Court of King's Bench of Alberta

Citation: Distinct Real Estate USA 2, LP v Wazonek, 2025 ABKB 451

Date: 20250728
Docket: 2501 00473
Registry: Calgary

Between:

Distinct Real Estate USA 2, LP, Distinct Real Estate LP 2, 2304460 Ontario Inc., Alberta Capital Corporation, Distinct Real Estate 2, LP by 2304460 Ontario Inc., Distinct Real Estate USA 2, LP by its limited partner Distinct Real Estate LP 2 by its limited partner Alberta Capital Corporation

Plaintiffs/Applicants/Cross-Respondents

- and -

Phillip Wazonek, Distinctive Realty Services Ltd., and 1508632 Alberta Ltd.

Defendants/Respondents/Cross-Applicants

Costs Decision
of the
Honourable Justice M.A. Marion

I. Introduction

[1] On May 6, 2025, in ***Distinct Real Estate USA 2 v Wazonek***, 2025 ABKB 275 (**Reasons**), I decided the Plaintiffs/Applicants'[1] Application and the Defendants/Cross-Applicants' Cross-Application in this matter pertaining to the Crane Manor Property, a multi-residential property in Memphis, Tennessee.

[2] Pursuant to para 130 of the Reasons, the parties were unable to resolve costs of the Application and Cross-Application and I directed a procedure for determining costs. I have since

[1] Capitalized terms used in this decision have the meaning set out in the Reasons unless otherwise indicated.

been provided costs submissions and reply submissions by both sides. These are my reasons for my costs decision in respect of the Application and Cross-Application.

[3] For the reasons set out below, I find that the Defendants/Cross Applicants were substantially successful and are entitled to one set of costs in the lump sum amount of C$40,000 (plus GST), together with disbursements (plus applicable GST), payable forthwith and in any event of the cause, from the Applicants/Cross-Applicants, jointly and severally.

II. Background

[4] The Plaintiffs/Applicants sought an order: (1) declaring that Crane Manor US LP can bring this action in its own name or through one of the other Applicants; and (2) an attachment order under the *Civil Enforcement Act*, RSA 2000, C C-15 (*CEA*) as against the Defendant Wazonek.

[5] The Defendants/Cross-Applicants sought an order: (1) directing the Clerk of the Court to pay their counsel the Court Funds (C$145,000) which had been paid into court under an earlier interim without prejudice attachment order; (2) dismissing the Plaintiffs' Application; and (3) setting aside the statement of claim.

[6] At para 8 of the Reasons, I summarized my decision, as follows:

(a) the claim by Crane Manor US LP in its own name is struck, without prejudice to any future action which may be brought by or through its general partner;

(b) the claims by Canadian Crane Manor LP, 230 Ontario and ACC, purportedly brought in the name of Crane Manor US LP, are struck, without prejudice to any future derivative action brought by them on behalf of Crane Manor US LP as may be authorized by an appropriate Delaware court;

(c) the direct claim by Canadian Crane Manor LP against the Defendants is declared not to have been properly brought by its general partner, but is not struck or set aside at this time, to allow an application seeking permission to commence a derivative action in its name to be filed within one month (failing which it is struck without further order);

(d) the direct claims by 230 Ontario and ACC against the Defendants are not struck or set aside;

(e) the Application for an attachment order against Wazonek is dismissed; and

(f) the Court Clerk is directed to pay the Court Funds to the Defendants' legal counsel forthwith.

III. Positions of the Parties

A. Plaintiffs/Applicants

[7] The Plaintiffs/Applicants' overall position is that costs should be determined with reference to Column 3 of Schedule C, but calculated as a lump sum. They acknowledged that elevated costs

in the amount of a multiple of 1.5 or 2 times Column 3 of Schedule C may be appropriate in light of the decision relating to lack of standing and striking of claims of Crane Manor US LP, but also argue that the Cross-Application was only partially successful and that costs for the Cross-Application should be reduced. In their response materials, the Plaintiffs/Applicants suggest a 2 to 2.5X multiplier is appropriate. The Plaintiffs/Applicants submitted a draft bill of costs reflecting $9,922.50 for total legal fees (before disbursements, other costs and GST). They did not submit their proposed actual reasonable costs incurred despite my direction to do so, presumably based on their submission that time spent by counsel was not directly or only referable to these proceedings.

B. Defendants/Cross-Applicants

[8] The Defendants/Cross-Applicants parse the Application/Cross-Application into what they describe as six discrete applications, at least four of which they argue were substantive. They argue that Column 4 of Schedule C is appropriate, increased by a 2-3 times multiplier and 1.2 times inflationary factor. The Defendants/Cross-Applicants' draft bill of costs (before disbursements, other costs and GST) ranged from $19,035 (Column 3) to $23,060 (Column 4), before multipliers and inflation. After considering multipliers, inflation and pre-application offers, they argue the range could be as high as $110,688. The Defendants/Cross-Applicants provided their actual costs of $112,856.87 (inclusive of $3,498.24 in disbursements and $5,323.13 in GST, and net of a $65,000 counsel discount). The Defendants/Cross-Applicants argue that a fair cost award should be in their favour in the range of a lump sum amount of $75,000, payable by ACC and 230 Ontario.

IV. Issue

[9] The issue is an appropriate cost award in respect of the Application and the Cross-Application.

V. Analysis

A. Costs Principles

[10] I have recently summarized general costs principles in ***Uhuegbulem v Balbi***, 2025 ABKB 318 at paras 58-77. I incorporate those principles by reference and do not reproduce them here.

B. Degree of Success

[11] The Application and Cross-Application, while multi-faceted, at their core raised two issues: first, did the Plaintiffs/Applicants properly have standing to make the claims made? and, second, should an attachment order be granted against Wazonek?

[12] With respect to the first core issue, I recognize that the direct claims of ACC and 230 Ontario were not struck, and the potential for a derivative action in the name of Canadian Crane Manor LP remains open (and will be the subject of an application before me in August 2025). However, the core claims sought to be the subject of this action were the claims of Crane Manor US LP, and those were struck because they were not filed by an appropriately authorized entity or under an appropriately approved derivative action. I find that, in the circumstances, the Defendants/Cross-Applicants were substantially successful on the first core issue. This is

consistent with the Plaintiffs/Applicants' costs argument, which confirms that they need to pursue those claims elsewhere. I have considered the fact that some claims were not struck despite the application to do so as a matter in determining the quantum of costs.

[13] Further, the application for an attachment order, while initially granted on a limited record against Wazonek, was unsuccessful in its entirety following a more complete evidentiary process. The Court Funds were ordered returned. I find that the Defendants/Cross-Applicants were substantially successful on the second core issue.

[14] Accordingly, I find that the Defendants/Cross-Applicants were substantially successful on both the Application and the Cross-Application. They are presumptively entitled to costs and I am not satisfied (and the Plaintiffs/Applicants do not argue) that it is appropriate to deviate from the presumptive rule in this case.

C. Rule 10.33 Factors

[15] I have considered the rule 10.33 factors, but only specifically address some of them below.

1. Result and Degree of Success / Amount Claimed / Amount Recovered

[16] The Plaintiffs/Applicants did not achieve the pre-judgment attachment of Wazonek's assets as applied-for. As noted, the Defendants/Cross-Applicants enjoyed substantial success in the Application/Cross-Application. However, the Defendants/Cross-Applicants did not enjoy total success, as their attempt to have the entire statement of claim set aside was unsuccessful; I found that Canadian Crane Manor LP has a reasonable likelihood it will establish a claim against Wazonek personally: Reasons at paras 91-92.

2. Importance of the Issues

[17] Both sides assert the importance of the issues to all parties. The importance is amplified given the allegations of fraud made against Wazonek along with the associated potential for reputational damage.

3. Complexity of the Action/Application/Cross-Application

[18] The action is complex given the legal and accounting issues it engages. The Plaintiffs/Applicants ill-founded choice to commence the action in Alberta in the manner they did, and without appropriate authorizations or approvals in place through Delaware limited partnership procedures added significant legal complexity to the matter. I raised the standing issue at the very first *ex parte* attendance and my concerns were never adequately addressed: Reasons at para 46.

4. Conduct that Shortened or Lengthened the Action/Application/Cross-Application

[19] I raised concerns about the Plaintiffs/Applicants' approach to the Application in my Reasons, at para 122. Those factors, in my view, lengthened the process and caused delay and unnecessary work and rework, which made the record confusing and difficult to follow. Further, the Plaintiffs/Applicants never adequately explained why they waited so long to file the Application if they were concerned that Wazonek was dissipating assets in Alberta.

[20] On the other hand, the Defendants/Cross-Applicants' lack of reasonable record-keeping also contributed to the confusion and the time the parties had to spend creating affidavits and conducting questioning on those affidavits.

[21] Overall, counsel and their clients addressed these complex matters expeditiously and efficiently. Compressed timelines precipitated by the asserted urgent nature of the relief sought often increases legal costs.

5. Unnecessary, Improper or Mistaken Proceedings

[22] The Plaintiffs/Applicants assert that it was necessary for them to proceed in the manner they did because the "money was gone and there was no record showing it was used for legitimate purposes". While I have found that Wazonek proceeded to close the Crane Manor Property sale without proper authorization, which raises a serious concern about his conduct, I disagree that the Plaintiffs/Applicants had to proceed in the manner they did. If the only concern had been to freeze dissipation of assets, they could have done so much sooner, and could have done so by proceeding first with appropriate Delaware limited partnership authority or court approval. An application could have been made for an attachment order in Alberta even if the Plaintiffs/Applicants had proceeded substantively before a foreign tribunal: *CEA*, section 17(1)(b). Doing so would have avoided the complexity caused by the standing issue.

6. Irregularities / Non-Compliance with *Rules* / Misconduct

[23] Other than the problems with the Berger affidavits previously noted in the Reasons, there was no other material non-compliance or litigation misconduct that would warrant elevation or reduction of costs entitlement.

7. Settlement Offers

[24] The Defendants/Cross-Applicants argue that they made an offer on January 30, 2025, after the Court Funds were paid into Court, which requires consideration. In it, they indicated their intent that the Court Funds "shall remain in place until this matter is determined, whether by trial or otherwise, or until further order of the Court". The letter also indicated that it was their position that the payment of the Court Funds into Court discharged the provisions of the Interim Order dealing with the attachment order application and hearing.

[25] In my view, whether this could be considered a settlement offer is debatable, although that appears to be how it was interpreted by the Plaintiffs/Applicants based on their cost submissions. In any event, there was no obvious way for the Plaintiffs/Applicants to "accept" the offer to "settle" the issue of whether the Court Funds would remain in Court pending final determination of the merits of the action and/or agreement of the parties. The January 30 letter left it open for the Court Funds to be paid back out by a "further order of the Court", which presumably could be instigated by the Defendants/Cross-Applicants at any time. Even if the January 30 letter was, or is assumed to be, an offer, as it turns out it was only in effect for a very short time as the Cross-Application was filed only a few days later. The January 30 letter was provided before the Plaintiffs/Applicants had seen the Wazonek supplemental affidavit which provided a more detailed response to the allegations against him (some of which for the first time). Further, on February 5, 2025, the Plaintiffs/Applicants made an offer on similar terms to the Defendants/Cross-Applicants,

indicating that they were prepared to forego cross-examination and the return hearing so long as the Court Funds remained in place until the matter is determined or further order of the Court. The Defendants/Cross-Applicants continued with the Cross-Application.

[26] In the circumstances, while a relevant factor, I do not find that the January 30 letter was clear enough, or open long enough, to be a settlement offer justifying double or enhanced costs as argued by the Defendants/Cross-Applicants.

D. Schedule C Column, Multiplier, Inflation and Bill of Costs

[27] Based on my review of the statement of claim, I find that Column 3 of Schedule C of the *Rules* is the appropriate column.

[28] I note that the Defendants/Cross-Applicants have included four sets of costs under item 8(1) of Schedule C, to reflect their position that there were several substantive applications within the Application/Cross-Application. They also assert a multiplier is appropriate. In my view, their suggested methodology results in at least some double counting.

[29] It is not uncommon for first-instance judges to apply a multiplier for a variety of reasons, such as the amount of the claim, complexity of the claim, or litigation misconduct: ***Weatherford Canada Partnership v Artemis Kautschuk und Kunstoff-Technik GmbH***, 2019 ABCA 92 at para 7, citing ***RVB Managements Ltd v Rocky Mountain House (Town)***, 2015 ABCA 304 at para 13; ***Weatherford Canada Partnership v Addie***, 2018 ABQB 571, citing ***Hill v Hill***, 2013 ABCA 313.

[30] In my view, the Application/Cross-Application were legally complex with respect to the standing issue. As noted above, proceeding as the Plaintiffs/Applicants did was ill-founded and appeared to be an attempt to short-circuit the appropriate avenue for dealing with litigation on behalf of a foreign limited partnership.

[31] The Application/Cross-Application were factually complex given the accounting issues engaged, the lack of clear record keeping, and Wazonek's evolving information about the Memphis Transaction and his assets.

[32] Ultimately, I find that a 3X multiplier is appropriate in this case. This adequately accounts for the different substantive issues raised in the Application and Cross-Application, the complexity of the matter, and all other factors.

[33] The Defendants/Cross-Applicants argue an inflationary adjustment to Schedule C costs is appropriate in this case. Some recent decisions of this Court have applied a 25% inflationary factor given that the most recent amendment to Schedule C, in March 2020, was based on recommendations from 2014: ***Grimes v Governors of the University of Lethbridge***, 2023 ABKB 432 at paras 88-89; ***Catterall v Condominium Plan No 752 1527 (Park Towers)***, 2024 ABKB 452 at para 34. I find a 25% inflationary increase is appropriate in this case. I disagree with the Plaintiffs/Applicants that the multiplier adequately accounts for inflation in this case. Further, the Plaintiffs/Applicants did not provide any authority to support its argument that an inflationary factor should be based on, or with reference to, the prescribed rate under the *Judgment Interest Act*, RSA 2000 c J-1 rate.

[34] I disagree with the Defendants/Cross-Applicants inclusion of items 1(1) and 5(1) in their draft bill of costs, since they were not required to file pleadings or conduct questioning under part 5 of the *Rules*. In my view, the time spent by the Defendants/Cross-Applicants preparing affidavits and preparing for questioning on affidavits is accounted for in the multiplier in this case.

[35] I find the appropriate Schedule C bill of costs (before disbursements, other costs and GST) is as follows:

Item No.	Item	Amount Column 3)	2.5 Multiplier
6(2)	Ex parte appearance	$ 135	$ 405
7(1)	Contested Adjournment/ Interim Order	$ 1,350	$ 4,050
5	Questioning		
	Berger - 1st 1/2 day	$ 1,350	$ 4,050
5(3)	Berger - Additional 1/2 day	$ 1,350	$ 4,050
	Wazonek - 1st 1/2 day	$ 1,350	$ 4,050
	Wazonek - Additional 1/2 day	$ 1,350	$ 4,050
8(1)	Contested Application - with Brief	$ 2,025	$ 6,075
8(1)	Contested Cross-Application - with Brief	$ 2,025	$ 6,075
			$ -
	Sub-Total		$ 32,805
	Inflation Adjustment (1.25)		$ 8,201
	TOTAL		**$ 41,006**

E. Actual Costs Incurred

[36] I have considered the actual costs incurred by the Defendants/Cross-Applicants, in the amount of $104,035.50 (before disbursements and GST). Under the rule of thumb of 40-50% recovery, costs would be in the range of $41,614.20 and $52,017.75 (before disbursements and GST). However, as noted in ***Uhuegbulem***, at para 76:

> [76] A rule of thumb of 40 to 50% recovery of a party's solicitor-client costs must consider both the payor's and the recipient's perspective - the quantum should reflect: (1) the costs that the cost-entitled recipient, as a reasonable client, might be required to pay for the services rendered (as informed by a detailed analysis of all the factors that go into assessing solicitor's fees under rules 10.2 and 10.33); and (2) whether that quantum represents an amount that the losing party in the litigation should reasonably be expected to pay to the winning party (as informed by appropriate costs using Schedule C as a rough measure of how much should have been incurred): [***McAllister v Calgary (City)***, 2021 ABCA 25] at paras 41-43, 46, 48; [***Barkwell v McDonald***, 2023 ABCA 87] at paras 57-60; ***Barkwell v McDonald***, 2023 ABCA 183 at para 74 [***Barkwell CA #2***], leave to SCC refused 2023 CanLII 100620; [***Serinus Energy PLC v SysGen Solutions Group Ltd***, 2024 ABKB 123] at para 26; [***Ford v New Democrats of Canada Association***, 2024

> ABCA 395] at para 21; ***Sutherland v Sutherland***, 2023 ABCA 185 at para 4; ***Sunridge Nissan Inc v McRuer***, 2023 ABCA 128 at para 57, leave to SCC refused 2023 CanLII 122411; ***Petropoulos v Petropoulos***, 2023 ABCA 193 at para 18. Parties should always provide a draft bill of costs based on Schedule C regardless of the costs claimed: ***Barkwell*** at para 58.

[37] With respect to (1) as referenced in the above paragraph, I have considered the factors in rule 10.2 and 10.33, including, in particular, Wazonek's circumstances, including allegations against him of fraud and likely dissipation of assets. Further, his counsel significantly discounted the fees incurred.

[38] With respect to (2), the rule of thumb range of 40-50% generates a fee amount that exceeds the reasonable amount as generated under my detailed Schedule C analysis above.

[39] The Plaintiffs/Applicants argue that the Defendants/Cross-Applicants have not provided sufficient detail of their actual reasonable costs incurred. A party seeking a percentage of their solicitor-client costs incurred must provide sufficient substantiation of the costs sought, including so the other party can challenge whether the costs are reasonable and proper; this is often done by producing their legal invoices: ***420 Investments Ltd v Tilray Inc***, 2024 ABKB 480 at para 18; ***VLM v Dominey Estate***, 2023 ABCA 382 at para 13.

[40] I do not have details supporting the Defendants/Cross-Applicants actual costs incurred. However, the Plaintiffs/Applicants, or their counsel, did not break down their actual costs incurred in relation to the Application/Cross-Application, and so I do not have the benefit of their own proposed reasonable actual costs for comparison purposes. Given my clear direction to provide me a "summary of their proposed reasonable and proper costs that the party incurred", I draw an adverse inference against the Plaintiffs/Applicants in this regard.

[41] While I am not ordering costs in favour of the Defendants/Cross-Applicants based on a percentage of their actual costs incurred, in the circumstances I find the Defendants/Cross-Applicants' actual costs incurred, net of the significant given by counsel discount, to be useful as a rough check against an appropriate lump sum.

F. Appropriate Costs Award

[42] I have also considered the overriding consideration of proportionality between the amount of the costs claimed and the issues and amounts involved in the litigation: ***Kantor*** at para 13; ***Barkwell*** at para 57; ***Sutherland*** at para 4; ***Petropoulos*** at para 18; ***Serinus*** at para 27. In my view, the amounts of costs incurred and claimed here, whether calculated under Schedule C or under the 40-50% rule of thumb, are disproportionate to amounts involved in this litigation.

[43] I agree with the parties that it is appropriate to award a lump sum cost award for legal fees.

[44] After considering all the factors, I find that a proportionate, reasonable and proper costs award for legal fees is a lump sum award in the amount of C$40,000 (before disbursements and GST) in favour of the Defendants/Cross-Applicants, payable forthwith and in any event of the cause by the Plaintiffs/Applicants (jointly and severally).

[45] I do not have details of the disbursements claimed by the Defendants/Cross-Applicants. Rather than request those, I order that the Defendants/Cross-Applicants are also entitled to reasonable disbursements, plus applicable GST, in an amount agreed by the parties (which amount may be inserted into the formal order arising from these reasons) or, if not agreed, as reviewed or assessed by a review/assessment officer. This additional amount shall also payable by the Plaintiffs/Applicants (jointly and severally) forthwith upon agreement or assessment, and in any event of the cause.

VI. Conclusion

[46] I make the cost award above. Neither party was substantially successful in their position on costs and there shall be no costs of the process to determine costs.

Written submissions received on June 30, 2025 and July 18, 2025.
Dated at the City of Calgary, Alberta this 28th day of July 2025.

M.A. Marion
J.C.K.B.A.

Appearances:

Amy M. Cooper
for the Plaintiffs/Applicants

Sean S. Smyth, KC
for the Defendants/Cross-Applicants