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COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

ULTRACUTS FRANCHISES INCORPORATED, plaintiff, -and- MAGICUTS INC., CHRISTOPHER R. CAWSTON and BRIAN A. LUBORSKY, defendants. (BY ORIGINAL ACTION) ULTRACUTS FRANCHISES INCORPORATED, plaintiff, -and- MAGICUTS INC., CHRISTOPHER R. CAWSTON, BRIAN A. LUBORSKY, and GRANT THORNTON LIMITED AS A TRUSTEE OF THE ESTATE OF PREMIER SALONS LTD., defendants.	)	Peter Halamandaris and Susan Cepanec for the plaintiff Brent C. Ross and Brayden Gray for the defendants Christopher R. Cawston and Brian A. Luborsky JUDGMENT DELIVERED: February 21, 2025

ASSOCIATE JUDGE BERTHAUDIN

[1] This decision relates to a trial costs assessment which was directed by the Manitoba Court of Appeal to proceed before an associate judge (see ***Ultracuts v. Magicuts***, 2024 MBCA 45) (the costs decision).

BACKGROUND

[2] The Court of Appeal succinctly summarized the factual background in the costs decision at paragraphs 3 to 6:

> **3** The events that gave rise to this litigation began in early 1994, when Wal-Mart Canada Inc. (Wal-Mart) announced that it was buying 120 Woolco department stores throughout Canada and converting them into Wal-Mart stores. At that time, Magicuts Inc. (Magicuts) operated 59 hair salons in Woolco stores, some of which were owned by franchisees and others of which were owned by Magicuts.
>
> **4** Over the next couple of years, Wal-Mart entered into individual contracts with both Ultracuts and Magicuts that resulted in each having hair salons in certain Wal-Mart stores. A disagreement arose between these three parties as to the exact nature of the agreements among them, which was the basis of a significant amount of litigation by Ultracuts. The defendants were officers and directors of Magicuts and indirectly held shares in it.
>
> **5** Ultracuts took the position that Wal-Mart did not honour its agreements with Ultracuts and commenced litigation against Wal-Mart in Arkansas, United States in September 1996. It also took the position that these defendants and others interfered with its relations with Wal-Mart by defrauding Wal-Mart. It filed a statement of claim in Manitoba in February 2001, alleging unlawful interference with economic interests by the unlawful act of civil fraud. In addition, Ultracuts brought proceedings alleging fraud against other parties, including Wal-Mart, Wal-Mart employees and Magicuts franchisees, none of which have been successful.
>
> **6** The claim against the defendants finally went to trial in 2019. In a decision released in late November 2021, the trial judge found the defendants liable (see *MBQB 2021*). That decision was overturned by this Court on appeal and Ultracuts' claim was dismissed (see *MBCA 2023*, leave to appeal to SCC refused, SCC Docket No 40980 (9 May 2024)), leading to this proceeding to determine costs for both the trial and the appeal.

[3] Ultimately the Court of Appeal decided that the defendants[1] were entitled to their costs at trial and on appeal at double the tariff limit. It concluded that if the parties

[1] Any reference to "the defendants" in these reasons is a reference only to the defendants Christopher R. Cawston and Brian A. Luborsky, as they are the only remaining defendants, with the defendant Magicuts Inc. having become bankrupt long before the trial of this matter.

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were not able to agree on the tariff costs for the trial and related proceedings, there would be an assessment by an associate judge.

ISSUES

[4] By the time of this hearing, the parties had reduced the contested issues to the following two disbursements:

i) The sum of $514,189.82 paid to Cohen Hamilton Steger & Co. Inc. (CHS) for providing expert advice to the defendants; and

ii) The sum of $4,340.63 for computerized legal research performed by defendants' counsel.

[5] The evidence before me at the costs assessment consisted of a preliminary affidavit sworn by a legal assistant at the office of defendants' counsel, a supplementary affidavit sworn by the same assistant, a responding affidavit sworn by the president of the plaintiff and a reply affidavit sworn by the legal assistant at the office of defendants' counsel. No cross-examinations were conducted.

[6] Reference to some of the evidence will be made, as necessary, when addressing the contested issues below.

GENERAL PRINCIPLES

[7] In assessing costs, consideration must always be given to Court of King's Bench Rule 57.01(1), which is set out below:

> **Factors in discretion**
> **57.01(1)** In exercising its discretion under section 96 of *The Court of King's Bench Act*, to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle made in writing,
> (a) the amount claimed and the amount recovered in the proceeding;
> (b) the complexity of the proceeding;
> (c) the importance of the issues;

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> (d) the conduct of any party which tended to shorten or lengthen unnecessarily the duration of the proceeding;
> (d.1) the conduct of any party which unnecessarily complicated the proceeding;
> (d.2) the failure of a party to meet a filing deadline;
> (e) whether any step in the proceeding was improper, vexatious or unnecessary;
> (f) a party's denial or refusal to admit anything which should have been admitted;
> (f.1) the relative success of a party on one or more issues in a proceeding in relation to all matters put in issue by that party;
> (g) whether it is appropriate to award any costs or more than one set of costs where there are several parties with identical interests who are unnecessarily represented by more than one counsel; and
> (h) any other matter relevant to the question of costs.

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[8] As the two remaining contested issues relate to disbursements, Rule 57.01(4) is also relevant:

> **Disbursements**
> **57.01(4)** The court may disallow a disbursement in whole or in part where, based on all circumstances of the case, it is satisfied that a disbursement claimed by a party was not reasonably necessary for the conduct of the proceeding or was for an unreasonable amount.

[9] Disbursements are found in Tariff B of the Court of King's Bench tariffs and the following provisions are relevant to the contested issues:

> 1 Unless otherwise directed by the court, the amount of disbursements in a proceeding shall be determined as follows:
>
> …
>
> (f) fees or expenses actually paid for experts' reports that were supplied to the other parties as required by *The Manitoba Evidence Act* or these rules and that were reasonably necessary for the conduct of the proceeding or a reasonable amount;
> (g) fees or expenses actually paid for investigations, tests, enquiries, examinations and other services performed for the purpose of the proceedings by experts, including all preparation for the purpose of giving evidence and attending to assist in the conduct of the proceedings or a reasonable amount;
>
> …
>
> (n) where ordered by the court, for any other disbursement reasonably necessary for the conduct of the proceeding, a reasonable amount in the discretion of the assessment officer;
>
> …

CHS DISBURSEMENT FOR $514,189.82

A. GENERAL CONTEXT

[10] In the course of the litigation, the plaintiff retained James Smith of Grant Thornton LLP's Winnipeg office to assess and quantify the economic loss allegedly suffered by the plaintiff as a result of the conduct of the defendants. An initial report was released by Grant Thornton on April 30, 2015 and a supplemental report on October 25, 2018. The quantification of the plaintiff's losses resulted in a claim pursued against the defendants in the maximum amount of $89,400,000.00.

[11] Understandably the defendants sought their own expert opinion as to the alleged economic loss of the plaintiff. The defendants, who reside in Toronto, retained CHS, a consulting firm from that city. The founding principal of CHS is Farley Cohen, who has been specializing in business valuations and quantification of economic damages since 1987. CHS prepared three reports which were submitted into evidence, dated July 3, 2018, January 17, 2019 and February 20, 2019.

[12] The total amount charged by Grant Thornton and paid by the plaintiff is $105,004.25. The total amount charged by CHS and paid by the defendants is $514,189.82. The plaintiff objects to the CHS disbursement claim for various reasons, some of which relate to specific work and some of which are more general complaints. I will deal first with the specific requests for reduction and move from there to the general complaints.

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B. THE RE-ATTENDANCE OF COHEN FOR CROSS-EXAMINATION AT TRIAL

[13] On a pre-trial motion, the defendants were ordered to produce certain documents to plaintiff's counsel. The documents apparently required some review by counsel for the defendants for the purposes of partial redaction of the documents before production. The redacted documents were then produced in the litigation. During the cross-examination of Cohen by plaintiff's counsel at trial, an issue arose as to whether some of the documents had been improperly redacted. Due to the timing of plaintiff's counsel becoming aware of the issue in the middle of Cohen's cross-examination, the cross-examination was closed subject to plaintiff's counsel's ability to recall Cohen to continue the cross-examination after further review of the documents.

[14] Subsequent to trial, a further appearance took place before the pre-trial judge (who had heard and decided the pre-trial disclosure motion). The pre-trial judge determined that the defendants had improperly redacted some of the documents and ordered a further review by counsel for the defendants and production of the documents with the improper redactions removed. Costs were ordered to be paid by the defendants on a Class 4 basis, forthwith and in any event of the cause. The pre-trial judge declined to make any additional order of costs or penalty against the defendants and commented that she did not find "an intentional failure to comply" with her previous decision.

[15] Subsequent to the properly redacted documents being disclosed, Cohen was recalled for cross-examination. For that re-attendance, CHS issued an account dated November 5, 2019, in the total amount of $9,562.73. The plaintiff argues that it should

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not be required to pay for Cohen's re-attendance when it occurred only as a result of the defendants improperly redacting documents disclosed in the litigation. In other words, had the documents been properly redacted in the first place, the cross-examination would have been completed on the first occasion and there would have been no need to for Cohen to re-attend.

[16] I agree with the plaintiff's argument on this point and therefore reduce the CHS disbursement by the sum of $9,562.73.

C. CHS WORK RELATED TO APPEAL

[17] Closing arguments were completed in November, 2020, and the trial judge's reasons for decision were delivered on November 26, 2021. The defendants appealed the decision and in the process of preparing for the hearing before the Court of Appeal, had CHS perform additional work to be able to put further calculations before the panel of the Court of Appeal. While some reference was made to this issue during submissions before the Court of Appeal in November, 2022, the additional calculations were not actually tendered or provided to the court.

[18] The plaintiff argues that the trial was complete by this stage and this work is not a proper disbursement related to the King's Bench action.

[19] I am in agreement with this submission. The trial and judgment in the King's Bench proceeding had long since been concluded when these charges were incurred. I do not consider them to be a disbursement in relation to the King's Bench action. At best, it was work in relation to the Court of Appeal proceedings and perhaps should have been sought as a disbursement in that court.

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[20] The invoice for the appeal work by CHS is dated May 6, 2022 and is in the total amount of $5,739.19. As this is not a proper disbursement in relation to the King's Bench action, the CHS disbursement is reduced by this amount.

D. ATTENDANCE BY COHEN'S JUNIOR AT TRIAL ON TWO OCCASIONS

[21] This issue is set out in the plaintiff's costs brief in the following manner:

> Finally, Cohen billed for his junior, Dan Ross to attend the trial, twice. Dan Ross did not give evidence and was not required to be in attendance. The plaintiff should not have to pay for this.

[22] There is no evidence in the affidavits filed by the parties relating to this issue. It appears that the CHS account at issue is dated March 7, 2019, as the invoice contains the following bullet points:

- To attendance at trial in Winnipeg for examinations of James Smith;
- To attendance at trial in Winnipeg to provide expert testimony

[23] The fee summary for the invoice lists Cohen as having recorded 59 hours at $645 per hour and Dan Ross having recorded 80.25 hours at $410 per hour. The total fees between the two of them for his period (which includes much more than just the two attendances in Winnipeg for trial) is reduced by a courtesy discount of $10,000. There are also travel related disbursements for two trips; the first being February 10-11 and the second being February 20-22. The total disbursements for these two trips is $6,282.80.

[24] There is no reference to Dan Ross having attended in Winnipeg for the trial on this invoice, although perhaps that may be assumed. There is no reference as to the breakdown of hours recorded by Cohen or Dan Ross for time spent at trial in Winnipeg

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versus time spent at their office in Toronto performing the various other services set out on the invoice. In other words, there is not an hourly breakdown of time spent.

[25] A further assessment of this issue would be theoretical at best. The defendants argue that Dan Ross performed a significant amount of work on the file and it was important for him to be present for the trial evidence of both experts to provide input to defendants' counsel. The plaintiff argues that the defendants already had Cohen in attendance at all times and he should have been able to provide the necessary input to defendants' counsel.

[26] As the argument was not developed any further than this and, in any event, the issue has not been quantified in any way, a complete assessment is not possible. I do note that CHS provided a courtesy discount of $10,000 on the fees recorded on this invoice, perhaps in recognition that charging fees for Ross's attendance at trial was extraordinary, but this is just a supposition. Such evidence was not given, but $10,000 is roughly the equivalent of 23 hours of Ross's recorded time, inclusive of tax.

[27] For these reasons, I decline to make a specific reduction to the CHS disbursement in relation to this issue. I will, however, keep this issue in mind in considering the more general issue raised by the plaintiff and discussed later in this decision that the overall amount of the total CHS disbursement is excessive.

[28] As a result of the specific reduction requests made in sections B, C and D above, the CHS disbursement is reduced to $498,887.90.

[29] I will now move on to the two more general requests for reduction that are not specific to any particular work performed by CHS, but apply on a more global basis to

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this disbursement. The first is a reduction justified by "misconduct" committed by Cohen during the course of the trial. The second is that, on a global basis, the amount charged by CHS is out of proportion to that charged by Grant Thornton LLP and not justified for various reasons.

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E. "MISCONDUCT" BY COHEN

[30] The plaintiff argues that Cohen was not an independent and unbiased expert and this should have an impact on the amount of the CHS disbursement that is allowed in this proceeding. These allegations relate in part to the improperly redacted documents referred to earlier in this decision at paragraphs 13 to 15. This also relates to an allegation that Cohen gave untruthful testimony in relation to the improperly redacted documents and a reference to a previous report prepared by Cohen in unrelated litigation wherein economic loss related to hair salons was analyzed.

[31] Excerpts from the trial transcripts were entered as evidence of the allegation of untruthfulness. This included allegations that Cohen intentionally misled the court.

[32] This allegation by the plaintiff was also made in written submissions at trial and in written submissions on costs made to the Court of Appeal. The plaintiff also sought additional costs from the pre-trial judge at the second hearing in relation to the improperly redacted documents, as a result of these allegations.

[33] In not awarding additional costs as a penalty relating to those documents, the pre-trial judge said:

> I am not inclined to make any additional order of costs as a penalty against the defendants. I have not found an intentional failure to comply with the Endorsement, and the CHS representative revealed the non-compliance in circumstances that, fortunately, have enabled the plaintiff to obtain the necessary documents.

[34] The trial judge, having the benefit of hearing Cohen's *viva voce* evidence and observing his demeanour, did not make any findings in his reasons for decision that Cohen was untruthful or biased or committed any misconduct. The trial judge did prefer the evidence of Grant Thornton in a number of areas. That being said, in overturning the trial judge's decision, the Court of Appeal said the following in ***Ultracuts v. Magicuts***, 2023 MBCA 71, at paragraph 162, on the topic of damages and other grounds of appeal:

> 162 As the appeal and the claim can be determined by analyzing the two grounds of appeal dealt with above, it is not necessary, in my view, to address the remaining five grounds. That is not to be taken as an indication that they are without merit, as that is not the case; rather, for reasons of judicial economy, there is no need to undertake further lengthy legal analysis.

[35] The "remaining five grounds" referred to by the Court of Appeal included that the trial judge erred by "determining damages based on incorrect considerations". Thus, it would be an error to place much weight on the trial judge having preferred Grant Thornton's evidence in light of these comments by the Court of Appeal.

[36] Further, in the costs decision, the Court of Appeal stated the following in relation to the allegation of misconduct by Cohen and the defendants disentitling the defendants to costs:

> 11 First, we reject, in its entirety, Ultracuts' suggestion that the defendants' conduct during the litigation should disentitle them to costs despite their ultimate success. We are of the view that there was no misconduct by the defendants and no reason to deprive them of the costs that are usually awarded to a successful party, and there can be no dispute that the defendants have been successful.

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[37] Thus, none of the pre-trial judge, the trial judge or the Court of Appeal concluded on more complete evidence than is before me that Cohen was untruthful or biased or that he or the defendants did anything in relation to his evidence that should give rise to any sort of costs sanction whatsoever, save for that imposed by the pre-trial judge on the second documents motion.

[38] That being the case, I am not prepared to conclude on this costs hearing with selected excerpts from the trial evidence, that any conduct of Cohen during the trial disentitles the defendants to pursue the claim for the CHS disbursement to be included in the costs awarded, or supports a reduction of the amount claimed.

F. CHS DISBURSEMENT IS EXCESSIVE

I. *PLAINTIFF'S POSITION*

[39] The plaintiff's overall position is that the CHS expert fees are excessive and unreasonable. The basis for this position is the following:

a) CHS's hourly rates, number of hours recorded and overall fees are far in excess of that of Grant Thornton;

b) CHS's fee of $514,189.82 (now reduced to $498,887.90) is nearly 5 times that of Grant Thornton. When a party to Manitoba litigation retains an expert from outside the jurisdiction of Manitoba, that party should not expect to receive reimbursement at out-of-province rates;

c) A comparison of the fees charged by CHS to the legal fees charged by defendants' counsel for the entirety of the King's Bench action ($1,277,243.85) suggests that CHS overbilled the file when considering that its involvement and

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services provided would have been much narrower than that of defendants' counsel.

[40] The overall position of the plaintiff in relation to the amount that should be allowed to the defendants for expert fees is that the defendants should be allowed no more than the amount that was charged by Grant Thornton to the plaintiff, being $105,004.25. The plaintiff suggests that the amount charged by Grant Thornton is indicative of the Manitoba rate for such services and the defendants should be limited to that amount.

[41] The plaintiff relies on several Manitoba authorities for the proposition that the retainer of an out-of-province expert comes with the risk that the disbursement incurred for that expert may not be allowed at a so called out-of-province rate, and/or travel expenses may not be allowed.

[42] The plaintiff refers to ***Knight v. Millman Estate***, 1990 CarswellMan 428, 66 Man. R. (2d) 275, wherein the defendant retained an engineer who was resident in Calgary, Alberta. The plaintiff argued that extra expenses relating to the expert residing out-of-province were unjustified. On that point, the trial judge stated the following at paragraph 7:

> 7. In response to the objections of the plaintiffs, I make the following observations:
>
> …
>
> 3. With regard to the hiring of an engineer from Calgary, Mr. Bowles explained the importance of finding an expert in soils and structure equal in reputation to the plaintiffs' witnesses. He also explained that he had approached two engineers in Winnipeg who had been recommended to him before seeking out Mr. Hamilton in Calgary. Mr. Bowles cannot be criticized for seeking the best advice available. Nonetheless, there are competent engineers practicing in Winnipeg and teaching at the University of Manitoba. I am satisfied that the expense incurred for Mr.

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> Hamilton's travel ought not to be charged to the plaintiffs. It may be as well that the time which he expended would have been less had he resided in Winnipeg.

[43] The result in ***Knight*** was that the trial judge disallowed any travel expenses for the expert and also reduced some of the other time recorded by the expert (although it appears that the latter reductions were not related to his residence out-of-province).

[44] The plaintiff also relies on ***Howael Ventures (1984) Inc. v. Arthur Andersen & Co.***, 1997 CarswellMan 26, 116 Man. R. (2d) 255, a case in which the trial judge had before him evidence of the generally accepted hourly rates in Manitoba for certain experts and reduced the rate of the out-of-province expert to the generally accepted Manitoba rate.

[45] Finally, the plaintiff relies on ***Conversions by Vantasy Ltd. v. General Motors of Canada Ltd.***, 2004 MBQB 29. In that case, the court determined the travel expenses for the out-of-province expert were not properly claimable as a disbursement.

[46] As noted, the plaintiff's primary position is that the CHS disbursement should be reduced to match that of Grant Thornton at $105,004.25.

II. *DEFENDANTS' POSITION*

[47] The defendants' position is that the CHS disbursement should be allowed in its entirety as it was both reasonable and necessary in the circumstances to incur it. The defendants point first to paragraph 35 of ***Howael,*** where the following is stated:

> 35. Since affidavit evidence establishes that these fees have been paid, the remaining issues for determination are whether these reports "... were reasonably necessary for the conduct of the proceeding ..." and, if so, should the allowance for this disbursement equal the amount paid.

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[48] The defendants suggest that the assessment of reasonableness of retaining a certain expert is not to be considered with hindsight but, rather, at the time the expense was incurred. For this the defendants rely on ***MDS Inc. v. Factory Mutual Insurance Company***, 2021 ONCA 837, at paragraph 20 and ***Howael*** at paragraph 40.

[49] The defendants further suggest that of the factors set out in King's Bench Rule 57.01(1), the most important factors relating to expert reports are the following:

a) The amount claimed and the amount recovered in the proceedings;

b) The complexity of the proceedings; and

c) The importance of the issues.

For this principle see paragraphs 13 and 18 of ***Conversions by Vantasy***.

[50] In ***Conversions by Vantasy***, the major issue being considered was the amount charged by the defendants' expert, as it was significantly higher than that of the plaintiffs' expert. The court determined at paragraph 18 that the most important of the three relevant factors for the purposes of that assessment was the amount in issue in the litigation.

[51] Further, the defendants refer to ***Morton et al v. Asper et al***, [1991] M.J. No. 94, 72. Man. R. (2d) 184, in which the plaintiffs made similar arguments that the defendants' expert fees were unreasonably high, with the following being stated at page 194:

> …To retain experts in this day and age is an expensive undertaking. If it is reasonably necessary for a litigant to retain an expert and if the charge is reasonable, as I find to be the case here, our rules and tariffs of costs contemplate that the litigant should recover the charges, even if they are high in

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> amount. It is not, in my view, fair to categorize what was done by the experts here, as did counsel for the plaintiffs, as treating the litigation as a "portable pension plan". It is fair to note that the total of the amount claimed by the defendants Asper for the experts' charges amounts to only .138% of the value of the assets of the businesses in question, assuming an asset value of $300,000,000;

[52] The defendants say that a comparison of the fees of one expert to the other is not necessarily reasonable in the circumstances. They point to ***Albionex (Overseas) Ltd. v. ConAgra Ltd***., 2013 MBQB 310, wherein the court allowed the plaintiff's full expert fees despite being 3 times that charged by the opposing expert. The court stated at paragraph 52:

> 52 Dr. Hoseney provided a detailed breakdown of his fee. CWB has not shown why specific portions of Dr. Hoseney's fee should be disallowed. I find the fee charged by Dr. Hoseney to be reasonable and I would, therefore, allow Albionex to recover his entire fee.

[53] Finally, the defendants rely on jurisprudence to suggest that the role of an expert retained by a defendant is materially different than the expert retained by plaintiff, in that the defendants' expert is not only giving its own opinion on the matter, but is critiquing the opinion of the plaintiff's expert. The suggestion is that higher fees are to be expected from a defendant's expert. The defendants rely on ***Edmonton Kenworth Ltd. v. Edmonton Cast Iron Repair Ltd.***, 2001 ABQB 33, for this proposition.

[54] Aside from these principles arising from the case law, the defendants argue that one must consider the context in which the CHS fees were incurred. That is, this litigation did not arise out of events that arose in Manitoba alone. While the plaintiff is located in Manitoba, the defendants at all times resided in Toronto, Ontario and the other party involved in the events at issue (Wal-Mart) is located in the United States.

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Indeed, the plaintiff commenced litigation against Wal-Mart in Arkansas, United States, before commencing this litigation. In other words, despite the litigation being commenced in Manitoba, the underlying actors and activities were spread across North America.

[55] The defendants point out that once Grant Thornton completed its analysis and produced a report, the defendants were then defending a claim for almost $90 million. Notably, due to the bankruptcy of the defendant Magicuts Inc., this was a claim pursued against the defendants personally. Obviously a judgment against them for anything approaching that amount would mean financial ruin for the defendants. The defendants say that when compared to the judgment sought against them, the amount of the CHS fee is both justified and reasonable.

[56] In response to the argument that the court should reduce the CHS fee to match that of Grant Thornton, the defendants suggest that such an approach does not reflect Cohen not only having greater qualifications than James Smith, but CHS performing additional work not done by Grant Thornton. Whereas CHS is a consulting firm specializing in damages quantification, business valuation and forensic accounting, Grant Thornton is an accounting firm that provides litigation support services. Further, the defendants pointed out in their brief on costs the research performed by CHS went far beyond that performed by Grant Thornton, as did the analysis and calculations performed by CHS. Additionally, CHS provided expert advice over and above the written reports to assist the defendants and their counsel in the conduct of the proceeding.

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[57] Finally, the defendants remind the court that the costs awarded by the Court of Appeal in the costs decision were elevated costs. This was done because fraud was alleged against the defendants in the litigation but not proven. The defendants point to the following comment by the Court of Appeal in the costs decision at paragraphs 18 and 19:

> 18 We are of the view that, taking into account the relevant factors in r 57.01(1) of the *King's Bench Rules*, Man Reg 553/88, an order of elevated costs is in the interests of justice in this case. In particular, we highlight, as noted in our reasons in *MBCA 2023*, that Ultracuts' claim of fraud was unsuccessful (see *McIvor* at para 8), that it was made with little foundation and, given the sophistication of the purported victim, the argument that Wal-Mart relied on the defendants' representations was a significant overreach (see *Tregobov* at para 27). As well, the defendants have had to endure more than 22 years of repeated character assassination to defend a complicated claim seeking tens of millions of dollars in damages, which they were completely successful in defending.
>
> 19 In our view, one set of double tariff costs in favour of the defendants for the trial and related proceedings, and for the appeal, including this proceeding, is appropriate.

III. *Analysis and Decision*

[58] As noted by Hamilton J. (*ex officio*), as she then was, in ***Conversions by Vantasy,*** the most important of the three relevant factors for the purposes of the assessment of an expert fee is the amount at issue in the litigation. In this case, the maximum amount claimed by the plaintiff, as assessed by Grant Thornton, was nearly $90 million. There is no doubt that this amount claimed would put this litigation in the upper echelon of all litigation conducted in Manitoba. Such claims are not commonplace. Thus, in my view, the measurement of reasonableness of the CHS fee would take place with the knowledge that the amount claimed was $90 million. The amount paid to CHS by the defendants was roughly .55 percent of the amount the

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defendants would have to pay if the plaintiff was fully successful in the litigation. Based on that factor alone, the amount sought is not unreasonable.

[59] Defendants' counsel took the time to calculate the average hourly rate of the individuals at CHS who performed work and compared that with the average hourly rate of the experts in some of the Manitoba authorities referred to in this decision, then adjusting for inflation to arrive at a comparable hourly rate for that charged in those decisions. In my view, such calculations are not necessary for the purposes of my assessment.

[60] I have concluded that all steps taken by the defendants in relation to CHS were reasonable in the circumstances. CHS had specialized litigation advisory experience. CHS was located in the same city as the defendants. The defendants were facing a claim against them personally for $90 million and cannot be blamed for seeking out the best advice they could possibly find to defend such a claim. While I make no conclusion as to whether other experts were available in Manitoba to assist the defendants, with no evidence of such before me, I do not find that in today's day and age it is required that a party to Manitoba litigation retain a Manitoba expert to provide opinion evidence. When faced with a life-altering potential judgment of $90 million, I find that the borders of this province should not restrict a party's ability to seek out expert advice.

[61] This does not suggest, as argued by the plaintiff, that a defendant then has a blank cheque to expend resources for experts who are located in other provinces or countries and may charge rates that are higher than those in Manitoba. The tariff and the principles to be applied in considering costs are a check on such expenditures.

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[62] While the amount claimed is the most important factor for consideration in this decision, the other two factors that are relevant are the complexity of the proceeding and the importance of the issues. I would assess the level of both the complexity and the importance of the issues in this litigation as being high. As noted, this was lengthy and complex litigation with many contested motions, including summary judgment motions, and multiple appeals by the parties to the Court of Appeal. The complexity and importance of the issues also supports the reasonableness of the amount of this disbursement.

[63] In sum, I find the CHS fee to be both reasonable and necessary in the particular circumstances of this unique and complex litigation, such that I am allowing the CHS fee in the amount of $498,887.90, without any reduction based on the plaintiff's suggestion that the fee is excessive.

COMPUTERIZED LEGAL RESEARCH FOR $4,340.63

[64] The defendants claim computerized legal research disbursements, primarily through Westlaw and Quicklaw, in the amount of $4,340.63. These disbursements were incurred over the life of this litigation file between its commencement in 2001 and its conclusion in 2020. It is not contentious that the defendants have been invoiced for these disbursements. All invoices setting out the relevant dates of the disbursements are in evidence. The defendants suggest that these disbursements were reasonably necessary and required for the conduct of this complex litigation in accordance with section 1(n) of Tariff B of the Court of King's Bench Rules.

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[65] The plaintiff opposes the inclusion of this disbursement for two basic reasons. First, that there is no evidence that defendants' counsel could not have used free resources to perform legal research. Second, and based on authorities from other provinces, that computerized legal research should be considered part of the law firm's overhead in this day and age, and should not be allowed.

[66] Once again, I point out that the context for this discussion is litigation which proceeded over a 19 year period and included a claim against the defendants for almost $90 million. By the time the trial judgment issued, 187 documents had been filed on the court file. Numerous motions were filed and contested, including several for summary judgment, some of which were appealed to the Court of Appeal. The cause of action relied upon was not necessarily settled law for a number of years of the litigation. There is no doubt that counsel on both sides of this litigation conducted a significant amount of legal research over 19 years.

[67] The only Manitoba authority in which electronic research charges have been specifically considered is ***Albionex***. In that decision, Hanssen J. considered argument on the issue and concluded as follows at paragraph 70 to 72:

> 70 CWB cites several cases in support of its argument against Albionex recovering the cost of computer research (see ***Milsom v. Corporate Computers Inc.***, 2003 ABQB 609, [2003] 9 W.W.R. 269; ***Strandquist v. Coneco Equipment, a division of Rivtow Equipment Ltd.***, 2000 ABCA 138, [2000] A.J. No. 554 (QL); ***Phillip (Next Friend of) v. Whitecourt General Hospital***, 2005 ABQB 174, [2005] A.J. No. 640 (QL); ***Cliffton Management Corp. v. Paterson (N.M.) and Sons Ltd. et al.***, 2000 MBQB 226, 154 Man.R. (2d) 176). From these cases, it would appear that some courts have taken the position that the costs of computer research should already be built into lawyers' fees and is therefore not recoverable.

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> 71 I do not agree. Tariff B 1(n) allows for the payment of "any other disbursement reasonably necessary for the conduct of the proceeding". Given the complexity of this case and the realities of technology in today's modern world, computer research was reasonably necessary. Albionex is claiming $3,538.37 for computer research. Given the length of time this litigation spanned, I am satisfied this claim is reasonable.
>
> 72 I would, therefore, allow Albionex to recover the costs it claims for computer research.

[68] In ***Albionex***, it appeared that the litigation took place over a 24 year period and was complex litigation. ***Albionex*** has been considered in some decisions from other provinces. Some of the authorities, relied on by the plaintiff, suggest that electronic research disbursements should be considered as part of the law firm's overhead and not recoverable. Other authorities from several provinces come to the opposite conclusion and allow such disbursements as recoverable.

[69] With other provinces not being unanimous in how they deal with electronic research disbursements, and with the most recent and binding Manitoba authority concluding that they are recoverable in a lengthy and complex proceeding, it is my view that they are recoverable in this case. Until such time as there is a Manitoba authority concluding otherwise, I am bound by ***Albionex***. I find that in the particular circumstances of this lengthy and complex litigation, electronic research was reasonably necessary for the conduct of the proceeding, and the amount claimed over the 19 year life of this litigation is reasonable. I stress that the length and complexity of this litigation, and amount claimed, are overriding factors leading me to conclude the disbursement was reasonably necessary. Such may not be the case in litigation that is simpler, shorter and for a lesser amount.

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[70] I am therefore allowing the electronic research disbursement in the amount $4,340.63.

CONCLUSION

[71] The CHS disbursement is allowed in the reduced amount of $498,887.90.

[72] The computerized legal research disbursement is allowed in the amount of $4,340.63.

[73] Counsel may submit a certificate of assessment in Form 58C for my signature.

S. D. Berthaudin
Associate Judge

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