Date: 20031014
Docket No.: S.C. 00-A0174/185
Registry: Whitehorse

IN THE SUPREME COURT OF THE YUKON TERRITORY

BETWEEN:

TRANS NORTH TURBO AIR LIMITED

PLAINTIFF

AND:

NORTH 60 PETRO LTD.

DEFENDANTS

DARRYL G. PANKRATZ — Appearing for the Plaintiff

BRUCE CHURCHILL-SMITH — Appearing for the Defendants

MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH

(Costs - Out of Town Counsel)

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[1] VEALE, J. (Oral) This is an application for out-of-town counsel costs by the plaintiff. It is of interest that both the plaintiff and the defendant had two counsel at trial and during case management, all from out-of-town.

[2] However, counsel for the defendant opposes the out-of-town counsel costs and has indicated it will not be claiming similar costs should they succeed on their appeal.

[3] This application is made under Rule 57(4) and the issue is whether the additional expenses incurred by out-of-town counsel have been necessarily or properly incurred in the conduct of this proceeding.

[4] The out-of-town counsel issue pervades other disbursements such as couriers, faxing, and telephone disbursement, et cetera.

[5] The case law referred to by counsel is very fact specific and focuses on the nature and complexity of the claim involved as well as the locations. In British Columbia, the issue is usually whether Vancouver counsel was necessary or proper in cases that were heard outside of Vancouver.

[6] In this case, it is a question of whether Vancouver counsel was necessary or proper for a case heard in Whitehorse, Yukon. I have agreed to hear the matter, rather than proceeding initially to the Clerk of the Court and then to me on appeal. I also indicate that no exception was taken to the evidence being given by way of submissions. Due to the nature of the application, I have agreed to this procedure.

[7] This case involves fire loss of an aircraft hangar at the Whitehorse Airport on January 18, 1999. The use of an oxy-acetylene torch, at first denied by the defendants, was a major focus of the inquiry until several months before the trial. However, it remained an issue at trial in the context of credibility.

[8] The trial took approximately three months and involved a significant number of expert witnesses on the issue of a surveillance video, the impact of the use of an oxy-acetylene torch, the rules and regulations relating to oxy-acetylene torch use, the construction of the building, building codes, and damages suffered, which were

generally related to the aircraft industry.

[9] While there was a great deal of factual complexity, the legal issues ranged from duty and standard of care, breach of duty and standard of care, spoliation, causation, direct liability, trespass, contributory negligence, property evaluation, and loss of revenue, all of which were equally complex.

[10] The experts of the plaintiffs generally came from the Vancouver or northwestern United States area, while the defendants' experts came from Los Angeles, Boston, and the province of Alberta.

[11] The plaintiff acknowledges that there is no issue about the competency of local counsel. However, they do question the capacity of local firms to take on a case where two counsel were involved virtually full-time, with the use of associates and administrative backup that only a large firm can provide from the fall of 2001 to the end of trial in August 2002.

[12] It is acknowledged that the named parties were nominal in the sense that there were insurers behind the scenes for both aviation and property issues. The law firm of the plaintiff's solicitors has had a long association with both the aviation and some of the property insurers. Thus they were brought into the case at the outset when there was a reasonable question as to whether the individual defendants had used an oxy-acetylene torch on the aircraft hangar that day.

[13] The plaintiff's firm then became closely involved with a video analyst who determined whether a writ would be issued at all and the case continued with.

[14] There are a number of factors submitted by the plaintiffs.

(1) The plaintiff's firm has expertise in the area of valuations of aircrafts and associated equipment.

(2) The firm has a relationship with the aviation and property underwriters.

(3) The inconvenience and costs of changing counsel after the initial investigation work.

(4) The firm had the capacity to have two lawyers as well as associates and research staff assigned to the case from the fall of 2001 to August 2002.

(5) None of the experts were from the Whitehorse area and, therefore, costs were saved in retaining and instructing experts nearby to counsel in Vancouver.

[15] Counsel for the defendants submits that the quantum issue for use of out-of-town counsel is significant, and he states that it is in the range of $125,000. That figure is not admitted by counsel for the plaintiffs. He submits, and I agree, that the onus is on the plaintiff's counsel to show the necessity of outside counsel. There is no issue of competency with respect to local counsel.

[16] Defence counsel advises that two outside law firms with offices in Whitehorse have the capacity to conduct such a case. In my view that capacity is not capacity that is in Whitehorse but capacity that is with those firms in Vancouver.

[17] Defence counsel also points outs that this was primarily a fire-loss case rather than an aviation accident case. Counsel also submits that there was no savings from using out-of-town counsel with respect to experts because all of the experts had to attend in Whitehorse to testify.

[18] In my view, there is a very real issue as to the capacity of Whitehorse firms to address such a long and complex trial. I have no doubt about the competency of Whitehorse counsel but the sheer size of this case both factually, legally, and from a point of view of the experts involved, lends support to the use of a larger firm in Vancouver, in this case, Alexander Holburn.

[19] In addition, the volume of experts that were called, and their location near plaintiff's counsel in Vancouver, undoubtedly led to cost savings.

[20] Therefore, on the basis of capacity, location of experts, initial involvement in the investigation, and expertise in managing long and complex trials, I am of the view that out-of-town counsel was necessarily and properly incurred.

[21] I have not determined the issue of the reasonableness of the specific accounts that have been filed; that will be left for another day.

[22] I do want to say, in my years on the bench and in private practice, I am not aware of a similarly lengthy and complex case having been dealt with in the Yukon by local counsel. Thus, it is not every case where outside counsel is employed that those extra expenses may be recovered. In my view, it is only in those cases of exceptional length and complexity and expertise where it will be appropriate.

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VEALE J.