Action No.: 1501-05020
E-File No.: CVQ15JANUS1
Appeal No.: _____

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF CALGARY

BETWEEN:

JANUS CAPITAL MEDITERRANEO SRL,
RAPID HEAVY OIL RECOVERY INC.,
RHOR BARBADOS INC.,
JANUS CAPITAL INC. and
RESILIENT SCIENCES INC.

Plaintiffs

and

PETRO MOTION INC.,
PETRO MOTION INTERNATIONAL LTD. also known as
PETRO MOTION INTERNATIONAL INC.,
PETROLEUM FIELD LABORATORIES INC. et al

Defendants

P R O C E E D I N G S

Calgary, Alberta
November 25, 2015

Transcript Management Services, Calgary
Suite 1901-N, 601-5th Street SW
Calgary, Alberta T2P 5P7
Phone: (403) 297-7392 Fax: (403) 297-7034

TABLE OF CONTENTS

Proceedings taken in the Court of Queen's Bench of Alberta, Calgary Courts Centre, Calgary, Alberta

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November 25, 2015	Afternoon Session
Master Robertson, Q.C.	Court of Queen's Bench of Alberta
P.D. Fitzpatrick	For the Plaintiffs
S.B. Cody	For the Defendants
(No Counsel)	For the Defendant Broadway
(No Counsel)	For the Defendant Kazamer (By Telephone)
P. Safadi	Court Clerk

THE MASTER: Do we have Mr. Kazamer on the telephone?

MR. KAZAMER: Yes, I am here.

THE MASTER: Okay, thank you.

MR. KAZAMER: Thank you.

Reasons for Judgment

THE MASTER: This lawsuit involves a claim of misuse of confidential and proprietary information by the defendants. The plaintiffs say that they own certain technology for the creation of a diluent to be used in the energy industry, and that the defendants have misused it and started a competing business to misappropriate and commercialize the information. In particular, the claim is that they used it in an application for a United States patent in respect of the diluent.

I was told during argument that the US patent application has been withdrawn, but that the defendants have applied for a Canadian patent.

The defendant/applicants, being all of the defendants except Leslie Broadway, who is self-represented, seek security for costs. The defendants other than Mr. Kazamer and his company, Jel Solutions Limited, are represented by counsel, other than Mr. Broadway. Mr. Kazamer and Jel Solutions Limited have brought a parallel application for security for costs. Mr. Kazamer purports to represent his company, but in light of the matters discussed by Master Schlosser in *National Leasing Group Inc. v. Acme Enterprises Ltd.*, 2015 ABQB 631, he is not able to do that. He's a chemist, not a lawyer, but he can

represent himself. Mr. Kazamer relies on the brief filed on behalf of the other defendants who have applied.

Facts

No Assets of Consequence

The plaintiffs, five corporations, do not have assets sufficient to post security for costs. They admit that. Four of them do not operate in Canada. The statement of claim asserts that Janus Capital Mediterraneo SRL is incorporated pursuant to the laws of Costa Rica, RHOR Barbados Inc. is a corporation incorporated pursuant to the laws of Barbados, Resilient Sciences Inc. is incorporated pursuant to the laws of Panama, and Janus Capital Inc. is a corporation incorporated pursuant to the laws of Belize. The fifth one, Rapid Heavy Oil Recovery Inc., RHOR, was incorporated in Alberta, but has an address that is in fact a UPS box. Accordingly, it appears to have no meaningful operations in Canada, and, in any event, its witness Ben Hurlbutt (phonetic) has admitted that its assets are insufficient to post a security for costs.

The plaintiffs say they cannot raise capital because of the wrongdoings by the defendants.

In cross-examination Mr. Hurlbutt admitted that he personally has assets, but he was not asked to elaborate. There is no other evidence as to the assets of the shareholders of the plaintiffs, and since four of the plaintiff companies are not registered in Canada, there is not complete information as to who are the shareholders of them.

Ms. Dewalt testified in her affidavit and in cross-examination that in her experience with the plaintiffs it appeared to her that an individual named David Rogerson controlled all of them, regardless of how the shares may be said to be held or who is shown as a director.

As to RHOR, the registered information indicates that there are only two directors, and one of them is Leslie Broadway, who is one of the defendants. Counsel for the defendants questions how the plaintiffs' counsel can take instructions from RHOR, given the circumstance, but plaintiffs' counsel advises that the board of directors has changed, although there is no updated information indicating that in the evidence.

The Documents Sued Upon

The plaintiff bases its claim in part on a non-disclosure agreement made between the plaintiff Janus Capital Inc. and "Petroleum Field Laboratory Inc.", which is a name close to the defendant Petroleum Field Laboratories Inc. That agreement says in section 9 that it "shall be governed and construed in accordance with the internal laws of Barbados. Any

legal proceedings arising hereunder shall be brought only in a court sitting in the Province of Alberta."

One of the plaintiffs is RHOR Barbados Inc. The statement of claim asserts that it was incorporated in Barbados. That would be the only connection in this case with Barbados. There has been no explanation put forth as to why the drafter thought an Alberta Court should be expected to apply the laws of Barbados.

The plaintiffs also based their claim in part on an unsigned employee non-competition non-disclosure proprietary information and patent and invention assignment agreement, which, after the exchange of some drafts, is said to be between the plaintiff Resilient Sciences Inc. and "Petroleum Field Laboratory". In the first paragraph it refers to Petroleum Field Laboratory Inc., abbreviated to "PFL", which again is at least close to the correct name of the defendant. The base precedent on which this draft agreement was crafted was clearly intended to be an employment agreement with certain collateral covenants. For example, section 1(b) begins: (as read)

> My employment creates a relationship of confidence and trust between PFL and the company.

Section 3 provides that: (as read)

> PFL will not, without the company's prior written consent, engage in any employment or business other than for the company, excluding the current PFL client involvements.

The document goes on to address the ownership of inventions and other matters, but it is quite clear that the document has been modified from a form of employment agreement. Section 19 says this: (as read)

> PFL acknowledges that this agreement does not constitute an employment agreement and agree that this agreement shall be binding on PFL regardless of whether or not our employment shall continue for any length of time hereafter and whether or not our employment is terminated for any reason whatsoever by either the company or PFL or both.

On its face this makes no sense whatsoever under Canadian law, but I am aware that provisions saying that a written employment agreement "does not constitute an employment agreement" are common in the United States, apparently, with the understanding that if the parties expressly state that it is not an employment agreement,

there is no obligation to continue to employ the individual for any length of time, and therefore there would be no severance pay claim.

But the provision makes no sense in Canada even in written employment agreements and it makes no sense whatsoever in the context of this case where both parties are corporations. PFL could not be an employee anyway.

Section 18 provides as follows:

> Governing law: this agreement shall be governed by and construed and enforced in accordance with the laws of Panama with respect to contracts made and to be performed wholly therein.

Panama has no connection at all with the facts of this case, other than the assertion in the statement of claim that Resilient Sciences Inc. is said to have been incorporated there.

As mentioned, this draft was never signed. The plaintiffs say that it is nonetheless binding because various drafts went back and forth, and there is an e-mail indicating that Ms. Dewalt, one of the defendants and a director of Petroleum Field Laboratories Inc. agreed to this form; however, in cross-examination she did not say that she intended to sign it. She said, starting at page 188, line 18, that she carried it with her to Calgary to discuss it with Mr. Rogerson, but before she could speak with him, she determined that he was not an ethical person, and that he was not someone she could do business with. Her evidence makes it clear that, contrary to the plaintiffs' assertion, she decided not to sign it or to continue negotiating its terms.

Evidence of Similarity of Chemicals

Counsel for the plaintiff demonstrates by comparing one of the test results said to have been provided by Ms. Dewalt on the letterhead of Petroleum Field Laboratories Inc. with the details of the draft application for the US patent found on Ms. Dewalt's computer that there appear to be striking similarities in the chemical compounds referenced. No expert evidence was put forward. However, in cross-examination, when Ms. Dewalt was asked to confirm the test results that were put to her and relied upon by plaintiffs' counsel in his explanation before me, she explained that, "all reports within the laboratory are controlled documents. I cannot confirm them without going back to the controlled documents." She gave an undertaking, number 7, to review the documents against her records, but she appears not to have answered that undertaking. In light of the altered e-mail, this comparison of the documents put before her with the documents that she or her company created could be important.

Mr. Rogerson had instructed Petroleum Field Laboratories Inc. to perform certain tests on some experimental chemicals. Ms. Dewalt was the contact at Petroleum Field Laboratories Limited (sic). She deposes that all of her dealings with the plaintiffs were through Mr. Rogerson. At page 172 of her cross-examination she deposed that the patent application did not refer to and rely upon test results that PFL had done at Mr. Rogerson's request. This is a denial of the core of the plaintiffs' claims.

Records and Laptops Said to Have Been Acquired by Crime

Some of the evidence that the plaintiffs rely upon, in particular the form of a draft application for patent in the United States that shows as inventors Christy L. Dewalt and Diane E. Duff, came from a laptop computer acquired by David Rogerson from Mr. Dewalt in August 2014. I will discuss the evidence about how it was acquired shortly.

Although Ms. Dewalt acknowledged the patent application was filed in the United States in December 2013, in cross-examination she deposed that the draft that was taken from her laptop on which the plaintiff now relies to show wrongdoing was never filed.

There is a significant disagreement as to how the laptop came into the possession of Mr. Rogerson. Ms. Dewalt describes Mr. Rogerson as an exceedingly dangerous and ruthless individual. Ms. Dewalt says that the laptop was taken from her at gunpoint by Mr. Rogerson. Mr. Rogerson has since been charged with a variety of offences, including robbery with a firearm, kidnapping with a firearm, unlawful confinement, assault with a weapon, mischief, uttering threats to cause death, use of a firearm in the commission of an offence, and more. The Royal Canadian Mounted Police took Ms. Dewalt's complaint very seriously.

Her counsel points out that it is extremely unlikely that she would have voluntarily given him her laptop computer. Laptop computers usually contain much personal information and almost certainly contain information that Mr. Rogerson had no right to see. He argues that it is absurd to think that she would give it to him in any circumstance other than involuntarily.

Mr. Rogerson did not swear an affidavit in these proceedings, but he is clearly behind some, if not all of the plaintiffs. According to the evidence, he is at least a shareholder of some of the companies, and critical information that is relied upon, which appears in an affidavit sworn by Ben Hurlbutt, came from Mr. Rogerson. Mr. Hurlbutt has no personal knowledge of how it was that Mr. Rogerson acquired records from Ms. Dewalt, but he reports that Mr. Rogerson told him that the records, in particular her laptop, were provided voluntarily.

Ontario Securities Commission Proceedings

In addition to the information about the criminal charges, she attached to her affidavit a decision of the Ontario Securities Commission, the OSC, entitled "Reasons and Decision", where Mr. Rogerson was found guilty of various securities-related offences. The Reasons comment specifically on the fact that the respondents, Mr. Rogerson and Amy Hanna-Rogerson, were apparently not able to disclose documents to support their defence, notwithstanding an unprecedented opportunity given to them to do so, and there was a lack of disclosure of relevant documents, and that some of their evidence strained credibility.

In addition to the applications for security for costs brought by most of the defendants, there is a cross-application brought by the plaintiffs to have significant portions of Ms. Dewalt's affidavit struck. They argue that her affidavit contains allegations that are scandalous and they are not relevant to the application for security for costs in support of which it has been filed. For the most part, it is not argued that the allegations are not true, but, rather that the scandalous allegations should not be before the Court.

Parts of the affidavit clearly involve Ms. Dewalt's own opinion and conjecture, but the main complaint is that the references to the circumstances under which some of the evidence came into the possession of the plaintiffs and the reasons for the OSC decision should not be before the Court. The defendants say that the reasons given by the OSC and their comments about Mr. Rogerson's credibility are merely opinions of another body, and they should not be put before this Court.

Ms. Dewalt's evidence is that the OSC's decision relates to the promotion of the diluent formation for use in heavy oil that was a similar diluent product and perhaps the same one that Mr. Rogerson approached her to test. She was not told while her company was doing the testing that he was dealing with the Securities Commission investigation, and she now believes that the testing of the diluent product was done in a desperate attempt by Mr. Rogerson to rebut allegations that he had misled investors about the efficacy of the diluent product.

As to the allegations of the assault and related offences, the applicant says that this information should not be before the Court at this time, because Mr. Rogerson is entitled to be treated as innocent until proven guilty. A trial has not yet taken place. Although counsel for the plaintiffs cross-examined Ms. Dewalt extensively, he did not cross-examine extensively on her allegations of assault at gunpoint; he merely asked her, starting at page 194, line 26, if she made up the story to help her keep the information that the plaintiffs claim she took from Mr. Rogerson. She denied that.

As to the OSC decision, he suggested, starting at page 178, line 22, that when she became aware of the proceedings, that she determined that that was an opportunity for her and other defendants to try to claim for themselves the information Mr. Rogerson had given to her. She denied that.

One of the e-mails that was put to her in cross-examination, apparently having been written by her, had been altered. Much of it she identified as not having been in her original e-mail. No explanation has been given by the plaintiffs as to why that would occur, and there is no evidence contradicting her testimony that the e-mail had been altered. I referenced that altered e-mail earlier in these reasons.

The evidence filed in response to the security for costs application comes from Ben Hurlbutt, who is vice-president sales and marketing of RHOR and RHOR Barbados Inc. It was filed at the last minute, after the applicants' brief was filed. Counsel was able to rally and conduct cross-examination on it almost immediately, and the transcript has been filed with the court. This became apparent in oral argument. Some arguments about the shortcomings in evidence stem from the fact that Mr. Hurlbutt's reply affidavit was provided at the last moment. That effectively prevented Ms. Dewalt from providing some further evidence which might have addressed concerns raised by the plaintiffs. I was not asked to disregard the late affidavit of Mr. Hurlbutt, which is allowed by rule 6.6(3), and, in fact, if the reply affidavit is filed unreasonably late, the rule directs the Court to ignore it, unless it orders otherwise, but it does not lie in the mouth of the respondent to complain about the applicants' evidence when its own is filed at the last minute.

Analysis - The Application to Strike Evidence

The plaintiffs as applicants to strike much of the evidence of Ms. Dewalt refer to *R. v. Karaibrahimovic*, 2002 ABCA 102; 2002 CarswellAlta 550, but that was a trial decision in a criminal matter under appeal. It is not relevant here on an interlocutory application in a civil dispute.

Where portions of affidavits have been inserted to prejudice or embarrass the opposing party for purposes of atmosphere or colour of a negative or adverse nature, or the affidavit is full of innuendo whose only purpose is to cast another party in a bad light, and it is irrelevant, the offending portions may be struck. *1001411 Ontario Limited v. City of Toronto Economic Development Corporation*, 2012 CarswellOnt 3533; 95 MPLR (4th) 107.

Normally, Courts just ignore the offending parts of affidavits that are not properly before them. Where the affidavits or parts of them are irrelevant and scandalous or otherwise

improper, the offending portions may be ordered to be struck. Here there is no doubt that the offending portions of the affidavit are scandalous and no doubt are embarrassing to the plaintiffs because of their association with Mr. Rogerson, but if they are relevant, they are not to be struck.

The decision from the Ontario Securities Commission is both reasons and decisions in one document. If the Court is to look at it at all, the reasons must be examined. Section 26 of the Alberta *Evidence Act*, RSA 2000, c A-18, contemplates a certificate of conviction, and one would not expect to find one in the circumstance involving an Ontario regulatory board. Section 24 does not prohibit proving the commission of an offence in another manner. Subsection 26(6) provides that at a trial the weight to be given the conviction is to be determined by the judge or jury, as the case may be.

This is not a trial, but an interlocutory application for security for costs. As scandalous as the Securities Commission decision may be, it is relevant here, not only to know that Mr. Rogerson was found guilty in those proceedings, but that the proceedings related to the raising of funds in respect of a diluent formula that Ms. Dewalt believes may be the same one that is the subject of these proceedings. It tends to support the evidence she has given to the effect that Mr. Rogerson does not have appropriate technical knowledge to have invented the diluent he claims to have created. Those proceedings against Mr. Rogerson did not directly involve the plaintiffs here, but since he appears to be behind the plaintiffs, or at least he is centrally involved with them, the evidence about him is relevant.

The reasons are also relevant, because they address issues of credibility, and although the reasons will not likely be admissible at trial, they are probative at this point because one of the tests I must consider for an application for security for costs is the relevant strength of the plaintiffs' case. If it is based to a great extent on the evidence of a person previously found in a formal hearing to have strained that other forum's ability to believe his testimony, it is at least of some relevance.

Most importantly, it is relevant because of the assertion by the plaintiffs that they are having trouble raising capital. They say that their problems raising capital are the result of the wrongdoings asserted against the defendants; however, they are associated with Mr. Rogerson, and that associates them with the finding of liability against him by the Securities Commission.

The evidence of the alleged assault and kidnapping is also relevant here. If the evidence that the plaintiffs based their case on was taken by criminal acts, it may not be admissible at trial. That is put forward as a possible outcome. As to the newspaper articles about the charges and the warrant for his arrest, they tend to corroborate her evidence.

Ms. Dewalt asserts that regardless of how the shares and the plaintiffs are held and regardless of how the boards of directors are established, Mr. Rogerson is the one in charge. He is the one she dealt with at all times when doing testing, and he is - to use a word not actually used by her, but captures the nature of her testimony - a bully. Her point is that her direct experience with him supports this belief. In light of her assertions that she was assaulted and that the records were taken at gunpoint, if she had not corroborated that with newspaper accounts of the charges and the search for Mr. Rogerson, as she did, it would be difficult to believe such a strange story. One would wonder why she did not call the police. The newspaper accounts show that she did. He was charged.

Some of the specific allegations in the affidavit are speculative. For example, Ms. Dewalt speculates that since Mr. Rogerson was arrested when disembarking from a BC ferry in Nanaimo, "he may well have been travelling to Duncan, British Columbia, to threaten, harm or kill Mr. Broadway." As to these speculations by Ms. Dewalt, there is no need to formally strike them. They should just be ignored. Affidavits are for the recitation of facts, but affidavits often improperly contain opinions and aspects of legal argument that the Court can and does simply ignore.

The evidence is that the patent application on which the plaintiffs currently base their case was a draft, not even the final patent application.

Security for costs

The plaintiffs are corporations and the basis for an application for security for costs is section 254 of the *Business Corporations Act*, RSA 2000 c B-9. The test as expressed in the section is "if it appears to the court on the application of a defendant that the body corporate will be unable to pay the costs of a successful defendant," then the court may order security be posted. However, it is not an automatic entitlement to security. The Court must exercise discretion.

Factors that must be taken into account in exercising discretion were discussed at length by Wakeling J. (as he then was) in *Amex Electrical Ltd. v. 726934 Alberta Ltd.*, 2014 ABQB 66; 2014 CarswellAlta 166. At paragraph 74 the Court quoted:

> ". . .a reasonably meritorious defence is sufficient to weigh in favour of granting security for costs". *Attila Dogan Construction and Installation Co. v. AMEC Americas Ltd.*, 2011 ABQB 175 at paragraph 17.

At paragraph 75 the Court again cited *Attila Dogan* for the proposition that:

> If it is difficult or impossible to predict with any degree of reliability the outcome of the action, the weaker the defence the more likely the court will decline to grant a security-for-costs order.

Wakeling J also pointed out that there are cases where the shareholders of a corporation can offer to provide personal guarantees for the costs. No such offer has been made here. Where the plaintiff will not be able to prosecute its action if security for costs are required, the plaintiff must present evidence that it does not have access to the funds needed to furnish security and prosecute its action, *Calmont Leasing Ltd. v. 32262 BC Ltd.*, 2002 ABCA 290, but this is a factor that is generally referred to when the plaintiff is an individual, not a corporation. The Court of Appeal said expressly this at paragraph 8:

> It is interesting that many of the decided cases which decline to order security for costs on the grounds that it would shut an impecunious plaintiff or appellant out from the court despite an arguable case, are cases where that plaintiff or appellant was an individual. Some of those arguments sound especially hollow in the case of a limited liability company. In the case of a limited liability company, it is particularly important that there be sworn evidence that the appellant or plaintiff has no way to raise any kind of security of any description. That is because an impecunious company with a cause of action is a one-way valve which allows money to flow from a successful lawsuit through the company to its creditors or shareholders (or both), but prevents any money from flowing in the opposite direction.

In *Calmont*, the Court of Appeal pointed out that there was no evidence who the shareholders were or that they had no money, and the Court referred to a decision of Master Funduk (not cited) where he pointed out that the shareholders of an impecunious company can at least offer personal guarantees.

As indicated earlier, I do not strike the so-called scandalous parts of Ms. Dewalt's affidavit, but even without the scandalous testimony, the basic evidence is that:

(a) Ms. Dewalt denies that the technology held by the defendants is the same as the technology claimed by the plaintiffs, and she asserts that Mr. Rogerson does not have the knowledge to have created what they claim to own, and she provides detailed information to explain why she holds this opinion of him;

(b) there is no expert testimony to show that the technologies are the same. The Court is expected to reach this conclusion from the technical documents;

(c) the claim is founded at least in part on an unsigned agreement which has many other internal problems in addition to the fact that it was never signed, and Ms. Dewalt's evidence is that she decided not to sign it;

(d) four of the five plaintiff companies do not even operate in Alberta, and the one that supposedly does so actually operates out of a UPS box. There is no indication that there are even any desks or other office furniture or equipment that might be used to pay a costs award after trial; and

(e) the plaintiffs claim that they cannot raise capital, which they say is because of the defendants' alleged wrongdoing.

Accordingly, this is a classic one-way valve case, as described by the Court in *Calmont.*

Furthermore, there is no detail at all as to Mr. Hurlbutt's hearsay evidence as to how Mr. Rogerson obtained the laptop on a so-called voluntary basis. I agree with the defence counsel that it is very hard to believe that she simply turned over her laptop to him rather than perhaps printing copies of certain documents that perhaps she might have thought he should have. With no information from Mr. Rogerson at this point, the evidence is so detailed and compelling that there is a very serious question as to whether there the evidence from the laptop will be admissible at trial, although, of course, that determination will be up to the trial judge.

In my view, the so-called scandalous evidence may be considered, if only to take into account that the reasons the plaintiffs may have difficulties raising capital must include their association with an individual who was found guilty of wrongdoing by the Ontario Securities Commission in connection with a diluent. Regardless of who owns or does not own the technology that is the subject of this claim, that must be a significant problem for them when trying to raise capital.

Conclusion

In the result, the application to strike parts of the affidavit of Mr. Dewalt is dismissed.

The application for security for costs is allowed; however, the plaintiffs need not post the entire amount through trial at this stage. It is appropriate to set amounts payable in stages. The plaintiffs shall post costs of $33,150 as security for the costs of the applicants represented by counsel, and an additional $5,000 as security for the costs of

Mr. Kazamer, by payment into court within two months of this decision before the matter moves further. This is roughly the amount claimed for the steps taken up to and including questioning, using the estimates of the defendants, plus a rounded and much lower figure for Mr. Kazamer, since he is not utilizing legal counsel.

Until the total of $38,150 is paid into court, further proceedings against all parties will be stayed. If the security is not fully provided within the time deadline, all of the claims against all of the defendants except Leslie Broadway will be dismissed without further order.

I point out that while the $5,000 is security for Mr. Kazamer's costs, not for his company, it can be anticipated that the costs he incurs will likely be paid by his company as business expenses, and it will be acceptable to provide evidence of proof of payment, either by Mr. Kazamer personally or by Jel Solutions Limited if a claim for costs is later established.

Given the nature of the claim and the number of defendants, it is difficult to project with any accuracy the appropriate level of costs even to that stage, let alone further. Accordingly, the defendants have leave to apply at a later stage for a further order for security for costs.

Do you have any submissions on costs of this application?

Submissions by Mr. Cody (Costs)

MR. CODY: I do, Master, if I may. There's a -- one of your decisions, the *Noushin v Adesa Auctions* decision, sir. And, certainly, sir, what we have effectively here is not one, but two special applications. There were briefs provided on both, and the parties that I represent have been successful in both. Our position with respect to the attempt to strike the affidavit was essentially what the Court determined, which is that it's -- certain portions of that were relevant, and to the extent that there was any portion - and you did cite one that was not of assistance in reaching your decision - certainly the Courts are sophisticated enough to simply disregard that, so there's one special application under column 5 that ultimately wasn't required and the position simply could have been that to the extent -- and, with respect, the great bulk of the affidavit was relevant and was helpful to the Court reaching its decision.

And then turning to the security for costs application, we were successful and -- and costs should follow, and, in my respectful submission, be payable forthwith.

There's one further wrinkle, and it's the very late affidavit of Mr. Hurlbutt. It was

provided, sir, on October the 16th, after the -- in fact, after not only the applicant's primary brief but the rebuttal brief with respect to the affidavits was filed with the court, so there was no opportunity to respond to it in any way, and --

THE MASTER: You did cross-examination, though. I mean, I was actually startled by how quickly you guys were able to be mobilized on that.

MR. CODY: I did, sir, and as I'm sure the Court would be aware from its practising days, it's sometimes a bit of a cynical calculation to sort of say, "Well, I'm quite convinced the Court won't deal with that evidence." There's the risk that a Court does wish to, but, in any event, to the extent that at a -- at a bare minimum some of the admissions arising from Mr. Hurlbutt in questioning assisted the Court, that's all material that could -- could have and should have been provided much sooner.

There's no reason -- and by way of, I guess, to -- to sore into the elevated heights of public policy, sir, the Courts are -- are a busy bunch and masters are busy people. This application was set down for a special in June. The earliest available special date we could find, I believe, was October 27th. There's litigants clamouring to get in front of the court on special applications, and I think it's -- well, what I think is irrelevant.

THE MASTER: You're preaching to the choir here.

MR. CODY: But --

THE MASTER: I'm quite upset with people who file affidavits --

MR. CODY: My -- my --

THE MASTER: -- at the last minute on a special application that was booked months before.

MR. CODY: My respectful submission, sir, is there's -- in the circumstances, it's difficult to see it as anything other than a very cynical calculation that the -- the party who's had this affidavit dumped on them and frankly been sandbagged with it either chooses to run the risk of running the application and having it get let in with no opportunity to rebut or very possibly to have to adjourn to deal with it, or, as we did, to prepare and question on a very, very compressed time frame, and still be denied any opportunity to make written submissions. None of those alternatives are something that the Court should countenance, and in --

THE MASTER: So you're saying there should be an elevated level of costs for that.

MR. CODY: Certainly, sir, and in your decision in *Noushin*, which I think in fact the affidavit there was -- was served in a more timely fashion than this one. It was served four days prior, as I read it, to the respondent's brief. In this case the -- literally the exchange of the rebuttal briefs was the first time we became aware of it. It was provided there in -- in sworn but unfiled format, and after essentially agonizing the weekend away and then seeking counsel, the advice that we received and followed was to examine on a very expedited basis, and, with respect, I think that the -- the questioning transcript that I retrieved personally from the court reporter and attended in front of masters chambers clerks with a specific direction that it be brought to the attention of the master hearing it was -- was all done literally on a -- the morning after questioning.

But, with respect, sir, that shouldn't be required, it shouldn't be countenanced, and -- and if the Court doesn't want to have this sort of behaviour reoccur, my respectful submission, sir, is that solicitor-and-own-client costs for everything associated with the questioning and -- and filing the Hurlbutt questioning with the court is appropriate.

It just -- there -- there was no need for it, and there's no need to countenance this sort of behaviour, and on a policy basis, rather than having the risk of dates that are booked for months (INDISCERNIBLE) days before they're to be heard, after the master at that point may well have sat down and spent otherwise valuable time chewing through a bunch of written materials, there's -- there's just no good reason for it, and in my respectful submission, sir, on the two applications that we've been successful on, costs under column 5 for all steps are appropriate, but with respect to this Hurlbutt affidavit, my submission, sir, is that costs on a solicitor-and-own-client basis are -- are warranted, and that's what -- what the Court did in a very similar fact pattern in this *Noushin v Adesa Auctions*.

THE MASTER: Well, the *Noushin* one -- I have to say I remember this one very well - the --

MR. CODY: And, sir, I believe paragraph 112 is -- 112 and then the subsequent decision with respect to costs appears at 138(c).

THE MASTER: But the -- just so we're clear, the reason I awarded such elevated costs there was because the fellow was a scoundrel all the way through and had done everything possible to try to defeat the litigation. It wasn't just the late filing of the affidavit. That was just sort of the icing on the cake. In fact, he stood at that podium and completely changed his story based on the affidavit from his ex-wife

filed at the last minute from what he had been telling the plaintiff by counterclaim's counsel. So it was on a different trajectory than this case. But I understand your submissions.

MR. CODY: Thank you, sir. That's all I have to add, unless you have questions of me.

THE MASTER: No.

Submissions by Mr. Fitzpatrick (Costs)

MR. FITZPATRICK: Briefly, sir, in respect of the last point, of course solicitor-and-client costs, let alone solicitor-and-own-client are -- are clearly rare and exceptional in -- in Alberta.

THE MASTER: Mmm hmm.

MR. FITZPATRICK: If you determine that it's appropriate to impose some sanctioning costs, in my submission, it's appropriate to -- to award something, but certainly not solicitor-and-client costs or solicitor-and-own-client costs.

In respect to my friend's submissions about costs generally, I agree that -- that pursuant to the *Rules* the --

THE MASTER: Costs follow the event.

MR. FITZPATRICK: -- costs follow the event. There's -- there's two issues I do want to raise, though, and one is the -- the one versus two hearings or two applications. Yes, we had the two applications for security for costs, one by my friend as well as the one by Mr. Kazamer, and the cross-application to strike, but we did have one actual oral hearing, so -- so a complete duplication of costs would -- would be excessive, in my -- in my submission.

The other -- the other point I wanted to raise is -- is that although you did determine that you would not strike the affidavit or portions of it, in my submission this would actually be an appropriate case for you to exercise your discretion to award costs notwithstanding the outcome of the application, because you found that certain of the -- the aspects of the affidavit were -- were clearly improper in terms of being argumentative and speculative, and then there's the allegation of intention to commit murder, which is completely over the top, in my submission. It would be -- I would submit that it's appropriate to -- to send a message to -- to litigants that those kinds of allegations just simply should not be

made, and when you don't strike out the affidavit, what's left for you to be able to do is to impose some kind of sanction and in terms of costs, whether that's to award costs to my client for the application notwithstanding the result, whether that's to say that's -- that there be no costs in respect of the application to strike.

THE MASTER: Anything you wanted to say in reply? I am going to turn to you, Mr. Kazamer, just to hear from you.

Submissions by Mr. Cody (Costs)

MR. CODY: Well, simply, sir, with respect to the notion that my friend's unsuccessful application to strike the affidavit of Ms. Dewalt should somehow receive costs is something that befuddles me, and when I made notes of your reasons, I believe there was the one comment with respect to Ms. Dewalt's speculating about the purpose Mr. Rogerson was travelling to Vancouver Island, given that the Duncan is close to Nanaimo, and you disregarded that speculation. But with respect, the vast bulk of her affidavit seemed to be something that the Court was assisted by, and I have --

THE MASTER: Mmm hmm.

MR. CODY: -- difficulty thinking that on the basis of one passing speculation that the Court merely disregarded that there would be any basis for an allocation of costs in the way that my friend submits. But although ultimately anyone who stood at this podium knows that Courts (sic) are very much in discretion of the Court, but my submission would be on that front there's no basis for a successful party, namely my clients, to be deprived of its costs.

And turning to the Hurlbutt affidavit, again, it's my submission, sir, that when my friend says that there -- solicitor-and-client costs are rare and exceptional, yes, they are. Having a substantive rebuttal affidavit provided after briefs are exchanged when the application has been set down for four months is also, in my respectful submission, something that's rare and exceptional, and when the Court weighs the --

THE MASTER: Yes, you already made that argument.

MR. CODY: When the Court weighs the potential for waste of time, it's something to factor in. Thank you, sir.

THE MASTER: Mr. Kazamer, is there anything you wanted to say about costs?

Submissions by Mr. Kazamer (Costs)

MR. KAZAMER: No, I agree with the decision, giving a timely manner for posting those security for costs. I will state something to the Court, though. My affidavit was given in plenty of time with counsel (INDISCERNIBLE) --

THE MASTER: Nobody's accusing you of -- nobody's accusing you --

MR. KAZAMER: (INDISCERNIBLE).

THE MASTER: -- of being late. Don't worry about it.

MR. KAZAMER: But -- but I haven't been questioned on it. I was never -- never asked anything (INDISCERNIBLE) front of the -- front of the Court. Also a couple of comments about knowing -- knowing the formulation and whatnot of the diluent, I provide bulk chemistries for a living, and, you know, what I give to people in certain quantities and stuff, what customers do with them after that is, you know, usually not my business, so as far as knowing what exactly the formulation was --

THE MASTER: Mr. Kazamer, we're --

MR. KAZAMER: -- (INDISCERNIBLE).

THE MASTER: Mr. Kazamer, we're just talking about costs now. As I understand it, you do not live in Calgary, you don't work here?

MR. KAZAMER: I'm sitting north of Drayton Valley about 80 miles in the bush now on top of a hill.

THE MASTER: You -- to be here when we heard the case on -- when it was argued before me, you had to come down from there for the day in Calgary and then go back, is that right?

MR. KAZAMER: Yes.

THE MASTER: Okay.

MR. KAZAMER: Yeah.

THE MASTER: So you would have stayed in a hotel overnight

or something?

MR. KAZAMER: Yes, I did.

THE MASTER: Okay.

MR. KAZAMER: And driving to counsel representing me out of Edmonton five or six times, so I have the dates and stuff. I will pull that information out.

Ruling (Costs)

THE MASTER: Okay, well, we're not going to get into nickels and dimes here. This is what I'm going to do. There were two cross-applications, but Mr. Fitzpatrick is right. In many ways it was really one application. There were two sets of briefs and so on. I'm going to award costs under column C at 1.5 times the normal rate for a disputed application where briefs were required, so to take into account the fact that there were sort of two applications. I mean, technically there two applications at one hearing. Plus the appropriate disbursements, the questioning and so on, you know, transcripts, and at the expedited rates that you would have paid.

MR. KAZAMER: Yes.

THE MASTER: Plus $1,000 for the late affidavit. I -- I don't think it's appropriate to award solicitor-and-client costs. I do think it's appropriate, as I have done before, to award an elevated level of costs for material filed at the last possible moment or near the last possible moment, but I don't see this as a *Noushin* type of case.

As to Mr. Kazamer, I'll award costs in his favour of $500. Mr. Kazamer, that's just a round number. That's to take into account basically your mileage, you meals, your hotel for coming down here to argue the case. Since you didn't have a lawyer, I'm not going to award significant costs to you there, as I awarded a very relatively modest amount for the security for costs.

MR. KAZAMER: Okay.

THE MASTER: So that's just a round number for Mr. Kazamer. The others, there may be some work you have to do to find out exactly what the disbursements were, but I think you know what I've directed.

MR. FITZPATRICK: Yes, I understand the first -- the first portion is as between Mr. Cody, his clients, and my clients. The second portion would specific to

Mr. Kazamer.

THE MASTER: Yeah, a --

MR. FITZPATRICK: (INDISCERNIBLE).

THE MASTER: -- a round number for Mr. Kazamer, because he wouldn't have paid for the transcript, I assume. You, Mr. Cody, paid for the transcript.

MR. CODY: Yes, sir.

THE MASTER: Right, okay.

MR. CODY: Yes.

THE MASTER: So you'll prepare the order. I'll waive the requirements of rule 9.4(2)(c) -- or not waive. I'll invoke 9.4(2)(c) insofar as it affects Mr. Kazamer.

Mr. Kazamer, that's a provision that allows opposing parties to see the form of order before it's formally signed and filed with the court. We routinely invoke it to allow the order to be entered without the signature where somebody is self-represented, because, frankly, you'll probably find it more confusing than anything else. We've got two competent counsel here can figure out what the terms of the order is. Yours is a small portion of it. Okay?

MR. KAZAMER: Okay.

MR. CODY: All right.

MR. FITZPATRICK: Thank you, sir.

THE MASTER: Okay, now I'm just going to speak to -- are we done then?

MR. CODY: One point of clarification --

THE MASTER: Oh, sorry.

MR. CODY: -- sir. Given the amount of the statement of claim, which I think is on the order of 15 or $17,000,000, clearly, that --

THE MASTER: It's column 5.

MR. CODY: -- puts us into column 5. So this is effectively 1.5 times the --

THE MASTER: The column 5 amount.

MR. CODY: Yes.

THE MASTER: Whatever it is. I'm sorry, I don't have it front of me here, but you know what I'm talking about. The contested --

MR. CODY: Yes.

THE MASTER: -- application where briefs are required, take that number and multiply it by 1.5.

MR. CODY: Yes.

THE MASTER: That's it. You don't get 1.5 times your disbursements and so on. It's just the --

MR. CODY: No.

THE MASTER: -- counsel and -- okay.

MR. CODY: Just --

MR. FITZPATRICK: Very good, sir.

MR. CODY: Fair enough.

THE MASTER: Okay.

PROCEEDINGS CONCLUDED

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