

***SUPERIOR COURT OF JUSTICE - ONTARIO  
(COMMERCIAL LIST)***

**IN THE MATTER OF *COMPANIES' CREDITORS ARRANGEMENT ACT*,  
R.S.C. 1985, c. C-36 AS AMENDED**

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF  
UNIQUE BROADBAND SYSTEMS, INC.**

**BEFORE:** MESBUR J.

**COUNSEL:** Gerald McGoey in person, and with leave of the court, on behalf of Jolian Investments Limited

*Clifford Cole, Benjamin Na and Joe Thorne* for Unique Broadband Systems, Inc.

**HEARD:** in writing

**SECOND DECISION ON COSTS**

[1] The trial decision in this case was appealed to the Court of Appeal. As a result of the appeal decision, the issue of costs of the trial has been referred back to me.

[2] At trial, I decided there should be no order as to costs since I determined success had been divided. The Court of Appeal's decision resulted in overall success for UBS. The Court of Appeal determined UBS is entitled to its costs of the trial and ordered "the parties may attend before the Trial Judge to fix the costs if the parties cannot agree on the scale and/or quantum of the costs."<sup>1</sup>

[3] The parties have been unable to agree. Accordingly, I must decide both the scale and amount of costs, and how those costs should be apportioned between Mr. McGoey and Jolian Investments Limited, who were the unsuccessful parties.

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<sup>1</sup> Paragraph 6 of the order of the Court of Appeal dated July 10, 2014

[4] After the trial and the release of my judgment, the parties made costs submissions. Both sets of lawyers delivered costs outlines, setting out their actual fees, as well as what they claimed on both partial and substantial indemnity bases. In my costs decision following the trial, I found:

Both sets of fees are extremely high. Given the range of fees each side submits, it seems to me neither can be particularly surprised by the magnitude of the other's. Thus, if either is deemed to be "unsuccessful", each could reasonably expect to pay costs in this range...<sup>2</sup>

[5] Notwithstanding Mr. McGoey's new lengthy submissions on the quantum of costs and his review and comments on UBS' counsel's dockets I am not prepared to revisit my earlier finding of reasonableness regarding the costs claimed. I recognize Mr. McGoey now represents himself. That does not entitle him, however, to attack my earlier findings.

[6] I therefore conclude that UBS is entitled to either partial indemnity costs or substantial indemnity costs in the ranges submitted in its original costs outline. I reject Mr. McGoey's suggestion that UBS' costs should be assessed. The Court of Appeal expressly directed me to fix the trial costs. I do not see that direction permitting me to refer the issue to assessment.

[7] I must now determine whether UBS is entitled to substantial indemnity costs, as it requests, or simply to partial indemnity costs.

[8] UBS suggests that given the findings of the Court of Appeal confirming Mr. McGoey had breached his fiduciary duty to UBS, and its further finding that this breach constituted "cause" under the Jolian Management Services Agreement, the scale of costs should be substantial indemnity.

[9] I agree. The Court of Appeal held this serious breach of Mr. McGoey's fiduciary duty would logically meet the definition of serious misconduct that was materially injurious to UBS. The Court of Appeal effectively determined Mr. McGoey's conduct was analogous to the enumerated grounds of fraud, theft and misappropriation set out as "cause" in the Jolian Management Services Agreement.

[10] There is ample case law to support the proposition that costs should be awarded on a substantial indemnity basis in cases involving a breach of fiduciary duty, breach of trust, conspiracy, misrepresentation and other forms of similar reprehensible conduct. <sup>3</sup> The Court of Appeal determined that kind of conduct was present in Mr. McGoey's behavior, and was sufficient to deprive him of his contractual right to a "golden parachute".

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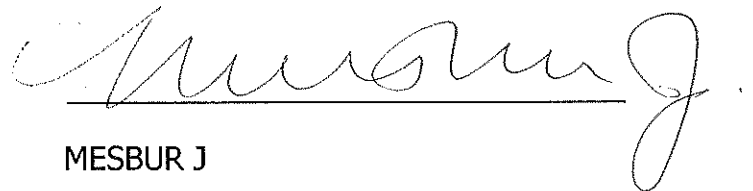
<sup>2</sup> Paragraph 9 of costs decision *Unique Broadband Systems, Inc. (Re)*, 2013 ONSC 5121

<sup>3</sup> See, for example, *Beaver Lumber Co. v. 222044 Ontario Ltd.*, [1996] O.J. No.3294 (Gen Div).

[11] Since I have already decided UBS's bill of costs is reasonable, I find Mr. McGoey and Jolian Investments Limited are liable to pay UBS's bill of costs on a substantial indemnity basis. UBS' costs outline shows actual fees incurred of \$1,170,894.25. In my view, 85% of that amount would represent a fair substantial indemnity award of costs. Accordingly, I fix UBS' substantial indemnity costs at \$995,000 (rounded) for fees, plus HST on that amount of \$129,350, and disbursements inclusive of HST of \$199,667 (rounded) all for a total of \$1,324,017 inclusive of fees, taxes and disbursements.

[12] The Court of Appeal apportioned costs of the appeal on a joint and several basis between Mr. McGoey and Jolian. If that was the appropriate apportionment on the appeal, which dealt with all aspects of the trial, I assume it must also be appropriate for the trial itself.

[13] Accordingly, Mr. McGoey and Jolian Investments Limited are jointly and severally liable for these costs, on a substantial indemnity basis, fixed at \$1,324,017 all inclusive.



MESBUR J

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