IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Milne v. Clarke*,
2010 BCSC 317

Date: 20100319
Docket: M073111
Registry: Vancouver

Between:

Joseph Milne

Plaintiff

And

Paul Donald Clarke and Elliot Heard Misener

Defendants

Before: The Honourable Mr. Justice Burnyeat

Reasons for Judgment
(from Chambers)

Counsel for the Plaintiff:	D. Klein
Counsel for the Defendants:	R. Pici
Place and Date of Hearing:	Vancouver, B.C. March 4, 2010
Place and Date of Judgment:	Vancouver, B.C. March 19, 2010

[1] The plaintiff appeals the December 29, 2009 decision of Master Tokarek sitting as Registrar of the Court wherein the Learned Registrar did not allow the claim of interest on a disbursement incurred by the solicitor for the Plaintiff.

[2] Mr. Milne was injured in a motor vehicle accident on June 2, 2005. Mr. Milne had M.R.I. examinations on November 30, 2005, February 28, 2006, and May 11, 2007. On April 30, 2009, an account in the amount of $3,922.55 was forwarded to the solicitor for Mr. Milne covering not only the $975.00 cost for each of the M.R.I. scans but also interest on the unpaid balances from the date of the scan to October 8, 2009. The action of Mr. Milne was subsequently settled for the sum of $170,000.00 plus costs. On an assessment of those costs, the Learned Registrar ruled that the interest portions of the April 30, 2009 invoice to the solicitor for Mr. Milne should not be allowed as appropriate disbursements of the solicitor.

[3] In *Peoples Trust Co. v. Longlea Estates Ltd.* (2005), C.B.R. (5th) 262 (B.C.S.C.), Preston J. set out the law governing the scope of review regarding a decision of a Registrar:

> ... Unless it can be shown that the registrar erred in principle – that is, that he or she was clearly wrong – the decision will stand. The fact that this scope of review differs from the scope of review of a master's decision on a purely interlocutory point or one that involves a question of law is not a matter of jurisdiction. It arises from the different nature of the processes that led to the decision appealed from. The decision of a master is, in almost all cases, made on the basis of material that is before the appellate court in the same form as it was before the master. However, the decision of a registrar is commonly made after hearing the evidence of witnesses. Typically, there is no record kept of the proceedings before the registrar. ...
>
> (at para. 39)

[4] In support of the submission that the Learned Registrar erred in principle, Mr. Milne submits that the law which was binding on the Learned Registrar is set out in *McCreight v. Currie*, [2008] B.C.J. No. 2494, where one of the matters under consideration was whether to allow the cost of imaging scans plus interest. While it is not clear from the decision, it appears that counsel for the Plaintiff had paid for imaging scans and had paid overdue interest of $92.88 on the disbursements. In allowing the interest, Registrar Young concluded:

> ... The plaintiff really had no choice but to pay the interest given that she did not have the funds to be retaining experts and paying for their reports up front. I suppose the defendant’s choice was that the defendant could have offered to pay for the report up front once it was disclosed to him, but no offer was forthcoming. Given this was the only way to finance the obtaining of a report, I find this to be a reasonable expense and I will allow it.
>
> (at para. 51)

[5] In opposing the application of the Plaintiff, the Defendants rely on a number of decisions. In *Sovani v. Jin*, Supreme Court of British Columbia Action No. B9814765 (Vancouver Registry) (an April 25, 2006 Ruling by Registrar Blok) the issue was the interest cost charged to the plaintiff by his counsel for the carrying of disbursements by the counsel. Counsel had made arrangements with his financial institution to carry or to provide financing for disbursements where his clients could not pay them. The exact cost of the interest charged was passed on to the client by counsel. Before ruling that such interest would not be allowed, Registrar Blok referred to three decisions:

(a) *Greene v. Troje* an unreported October 16, 1991 decision (Courtenay Registry No. 86009) where the Learned Registrar denied a claim for disbursements that had been charged by providers stating at page 3:

> The reason for incurring those interest charges flows not from the necessities of litigation, but from the necessities of this litigant. That is not something ways [sic] caused by the defendant. It might be argued that the impecuniosity of the plaintiff flows from the wrong committed by the defendant, but I have no evidence as to that.
>
> (at para. 3);

(b) *Moore v. Dhillon*, [1992] B.C.J. No. 3055 where Master Wilson, as he then was, stated that the outlay of interest money to the counsel was necessary but he could not accept the proposition that the outlay was an "expense" or a "disbursement" or a "charge" as those words were used in Rule 57(4) and Rule 57(8) concluding that it was not a "charge" or an "expense" but that: "... it is in the nature of damages." (at para. 448);

(c) In *Hudniuk v. Warkentin* (Supreme Court of British Columbia Action No. S058003 – New Westminster Registry – August 29, 2002 oral ruling) the issue was whether the question of whether disbursement interest as a head of damage should be an issue put to a jury. After noting that he was not bound by the decision in *Moore v. Dhillon*, Pitfield J. stated:

> ... these disbursements were incurred in the course of the solicitor/client relationship. They are recoverable, if at all, as costs on the taxation thereof. In that regard, unless the rules have been changed so that *Moore v. Dhillon* has been overruled, the present law is that interest on unpaid or overdue disbursements is not recoverable any more than it should be recoverable as a head of damages on unpaid fees.

[6] Rule 57(4) of the *Supreme Court Rules* provides that, in addition to determining fees, the Registrar must:

(a) determine which expenses and disbursements have been necessarily or properly

incurred in the conduct of the proceeding, and

(b) allow a reasonable amount for those expenses and disbursements.

[7] In support of the application, it is said that Mr. Milne had no means of paying for the required M.R.I. scans other than to borrow money from the provider and that, since the cost of the M.R.I. had already been agreed upon, so too should the interest on the unpaid accounts rendered by the provider of the M.R.I. images. Here, it is the provider of the M.R.I. and not counsel for Mr. Milne who is charging the interest on the invoices.

[8] I find that the Learned Registrar erred in principle. The December 29, 2009 decision was clearly wrong. First, even if the Learned Registrar was not bound by the decision in *McCreight*, I am not bound by the decision reached by the Learned Registrar herein. I am satisfied that the statement set out in *McCreight* accurately represents the law in British Columbia. Second, the decision in *Hudniuk* relates to the question of whether disbursement interest is a head of damage and not to the question of whether it is recoverable as costs on an assessment.

[9] The law in British Columbia is that interest charged by a provider of services where the disbursement has been paid by counsel for a party is recoverable as is the disbursement. The interest charge flows from the necessity of the litigation. If the disbursement itself can be assessed as an appropriate disbursement, so also can the interest owing as a result of the failure or inability of a party to pay for the service provided. In order to obtain the M.R.I., it was necessary to pay not only the $975.00 cost but also the interest on any unpaid balances that were not paid immediately. The cost plus interest was the cost of obtaining the M.R.I. The claim for interest should have been allowed.

[10] The appeal of Mr. Milne is allowed. Mr. Milne is entitled to his costs of the application on a Party and Party (Scale “B”) basis.

“Burnyeat J.”

The Honourable Mr. Justice Burnyeat