

Court of King's Bench of Alberta

**Citation: Tempo Alberta Electrical Contractors Co. Ltd v Man-Shield Construction Inc,
2023 ABKB 575**

Date: 20231012
Docket: 1703 19697
Registry: Edmonton

Between:

**Tempo Alberta Electrical Contractors Co. Ltd., Tempo Alberta Contractors Co. Ltd.;
Cob, Tempo Electrical Contractors Co. Ltd., Tempo Alberta Electrical Contractors Co.
Ltd., Tempo Alberta Electrical Contractors Co. Ltd.; Cob, Shepherd's Garden Inc.,
Condo Corp. 1623512, Shepard's Care Foundation**

Plaintiffs (Respondents)

- and -

**Man-Shield (Alta) Construction Inc., Man-Shield (Alta) Construction Inc.; Cob, Man-
Shield (Alta) Construction, Shepherd's Garden Inc., Condo Corp. 1623512, Shepard's Care
Foundation, Man-Shield (Alta) Construction Inc., Man-Shield (Alta) Construction Inc.;
Op., Man-Shield (Alta) Construction, Shepherd's Garden Inc., Condo Corp. 1623512,
Man-Shield (Alta) Construction Inc., Man-Shield (Alta) Construction Inc.; Cob,
Man-Shield (Alta) Construction**

Defendants (Appellants)

**Endorsement on Costs
of the
Honourable Justice Susan L. Bercov**

I. Introduction

[1] On June 30, 2023, I heard an appeal by Man-Shield (Alta) Construction (Man-Shield), from a decision of an Applications Judge, granting Tempo Alberta Electrical Contractors Co. Ltd. (Tempo) partial summary judgment of \$678,261.00.

[2] The Appeal was scheduled for earlier in the year. However, due to illness by the Court, the Appeal was rescheduled.

[3] On July 26, 2023, I issued a written decision dismissing the Appeal: 2023 ABKB 444 (“Judgment”). I gave the parties leave to make cost submissions if agreement on costs could not be reached.

[4] The parties are not able to agree on costs. Both parties provided written submissions.

[5] Tempo seeks a cost award of \$71,953.86. This amount represents 50% of the fees Tempo incurred in obtaining the Judgment (\$61,331.03), plus disbursements (\$10,622.83).

[6] Man-Shield does not dispute that, as the successful party, Tempo is entitled to costs for the Appeal. Man-Shield disagrees that in the circumstances of this case, costs should be based on a percentage of Tempo’s solicitor-client costs. Man-Shield argues that in this case costs should be based on Schedule C of the *Alberta Rules of Court (Rules)*. Using Schedule C, Man-Shield argues that costs of \$4,425.00, plus reasonable disbursements is appropriate.

[7] I must decide the following issues:

- a. Is Tempo entitled to recover costs based on a percentage of the fees Tempo incurred in obtaining the Judgment?
- b. If not, what is a reasonable and proper costs award in the circumstances of this case?

II. Should Costs be Awarded as a Percentage of Legal Fees?

A. Tempo’s Position

[8] Tempo’s position is that the reasonable and proper costs it incurred in obtaining the Judgment against Man-Shield is \$61,331.03, plus disbursements of \$10,622.83, for a total amount of \$71,953.86. This represents 50% of Tempo’s solicitor-client costs incurred in obtaining the Judgment. Tempo provides the following supporting documents:

- a. A draft Bill of Costs in the sum of \$30,977.08 (this includes disbursements of \$10,622.83 and GST) representing the costs Tempo is entitled to in accordance with Schedule C of the *Alberta Rules of Court (Rules)*;
- b. A draft Bill of Costs in the sum of \$133,284.88 representing the total sum of solicitor-client costs, disbursements, and GST incurred by Tempo in obtaining the Judgment; and
- c. All of the Statements of Account rendered to Tempo from legal counsel from the start of the action up to the date of the Judgment totalling \$222,091.87.

[9] Tempo notes that if Schedule C is used to determine costs, the total amount that Tempo would be entitled to is \$30,977.08. This represents only 23% of the total solicitor-client costs that Tempo incurred in obtaining the Judgment.

[10] Relying on *McAllister v Calgary (City)*, 2021 ABCA 25, Tempo argues that reasonable and proper costs should be based on 50% of Tempo's solicitor-client costs for the following reasons:

- a. The Action was complex, given that 1,304 pages of documentary evidence was adduced, and questioning occurred in relation to this evidence.
- b. Tempo attempted to settle by issuing offers that were rejected by Man-Shield.
- c. The Action was delayed, and costs were increased because Man-Shield cancelled the mediation after Tempo had already prepared a Mediation Brief.
- d. Man-Shield had the use of cash since the Lien Bond Order which has encouraged Man-Shield not to settle.
- e. Man-Shield did not provide any evidence to contradict Tempo's evidence in relation to the change orders. Man-Shield's refusal to admit that \$122,682.12 was owed to Tempo in relation to the change orders weighs in favour of granting costs beyond Schedule C.
- f. Man-Shield's lack of evidence in relation to its claim for damages due to delays.
- g. Man-Shield's stay application was another mechanism by which Man-Shield has delayed paying Tempo what Man-Shield owes.

B. Man-Shield's Position

[11] Man-Shield disagrees that Tempo's costs should be determined based on a percentage of solicitor-client costs. Man-Shield argues that Schedule C costs with a multiplier of 1.5 is reasonable and proper for the following reasons:

- a. Tempo is claiming costs for services relating to the litigation as a whole and not just the Appeal of the Applications Judge's decision.
- b. Tempo is claiming costs for steps taken where there are already existing cost orders. This includes:
 - (i) The Summary Judgment Application before the Applications Judge when costs of that application was awarded based on Column 4 of Schedule C.
 - (ii) Man-Shield's Stay Application when the parties were ordered to bear their own costs of the Stay Application.
 - (iii) The Consent Order relating to Man-Shield's Application for permission to file the appeal and setting timelines states that no costs are awarded for that Application.
- c. Tempo is claiming costs relating to the hearing that was unexpectedly postponed by the Court. However, in Tempo's Reply Submissions, Tempo agrees to remove these costs.
- d. The circumstances Tempo relies on to support a percentage of solicitor-client costs do not justify the award.

C. Analysis

[12] Tempo is entitled to costs of the Appeal of the Applications Judge's decision to grant partial summary judgment. I must determine what are Tempo's reasonable and proper costs, considering all factors, including those set out in *Rule* 10.33. *McAllister* confirms that I have a range of options to use in determining costs. I can award costs based on a percentage of legal expenses, or under Schedule C, or a modification of Schedule C, or some other alternative.

[13] The key message from *McAllister* is that Schedule C based costs is only one of several options for determining reasonable and proper costs. In determining how to best assess reasonable and proper costs, I must consider all the circumstances in each individual case.

[14] I have significant concerns with Tempo's position. In my view, for the reasons that follow, Tempo's claim of \$71,953.86 is not a reasonable and proper costs award.

(1) Accounts Submitted

[15] In *Barkwell v McDonald*, 2023 ABCA 183, the Court of Appeal made it clear that a party seeking costs, based on a percentage of its legal bill, must justify the request. The right to costs as a percentage of solicitor-client costs must be based on what reasonably should have been incurred, and not on an actual legal bill. The Court should consider hourly rates, whether work was done by lawyers of appropriate seniority, the number of counsel involved, and other factors.

[16] The accounts that Tempo submitted do not contain the details I require to assess whether the accounts rendered are what reasonably should have been incurred. In the absence of this information, I cannot determine whether the accounts are what reasonably should have been incurred. While I have discretion to send the matter to an Assessment Officer to determine this issue, I decline to do so because of the other concerns I have.

(2) Tempo's Claim Includes Matters Other Than the Appeal

[17] An important consideration in this case is that the Summary Judgment Decision did not finally resolve the litigation. Tempo was successful in obtaining a partial summary judgment for amounts it claimed were owed for work Tempo performed. The Statement of Claim sought damages for both unpaid work that Tempo performed and damages for delay Tempo alleges were caused by Man-Shield. Man-Shield's counterclaim is for delay damages that Man-Shield alleges were caused by Tempo.

[18] Both parties agreed before the Applications Judge, and before me, that Tempo's application for partial summary judgment did not include the damages Tempo sought for delay, or Man-Shield's damages it seeks for delay. Both parties agreed that a trial is necessary to determine these issues.

[19] In the accounts Tempo submitted in support of its claim, Tempo is seeking to recover for services rendered in the litigation generally. Some, but not all, examples of this include:

- (i) Reviewing Man-Shield's Counterclaim and drafting a Statement of Defence to Counterclaim.
- (ii) Amendments to the Statement of Claim.
- (iii) Drafting an Affidavit of Records.
- (iv) Services performed relating to the mediation.

- (v) Services performed relating to offers.
- (vi) Meetings and telephone calls with clients, with no indication of the purpose for the meetings or telephone calls

[20] Tempo's claim assumes that it will be the successful party at the end of the Action. Many of the services Tempo includes are services relating to both the claim for unpaid work and the claim for damages due to delay. At this time, it is not known who will be successful when both Tempo's claim for delay damages and Man-Shield's counterclaim for delay damages proceeds to trial.

[21] Tempo has not provided any breakdown of what services relate specifically to the claim for unpaid work, as opposed to the claim for delay damages. It is not possible from the material provided to determine this.

[22] In *McAllister*, the Court of Appeal at para 64 provides the following guidance with respect to costs at the interlocutory stage:

However, we emphasize, once again, that this was a case involving an almost completed piece of protracted litigation, which included a trial and the many steps required to bring the matter to trial. The issue of indemnification becomes a more important consideration in assessing costs at the end of a lawsuit than it does at each and every step of the way. At the interlocutory stage, it is often not clear who will ultimately be entitled to some level of indemnification.

[23] As it is not clear at this stage who will be successful in recovering damages due to delay, I conclude that it is not appropriate to award costs for services relating, entirely or in part, to the parties' claims for delay damages.

(3) Offers

[24] Tempo relies on offers exchanged between the parties. Tempo does not seek double costs as a formal offer, but argues that I should consider that Man-Shield should have accepted the offers made by Tempo.

[25] The difficulty with considering the offers in assessing costs is that the offers exchanged were to settle the entire Action, not just Tempo's claim for unpaid work. Therefore, without knowing the result of the claims for delay damages, it is not possible to fairly consider whether Man-Shield should have accepted the offers.

(4) Mediation

[26] I disagree with Tempo that the cancelled mediation occurred in circumstances that justify Tempo's claim. A mediation was scheduled for December 10, 2018. On November 7, 2018, Man-Shield advised that its representative was required to be out of town on the scheduled date. Man-Shield offered alternate dates, but the mediator could not accommodate those dates. Tempo then insisted on questioning Man-Shield's representative on his Affidavit before the mediation. Man-Shield's position was that as the mediation was intended to avoid costs and steps in the litigation, if Tempo insisted on proceeding with the questioning, the mediation would not proceed.

[27] There is no indication of why questioning could not wait until after the mediation was rescheduled in January 2019. Tempo's representative then indicated there was no point to a

mediation unless Man-Shield would agree to a settlement exceeding \$800,000.00. In these circumstances, I am not persuaded that the cancelled mediation can be considered a delay tactic or other inappropriate conduct that should be considered in determining costs.

(5) Costs for Steps Already Dealt With

[28] Tempo is seeking costs for services performed relating to the Application before the Applications Judge, the Stay Application, and the Order allowing the filing of Man-Shield's Appeal. Man-Shield argues that this is double dipping, because the costs for these services are dealt with in the applicable Orders.

[29] Tempo disagrees that the costs it seeks are duplicative. Tempo argues that because Man-Shield appealed the decision of the Applications Judge, and because the appeal is a hearing *de novo*, I have jurisdiction to increase the costs award of the Applications Judge.

[30] Assuming, without deciding, that I do have jurisdiction to grant costs for the initial Summary Judgment Application, the Stay Application, and the Order for filing the Appeal in excess of the amounts already ordered, I decline to do so. It is not possible from the information Tempo provides to determine the cost of legal services Tempo paid related to those services. In addition, Tempo's Application for Summary Judgment filed on February 14, 2018, was for the full amount of its claim, in the sum of \$1,884,740.00. After Man-Shield filed an Affidavit, the parties were questioned on their affidavits, and answers to undertakings provided. On May 6, 2019, Tempo advised Man-Shield that, in relation to the Summary Judgment Application, it would only be seeking partial summary judgment in the amount of \$678,261.00. A reasonable inference is that some of the legal services provided relating to the Summary Judgment were for issues that Tempo did not proceed on and are still to be determined. It is not possible, from the information, to determine the cost of legal services relating to the issues Tempo did not proceed with in its partial summary judgment application.

[31] In summary, for the reasons expressed above, I conclude that in the circumstances of this case, it is not appropriate to determine reasonable and proper costs based on a percentage of solicitor-client accounts.

III. What Are the Reasonable and Proper Costs in this Case?

[32] Tempo submitted a Bill of Costs using Schedule C in the sum of \$30,977.08, including disbursements and GST. I agree with Man-Shield that this Bill of Costs is not appropriate because it includes steps not directly related to the Summary Judgment Appeal, such as pleadings and Affidavit of Records. It also includes steps that Tempo was reimbursed for under the previous Schedule C Order of the Applications Judge

[33] Man-Shield's position is that I should grant Tempo costs of the Appeal only on the basis of Column 4 of Schedule C multiplied by 1.25, for a total of \$4,425.00, plus reasonable disbursements. Man-Shield argues that the litigation was not complex. While the volume of material may have increased the time required to argue the Appeal, this is dealt with by the additional half-day item for costs for an application under Schedule C. There was no new evidence or questioning required.

[34] I disagree with Man-Shield that an award of costs of \$4,425.00 is a reasonable and proper costs award because of the way Man-Shield defended the Summary Judgment Application.

[35] The *Rules* place an obligation on all parties to civil disputes to identify the real issues in dispute and facilitate the quickest means of resolving the dispute at the least expense. I may consider a party's failure to comply with this obligation in determining costs: *1808882 Alberta Ltd. v Moderno Ventures Ltd.*, 2018 ABQB 1000.

[36] Tempo argues that, in several different ways, Man-Shield's conduct throughout has been designed to delay Tempo from recovering what is properly owed. Man-Shield's cancelling the mediation, using the cash since the Lien Bond Order, failing to provide evidence to contradict Tempo's evidence or support Man-Shield's claim for delay damages are all conduct that Man-Shield argues should be considered in determining costs. I disagree with Tempo that this conduct justifies a greater cost award.

[37] However, I do agree that Man-Shield did not comply with the *Rules* in the way it presented its evidence. The Affidavit Man-Shield filed in opposition to the Application attached over 500 pages of invoices, meeting minutes, and other documents. No attempt was made to organize, classify, or link the documents to the issues in dispute. Many of the documents did not support any issue in dispute. Essentially, it was a document dump on Tempo and the Court. As a result, both Tempo and the Court needed to wade through volumes of documents to determine whether there was any evidence that defeated Tempo's claim or supported Man-Shield's alleged defences. A reasonable inference is that this was done to obfuscate, rather than clarify the issues. This does not comply with the *Rules*. A reasonable inference is that Tempo incurred significantly more costs to review this material and draft a brief that was organized and responsive to the issues than the amounts allowed for under Schedule C multiplied by 1.5

[38] Considering all relevant factors, in the circumstances of this case, a lump sum cost award is appropriate. Given the additional work required to prepare for and argue the Appeal because of the way Man-Shield presented its evidence, I conclude that Tempo is entitled to a lump sum cost award of \$10,000.00. This includes all disbursements and GST.

Susan L. Bercov
J.C.K.B.A.

Appearances:

Kevin Sean Burron
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for the Appellants

Jose Antonio Delgado
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for the Respondents