CITATION: Galea v. Best Water Limited, 2019 ONSC 7213
COURT FILE NO.: CV-18-589644
DATE: 2019 12 11

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SUPERIOR COURT OF JUSTICE - ONTARIO

RE: EMILY GALEA, *Plaintiff*

- and -

BEST WATER LIMITED c.o.b. as AQUASOFT and CANATURE WATERGROUP CANADA INCORPORATED, *Defendants*

BEFORE: Master Todd Robinson

COUNSEL: S. Tesaro, *counsel for the defendant, Best Water Limited c.o.b. as Aquasoft*

J. Naumis, *counsel for the plaintiff*

HEARD: August 30 and September 11, 2019

REASONS FOR DECISION

[1] Best Water Limited c.o.b. as Aquasoft ("Aquasoft") moves to compel answers to undertakings and questions refused during the examination for discovery of the plaintiff. Aquasoft also seeks orders that the plaintiff serve a further and better affidavit of documents, that the plaintiff produce "proper disclosure of the expert reports, type of testing performed, the conclusions drawn, raw data and photographs" that are within Schedule B to the plaintiff's affidavit of documents, and that the plaintiff re-attend examination for discovery at her own expense. The motion is opposed by the plaintiff. No one appeared on behalf of the remaining defendant, Canature Watergroup Canada Incorporated, although duly served.

[2] The plaintiff brings a cross-motion seeking an order compelling a representative of Aquasoft to attend examination for discovery, a further and better affidavit of documents, production of copies of the stamped exhibits from the plaintiff's examination for discovery, and disclosure of the findings, opinions, and conclusions of Aquasoft's experts. Aquasoft opposes the cross-motion.

[3] Although the cross-motion was not properly booked, both counsel agreed that the two motions are related and should be heard together. Counsel were ready to proceed with both motions. Having reviewed the materials, I agreed there was efficiency in both motions being heard concurrently. Since I would have seized myself of both motions in all the circumstances,

but given my own limited motion availability before late November, I exercised my discretion to permit the cross-motion to be heard concurrently. The alternative was for a lengthy adjournment of both motions. However, neither counsel nor the parties should take my exercise of discretion to hear the cross-motion in the particular circumstances of this case as condoning the failure to follow required procedures for booking and bringing a cross-motion.

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Background

[4] This subrogated action arises from a dispute regarding installation of a reverse osmosis system in the plaintiff's home in Woodbridge, Ontario. That system is alleged to be the source of water leakage in early 2016 that caused extensive damage to the house. The reverse osmosis system was designed and distributed by Canature Watergroup Canada Incorporated. The system was installed and serviced by Aquasoft. The plaintiff claims damages of $100,000 in the statement of claim, but the actual damages claim appears to be $62,833.

Aquasoft's Motion

Disclosure of Expert Reports

[5] Aquasoft seeks "proper disclosure of the expert reports, type of testing performed, the conclusions drawn, raw data and photographs" that are within Schedule B to the plaintiff's affidavit of documents. Although asserted as separate relief, this is the subject matter of several refusals, and is relied upon by Aquasoft as justification for refusing to produce a representative for examination (discussed in the plaintiff's cross-motion below). The parties dispute the proper scope of discovery pursuant to Rule 31.06(3) of the *Rules of Civil Procedure,* RRO 1990, Reg 194 (the "*Rules*"), which provides as follows:

> **Expert Opinions**
>
> (3) A party may on an examination for discovery obtain disclosure of the findings, opinions and conclusions of an expert engaged by or on behalf of the party being examined that are relevant to a matter in issue in the action and of the expert's name and address, but the party being examined need not disclose the information or the name and address of the expert where,
>
> > (a) the findings, opinions and conclusions of the expert relevant to any matter in issue in the action were made or formed in preparation for contemplated or pending litigation and for no other purpose; and
> >
> > (b) the party being examined undertakes not to call the expert as a witness at the trial.

[6] Prior to the plaintiff's examination, following several requests by Aquasoft's counsel, plaintiff's counsel provided a summary of the findings, opinions and conclusions of the plaintiff's two experts by email dated December 13, 2018. Aquasoft sought further information and documents in the course of the plaintiff's examination, which gave rise to the refusals discussed below. Aquasoft argues that the summary provided by plaintiff's counsel is "indecipherable" on its face, fails to identify which findings, opinions and conclusions relate to

which of the plaintiff's experts, and provides no context of the experts' findings, opinions and conclusions, such as what testing was done, what procedures were taken, what raw data was consulted, and what photographs were consulted. Aquasoft's position is that, as a matter of fairness, the foundational information and documents relied upon by the experts must be provided prior to examination of Aquasoft's representative so that counsel may properly prepare its representative and so the representative is not "sandbagged" by technical questions that s/he may not fully appreciate.

[7] Aquasoft submits that the scope of "findings, opinions and conclusions" in Rule 31.06(3) is broad and captures calculations, raw data, field notes, photographs and records used by an expert, citing *Turner (Litigation guardian of) v. Dyck,* [2002] OJ No 4775 (SCJ) at para. 16 and *Aherne v. Chang,* [2011] OJ No 2797 (SCJ) at para. 21. Aquasoft further argues that disclosure and production obligations under Rule 31.06(3) extend to all foundational information, citing *Horodynsky Farms Inc. v. Zeneca Corp.,* [2006] OJ No 3716 (CA) at para. 21. The scope of Rule 31.06(3) is argued to be "somewhere between the foundational information for the expert's opinion, and everything that has passed between the expert and the instructing solicitor, including the expert's entire file" as held in *Bookman v. Loeb,* [2009] OJ No 2741 (SCJ) at para. 29. Aquasoft argues that, based on the determinations in these cases, production of foundational information is relevant and should be ordered from the plaintiff at the discovery stage of the proceeding.

[8] I reject Aquasoft's argument. All of the case law cited by Aquasoft was decided prior to the more recent decisions in *Moore v. Getahun,* 2015 ONCA 55 and *Edwards v. Carthy,* 2019 ONSC 3925. The right of a party to expert-related disclosure in pre-trial stages is set out in Rules 31.06(3) and 53.03(2.1). The requirement to disclose "foundational information" has now been expressly held to be mandated by Rule 53.03(2.1): *Edwards, supra* at paras. 12 and 14, citing *Moore, supra*. In my view, the decision in *Edwards,* which was decided with consideration of the Court of Appeal's decision in *Moore,* is a more appropriate authority to follow than pre-*Moore* case law.

[9] The scope of permissible examination regarding expert opinions during discovery is limited by Rule 31.06(3) to the findings, opinions and conclusions of an expert and the expert's name and address. Having considered *Edwards*, I am satisfied that the plaintiff has provided the required information. I do not agree with Aquasoft that the summary provided is "indecipherable". It is drafted in understandable language and, in my view, satisfies the requirements of Rule 31.06(3). Consistent with the recent decision in *Edwards,* the foundational information and related documents sought by Aquasoft are beyond the scope of required disclosure pursuant to Rule 31.06(3), and are not required to be disclosed until an expert report is delivered pursuant to Rule 53.03(2.1).

[10] Having addressed that issue, I turn to the plaintiff's undertakings and refusals.

Undertakings and Refusals

[11] In its amended notice of motion, Aquasoft moves on a total of 7 undertakings and 9 refusals, as outlined in Aquasoft's charts in Schedule "A" (undertakings) and Schedule "B"

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(refusals) to the amended notice of motion. Those charts are located at Tab 2 of the motion record. Notwithstanding the mandatory language of Rule 37.10(10)(b) of the *Rules*, the plaintiff failed to file a responding refusals and undertakings chart. The numerical references below match the numerical references in Aquasoft's undertakings and refusals charts.

[12] In determining Aquasoft's motion, I have applied the relevance test stated at both Rules 30.03 and 31.06 of the and the principles of proportionality set out at Rule 29.2.03. I have further considered the scope of discovery as summarized by Justice Perell in *Ontario v. Rothmans Inc.,* 2011 ONSC 2504 at para. 129.

[13] My rulings on the undertakings are as follows:

(a) *Undertaking nos. 1, 2 and 5*: These have been satisfied and withdrawn.

(b) *Undertaking no. 3*: I agree with the plaintiff that no undertaking was given for reciprocal exchange of expert photographs, despite the reporter recording it as such. The exchange on the record is, in my view, nothing more than a discussion regarding mutual exchange. It is not an undertaking to produce. No answer is required.

(c) *Undertaking no. 4*: Aquasoft argues that the plaintiff has failed to provide any response to the undertaking given to advise of any evidence contradicting that Aquasoft's last visit to the subject property was on June 12, 2015. The plaintiff argues that no answer is required, since the undertaking is an ongoing obligation to advise if anything is subsequently learned. The specific undertaking given was, "If I hear about anything, I mean 30 days I don't know if I'd hear about anything, but if I do hear about something I'll endeavour to let you know about it." Neither the question asked nor undertaking given was to make inquiries or review records. There is no evidence before me to suggest that the plaintiff or her counsel has "heard about anything" that has not been disclosed. I accordingly find that this undertaking is an ongoing obligation in respect of which the plaintiff is not in default.

(d) *Undertaking nos. 6 and 7*: I agree with the plaintiff that Aquasoft has asserted versions of these undertakings that are more general than what was actually given. Having reviewed the relevant portion of the transcript, the actual undertakings given were to make best efforts to contact Tony Menchella and request the real estate file. The only substantive answer provided by the plaintiff is the following: "Efforts have been made and continue to be made. A copy of the file will be provided to your office immediately once we receive same." This is an insufficient answer. The undertakings were to make best efforts. If the plaintiff has not received the file from Mr. Menchella, then details of what steps have been taken to request and obtain it, including copies of letters sent, must be provided.

(e) *Undertaking no. 8*: The parties dispute whether the undertaking given by the plaintiff has been satisfied, but the plaintiff has nevertheless consented to an order that the plaintiff make inquiries of the insurer, without prejudice to the plaintiff's position on costs. Since it is relevant to costs whether or not the undertaking was satisfied, I have

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considered the issue. I am satisfied the plaintiff is correct that the undertaking given was limited to reviewing counsel's file for a further proof of loss. No undertaking was given to make inquiries of the insurer or review any other files or records. Accordingly, the answers provided in the letters sent on February 24 and June 5, 2019 were sufficient. Nevertheless, on consent, I order that the plaintiff make inquiries of the insurer and produce a copy of any further proof of loss obtained from the insurer.

(f) *Undertaking no. 9*: This has been withdrawn by Aquasoft since there are no outstanding Schedule A productions to be provided.

(g) *Undertaking no. 10*: I agree with Aquasoft that this undertaking was given and has not been answered. The only answer provided in evidence before me is a statement that, "We've asked our client to look for and provide same." This is not an answer. It is a status update. I give no weight to the plaintiff's arguments that ordering an answer is not proportional, because Aquasoft has copies of the subject invoices. The undertaking was given and undertakings given by a party must be answered. Since a best efforts undertaking was given, if the invoices cannot be located, then details of what steps have been taken and efforts made to locate the invoices must be provided.

[14] My rulings on the refusals are as follows:

(a) *Refusal no. 1*: I find that the plaintiff's refusal is unsustainable. Aquasoft sought to confirm the plaintiff's position on the date(s) from which litigation privilege and solicitor-client privilege are asserted. The plaintiff argues that the question was unclear and when litigation privilege arose is overbroad. I disagree. The date from which litigation privilege is claimed is a proper question and that information is not itself privileged. Similarly, the date on which a lawyer became involved on behalf of the plaintiff is not solicitor-client privileged. Aquasoft is not asking for disclosure of the substance of any communications between the plaintiff and any lawyer, only when a lawyer became involved. These were proper questions. The plaintiff shall confirm the date from which litigation privilege is claimed, the date a lawyer was first involved, and the date from which solicitor-client privilege is claimed.

(b) *Refusal no. 2*: The plaintiff's basis for asserting litigation privilege over the adjuster's notes and file and the evidence chain of custody were proper questions. The plaintiff shall provide an answer regarding the basis upon which litigation privilege is claimed over the adjuster's notes and file and the evidence chain of custody.

(c) *Refusal no. 3*: This refusal has been partially satisfied, and the only outstanding issue relates to production of the c.v. of Martin Lazarek, who is an expert engaged by the plaintiff. Rule 31.06(3) provides that an examining party is entitled to the findings, opinions and conclusions of an expert engaged by or on behalf of the party being examined that are relevant to a matter in issue in the action and of the expert's name and address. It says nothing about production of a c.v. Rule 53.03(2.1) provides that an expert's qualifications and employment and educational experiences in his or her area of expertise must be included in an expert report served pursuant to that rule. An expert

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report has not yet been served. I have been provided with no case law or other authority supporting entitlement to a copy of an expert's c.v. prior to delivery of an expert report. The refusal was proper.

(d) *Refusal nos. 4, 5 and 6*: These have been withdrawn by Aquasoft.

(e) *Refusal no. 8*: As set out in paragraph 8 above, in my view, the plaintiff has satisfied her obligation pursuant to Rule 31.06(3) to provide the conclusions drawn by her experts. No further answer regarding experts' conclusions is required at this stage.

(f) *Refusal nos. 7, 9, 10 and 11*: For reasons outlined in paragraphs 8-9 above, in my view, the plaintiff's refusals were proper and these questions need not be answered.

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Further and Better Affidavit of Documents

[15] No case law was provided by either party regarding the relevant test applicable to motions for a further and better affidavit of documents. That test is well-established. On such a motion, the moving party must prove that the subject documents exist on a balance of probabilities before an order is made that they be disclosed in a further and better affidavit of documents: see, for example, *Seelster v. HMTQ and OLG*, 2016 ONSC 97 at para. 46, and *Apotex Inc. v. Richter Gedeon Vegyeszeti Gyar RT*, 2010 ONSC 4070 at para. 119. While evidence in support of the motion cannot be based on speculation or guesswork, the level of proof required must take into account that one party has access to the documents and the moving party does not: *Apotex Inc., supra* at para. 119.

[16] It is conceded that the plaintiff is entitled to maintain litigation privilege over her expert reports, but I understand Aquasoft's position to be that litigation privilege is improperly maintained over the foundational information. No other undisclosed documents within the possession, control or power of the plaintiff was argued. Given my determinations above, there is no basis for an order that the plaintiff provide a further and better affidavit of documents. That portion of Aquasoft's motion is dismissed.

Re-Examination

[17] I find no basis to order re-examination of the plaintiff on the evidence before me. Aquasoft has not provided any evidence or argument regarding necessary follow-up questions that would reasonably need to be asked. Given the quantum in dispute, and taking into account principles of proportionality, I accordingly dismiss that portion of Aquasoft's motion.

Plaintiff's Cross-Motion

Compelling Attendance at Examination for Discovery

[18] Aquasoft supports its refusal to produce a representative for examination on the basis that the plaintiff has failed to comply with her Rule 31.06(3) disclosure obligations. Aquasoft's position is that "proper disclosure" is necessary so that Aquasoft's representative may be properly prepared for the examination. Aquasoft further argues that prior case law has held it is

reasonable to refuse to produce a representative until the "findings, opinions and conclusions" of a plaintiff's expert have been provided: *Turner, supra* at para. 18.

[19] In my view, as outlined above, the plaintiff has satisfied her obligations pursuant to Rule 31.06(3). I also do not accept Aquasoft's argument that further disclosure is a necessary prerequisite to preparing its representative for examination. There is evidence before the court supporting that a joint inspection of the failed reverse osmosis system was conducted by both the plaintiff's and Aquasoft's experts pursuant to a joint testing protocol agreed by those experts. The undisputed evidence is that data, testing and analysis results from that investigation was exchanged between the experts. Further, if there are surprises or "sandbagging" in questions asked during discovery, it is the role of counsel to determine if the question is proper and, if not, object to it, as provided in Rule 34.12 of the *Rules*.

[20] Aquasoft shall accordingly produce a representative for examination within 30 days, unless a later date is otherwise agreed by the parties.

<u>*Further and Better Affidavit of Documents*</u>

[21] A supplementary affidavit of documents was served by Aquasoft just prior to the hearing of these motions. That supplementary affidavit of documents addresses some of the documents sought by the plaintiff, but does not include pre-2014 invoices that the plaintiff asserts should be in the possession, control or power of Aquasoft.

[22] Based on the evidence filed, I am satisfied that, on a balance of probabilities, additional relevant invoices exist from the pre-2014 period dating back to 2009 within the possession, control or power of Aquasoft that have not been disclosed in its affidavit of documents. In particular, the plaintiff has tendered evidence that, during a telephone call with Aquasoft's counsel, Richard Bickford, he confirmed that he had copies of pre-2014 invoices generated by Aquasoft. Mr. Bickford has sworn the responding affidavit. He neither denies nor disputes the plaintiff's evidence on the existence of further invoices within Aquasoft's possession, control or power.

[23] Aquasoft is in the best position to confirm if it does or does not, in fact, have further invoices and has failed to lead any evidence on the matter. I am satisfied the pre-2014 invoices are relevant to identifying the scope of work performed by Aquasoft and potential warranties and conditions for Aquasoft's work. These are relevant issues based on the pleadings: see, for example, paras. 11, 14, 19 and 20 of the statement of claim.

[24] Regarding the particularization of Schedule B to Aquasoft's affidavit of documents, I am satisfied that the supplementary affidavit of documents provides what the plaintiff was seeking. Any further questions may be asked at the examination of Aquasoft's representative.

[25] An order is appropriate for a further and better affidavit of documents disclosing all Aquasoft invoices in respect of work performed at the subject property from 2009 to 2014. Aquasoft shall accordingly serve a further and better affidavit of documents disclosing such invoices and shall further produce all such documents for inspection (or provide copies to the plaintiff) at least 14 days prior to the examination for discovery of its representative.

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Stamped Exhibits

[26] The plaintiff seeks production from Aquasoft of copies of the stamped exhibits from the plaintiff's examination for discovery. By email dated August 19, 2019, Aquasoft's counsel provided copies of the exhibits. The plaintiff complains that the exhibit stamps have not been filled in with details of the examination and that Exhibit 7 from the plaintiff's examination has not been provided in full.

[27] I am disconcerted that relief on a motion was necessary for counsel to cooperate in providing complete copies of exhibits from a party's examination. That said, I am equally disconcerted that the court is being asked to adjudicate on whether or not an examining party is obliged to fill out the spaces in an exhibit stamp where the reporter did not do so. There is no dispute that the exhibits as sent are, in fact, the exhibits as marked. I see no utility or proportionality in ordering Aquasoft to fill in the blank spaces in an exhibit stamp.

[28] Exhibit 7 is the plaintiff's draft affidavit of documents, including Schedule A productions. The unsworn affidavit of documents marked as Exhibit 7 has been provided, without the Schedule A productions. I agree with Aquasoft that it is disproportionate to have Aquasoft provide to the plaintiff copies of productions that are the same productions served by the plaintiff. The marked affidavit of documents, without productions, is sufficient.

Disclosure of Expert Findings, Opinions, and Conclusions

[29] Nothing in Rule 31.06 provides a basis for a party to independently move for relief to disclose the findings, opinions and conclusions contemplated in Rule 31.06(3), absent an undertaking or refusal. I was pointed to no case law suggesting the contrary. In my view, the language of Rule 31.06(3) is clear that the findings, opinions and conclusions of Aquasoft's experts are properly the subject of an examination for discovery.

[30] The plaintiff does not dispute the language of Rule 31.06(3), but argues it is fair and equitable for the court to make an order for reciprocal pre-examination production of expert findings, since the plaintiff did so prior to her examination. I have been provided with no case law supporting any circumstances in which the court has ordered such disclosure in advance of discoveries. I see no reason to make such an order here. The plaintiff may have agreed to disclose the findings, opinions and conclusions of its experts prior to examination, but it had no obligation to do so. There is no evidence before me of any reciprocal agreement by Aquasoft to provide findings, opinions and conclusions other than as provided pursuant to the *Rules*.

[31] There shall accordingly be no order as requested. The plaintiff may examine on the findings, opinions and conclusions in accordance with Rule 31.06(3) at the examination for discovery of Aquasoft's representative.

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Orders

[32] I accordingly order as follows:

(a) In respect of Aquasoft's motion:

(i) The plaintiff shall provide answers to undertakings in accordance with subparagraphs 13(d), (e) and (g) above, within thirty (30) days.

(ii) The plaintiff shall answer refusal nos. 1 and 2 in accordance with subparagraphs 14(a) and (b) above, within thirty (30) days.

(iii) The balance of Aquasoft's motion is dismissed.

(b) In respect of the plaintiff's cross-motion:

(i) Aquasoft shall produce a representative for examination for discovery within thirty (30) days, unless a later date is otherwise agreed by the parties.

(ii) Aquasoft shall serve a further and better affidavit of documents disclosing all Aquasoft invoices in respect of work performed at the subject property from 2009 to 2014, and shall further produce all such documents for inspection (or provide copies to the plaintiff) at least fourteen (14) days prior to the examination for discovery of its representative.

(iii) The balance of the plaintiff's cross-motion is dismissed.

(c) This order is effective without further formality.

Costs

[33] At the conclusion of argument, since there were no offers to settle, both sides made their submissions as to costs. Both parties seek their costs of these motions.

[34] Aquasoft seeks $8,237 in costs on a substantial indemnity basis or, in the alternative, $6,619 in costs on a partial indemnity basis. Aquasoft argues that proper disclosure of experts' "findings, opinions and conclusions" was requested for months, but was not provided. Aquasoft further argues that its costs are reasonable and not excessive, that plaintiff's counsel failed to reasonably communicate with Aquasoft's counsel, and that the motion was necessary to clarify the expert issue and obtain answers to undertakings and improperly refused questions. Aquasoft further argues that the plaintiff's cross-motion was unnecessary and that the fees claimed by the plaintiff are excessive.

[35] The plaintiff seeks $13,495 in costs on a full indemnity basis or, in the alternative, 65% of actual costs on a partial indemnity basis. The plaintiff argues that Aquasoft denied the plaintiff's procedural rights and hijacked the action, intentionally seeking to "bleed" the plaintiff (although this appears to be a subrogated action), all of which warrants heightened costs. The plaintiff argues that insurers advancing "stonewall" or other harsh tactics should be subject to

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adverse costs awards: see, for example, *Persampieri v. Hobbs,* 2018 ONSC 368 at paras. 38, 83 and 100-103. Aquasoft is also argued to have engaged in scandalous conduct by waiting until August 19, 2019, when the amended notice of motion was served, to confirm which undertakings and refusals were actually being pursued. This is argued to have forced the plaintiff to incur unnecessary time and expense responding to Aquasoft's motion when satisfactory answers had already been given. The undertaking and refusals charts are further argued to have been inaccurate, resulting in additional time and expense. Aquasoft's motion is also argued to have been unnecessary, since the expert data and documents sought by Aquasoft (and the main issue argued on the motion) were already with its own expert's possession.

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[36] In determining costs, Section 131 of the *Courts of Justice Act,* RSO 1990, c. C.43 and Rule 57.01 of the *Rules* afford broad discretion to fashion a costs award that the court deems fit and just in the circumstances. The general principles applicable when determining costs are well settled. Costs are discretionary. Rule 57.01 sets out factors to be considered by the court in exercising that discretion, which are in addition to considering the result of the proceeding and any written offers to settle. The court must also consider the overall objective of fixing an amount that is fair and reasonable in the particular proceeding, having regard to the expectations of the parties concerning the quantum of costs: *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 OR (3d) 291 (CA) at paras. 26 and 38.

[37] I have considered all relevant factors in exercising of my discretion regarding costs. Without going through every factor in detail, I note the following:

(a) I see no basis for substantial indemnity costs in favour of either party. The parties both took staunch and unnecessarily unyielding positions that, in my view, exacerbated costs and resulted in more court time than should reasonably have been necessary to prepare for and argue these motions. Reasonable compromise and appropriate concessions were not made, such as, in the case of Aquasoft, the inaccuracy of undertakings and refusals as framed in its charts and, in the case of the plaintiff, the insufficiency of certain answers or impropriety of certain refusals. Notably, during vetting of my motions list on August 30, 2019, and since no responding refusals and undertakings chart had been provided by the plaintiff, I encouraged counsel to use the time prior to the motion being called to determine which undertakings and refusals remained in dispute and if any argument on the plaintiff's cross-motion would be necessary given Aquasoft's position that it was not refusing to produce a representative for examination. Hours passed before the motion was called. Plaintiff's counsel advised the court that majority of Aquasoft's motion had been resolved, but Aquasoft's lawyer disagreed. It quickly became apparent that the only agreement reached was withdrawal of one refusal and consent to answer one alleged undertaking. That "consent" itself became the subject matter of submissions on the motion, so the disputed undertaking was essentially not resolved.

(b) Aquasoft originally moved on undertakings and refusals that it ultimately accepted had been answered or satisfied, thereafter serving an amended notice of motion reducing the scope of the motion. I agree some unnecessary costs were incurred by the plaintiff as a result.

(c) The accuracy of how Aquasoft framed undertakings and refusals in its charts was squarely at issue on Aquasoft's motion. As outlined above, I have in several instances accepted the plaintiff's position that an undertaking was not given as written in the chart. Those findings underscore the importance of a responding party complying with the requirement to deliver a responding chart on these types of motions. Much of the hearing was spent reviewing the charts and confirming positions of the parties. This could have been substantially reduced with a clear and concise chart from Aquasoft organized by issues as required by Rule 37.10(10) and with Aquasoft having carefully reviewed the transcript to ensure undertakings and refusals were captured accurately. However, an equally clear and concise responding chart should have been prepared by the plaintiff setting out her position on misstated undertakings or refusals, including the answers given and why they were sufficient or the position taken on a refused question. In my view, both parties failed to organize their motion materials for Aquasoft's motion in a manner that assisted the court or simplified argument.

(d) The plaintiff's costs outline includes time spent on tasks that are properly costs of the action. Similarly, both parties have improperly claimed costs of transcripts from the examinations for discovery, which are disbursements properly claimed in the action.

(e) In my view, notwithstanding that rates charged by counsel on both sides are reasonable, the hours spent and thereby total costs incurred for these motions are grossly disproportionate to the amount of the claim and the issues on this motion.

(f) Given my findings above, Aquasoft's basis for refusing to produce its representative for examination was improper. In my view, the plaintiff is entitled to reimbursement of the costs of the certificates of non-attendance.

(g) Despite the position of each party that the other party's motion was unnecessary, in my view, both motions were partially necessary. There has been largely divided success on each of the motions, with portions granted and portions dismissed. In my view, though, the plaintiff has been overall more successful than Aquasoft, particularly when considering that relief on certain undertakings and refusals was withdrawn at the hearing and the significance of the expert issue on this motion, on which the plaintiff was successful.

[38] Having weighed the factors in Rule 57.01, I find that its is fair and reasonable that Aquasoft pay costs to the plaintiff in respect of these motions fixed in the amount of $2,250.00, inclusive of HST and disbursements, payable in any event of the cause.

MASTER TODD ROBINSON

DATE: December 11, 2019

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