudson's Bay Co.*, [2002] O.J. No. 2096 (S.C.J.), at para. 25, Lang J. stated:

> The plaintiff is entitled to compensation for reasonable costs for facsimile, telephone, and courier, provided such costs do not fall within standard office overhead, that they are charged at a reasonable rate and they are not unusually high.

On appeal to this court, her order respecting disbursements was not considered: [2003] O.J. No. 950 (C.A.).

[39] It would seem, therefore, that amounts disbursed for Quicklaw services, courier services, stationary and postage may be recoverable under Tariff item 35 if the service or expense is "reasonably necessary for the conduct of the proceeding", the amount is reasonable and has been charged to the client, and the disbursement does not fall within

standard office overhead. Indeed, as Quicklaw and similar search vehicles have become convenient aids to research, although not found in the Tariff, their costs should be recoverable as disbursements provided they are not excessive and have been charged to the client. It is for the party seeking recovery of the disbursements to satisfy these criteria.

[40] In my view, the GLOI has satisfied the criteria with respect to Quicklaw and courier expenses. It is also entitled to the reasonable cost for making copies, but based on considerably fewer copies than were made. As the GLOI did not object to Moon's position that stationary and postage expenses are not recoverable because they come within standard office overhead, these expenses are not recoverable.

[41] Two other matters were raised by counsel on which I will comment briefly:

- this is not the occasion to resolve whether rule 39.02(4) deprives the GLOI and the Piersons of their costs of cross-examining Moon. As such, this represents a relatively small item in the totality of the bills of costs.

- although there was "waiting" time on the argument of the motion, the motion was not argued over four full days. Counsel for the GLOI and the Piersons are each entitled to a counsel fee for a three day motion.

[42] There is another factor that has an effect on fixing costs that it appears the motion judge was not asked to consider and which I mention to underscore its significance in the cost fixing exercise. I refer to the rate that was, or will be, charged to the client for the services of the lawyers, law students and law clerks who worked on the case.[3] As this court has held, to avoid a windfall it is not appropriate for a party to seek or receive an award of costs in excess of the fees and disbursements actually charged to it. Therefore, the hourly billing rates actually charged and the fees actually billed to the successful litigant are relevant considerations: *TransCanada Pipelines Ltd. v. Potter Station Power Limited Partnership* (2003), 172 O.A.C. 379 (C.A.) at para. 3; *Stellarbridge, supra*, at paras. 93-100.

[43] Although the motion judge referred to a number of the guiding principles, he fixed the costs in an amount that was not fair and reasonable. In my view, had he given more weight to the submissions of Moon's counsel, particularly in respect to excessive preparation, the result would have been more in keeping with the reasonable expectation

---

[3] In fairness to the GLOI, para. 35 of its submissions on costs, which is difficult to understand, may deal with the rates it was charged by its lawyer.

of the parties. In the end, the amount fixed by the motion judge was driven far too much by the hours actually spent by counsel and the rates provided by the grid rather than the need to reach a fair and reasonable result. Appellate intervention is therefore required.

VIII

[44] I would grant leave to appeal costs and vary the quantum of the motion judge's costs award to allow the GLOI costs of $40,000 for fees and disbursements, plus G.S.T., and to allow the Piersons costs of $27,500 for fees and disbursements, plus G.S.T. This total amount of $67,500 is much more in keeping with what a losing party would reasonably expect to pay the winning party in this type of proceeding.

[45] In our reasons dismissing Moon's appeal from the motion judge's order staying the action against the GLOI and the Piersons, we indicated that we would deal with costs of the entire appeal when we decided the costs appeal. As success on the appeal is divided, there will be no costs.

RELEASED: November 16, 2004 ("SB")

"S. Borins J.A."
"I agree Susan Lang J.A."
"I agree R. G. Juriansz J.A."