IN THE COURT OF APPEAL OF MANITOBA

B E T W E E N :

	)	***F. J. Trippier*** *and*
	)	***S. Nelko***
	)	*for the Appellants*
	)	
	)	***G. M. Fleetwood***
GREG MCLEOD and JAMES MCLEOD as	)	*for the Respondents*
Co-Administrators of the Estate of	)	*Terry Cole, Stuart James*
EDWARD ALEXANDER MCLEOD	)	*Cowie carrying on business*
	)	*as Cowie Real Estate*
	)	
(Plaintiffs) Appellants	)	***S. F. Vincent***
	)	*for the Respondents*
- and -	)	*Jarett Kehler, Jarett D.*
	)	*Kehler Law Corporation*
TERRY COLE, STUART JAMES COWIE	)	*carrying on business as*
carrying on business as COWIE REAL	)	*Donald Legal Services,*
ESTATE, JARETT KEHLER, JARETT D.	)	*L.W. Donald Law Corporation*
KEHLER LAW CORPORATION carrying on	)	*carrying on business as*
business as DONALD LEGAL SERVICES,	)	*Donald Legal Services and*
L.W. DONALD LAW CORPORATION	)	*the said Donald Legal*
carrying on business as DONALD LEGAL	)	*Services*
SERVICES and the said DONALD LEGAL	)	
SERVICES, JAYSUKH RUDANI and 5935491	)	***No appearance***
MANITOBA LTD.	)	*for the Respondents*
	)	*Jaysukh Rudani and*
	)	*5935491 Manitoba Ltd.*
(Defendants) Respondents	)	
	)	*Chambers motion heard:*
	)	***September 16, 2021***
	)	
	)	*Decision pronounced:*
	)	***September 23, 2021***

MAINELLA JA

Introduction

[1] The modern appellate court has been aptly described as a "paper jungle" (*Inplayer Ltd & Anor v Thorogood*, [2014] EWCA Civ 1511 (BAILII) at para 55). This chambers motion, about the length of the plaintiffs' factum, illustrates that vivid depiction.

[2] The plaintiffs, who are administrators of the deceased's estate, commenced an action over whether he had the mental capacity to sell three parcels of land, whether he was properly represented in the real estate deals by his advisors and whether he received fair market value for the land sold. Over the course of the five-week trial, 212 exhibits were filed and 18 witnesses testified. The trial transcript is 2,951 pages. The trial judge received 488 pages of written submissions and, ultimately, delivered a 138-page written decision dismissing the action (see 2021 MBQB 24). The notice of appeal particularizes 17 grounds of appeal. No doubt the written materials still to be generated by the appeal will be voluminous.

[3] The plaintiffs now move for leave to file a 43-page factum (although counsel candidly advised in oral submissions a further five pages would be even better). The defendants take no position on the motion other than, if it is granted, they request an equal page limit.

[4] For the following reasons, the motion is dismissed.

Discussion

The Law

[5] Relevant to this motion is r 29 of the MB, *Court of Appeal Rules*, MR 555/88R, and Guideline 3.5 of the "Court of Appeal Practice Guidelines" (July 2003), online (pdf): *Manitoba Courts* <www.manitobacourts.mb.ca/site/assets/files/1139/practice_guidelines.pdf> (date accessed 20 September 2021).

[6] Rule 29(1) addresses the content of a factum. It requires that the overview of the case, the summary of the facts, the issues, a party's position and a statement of the argument be set out concisely.

[7] Guideline 3.5 sets a 30-page limit for a factum:

> 3.5 The Court reserves the right to reject factums of excessive length. Any factum exceeding 30 pages is subject to review. If rejected, a more concise factum must be filed on a timely basis.

[8] Rule 29(3) provides for judicial discretion to deal with factums of an excessive length:

> **Content of factum**
> . . .
>
> **29(3)** A judge may, without a hearing, reject a factum on the grounds of excessive length and may give directions regarding the maximum length, in which case the factum shall be redone and refiled within the next 10 days.

[9] In *Saint John (City) v IAFF, Local 771*, 2010 CarswellNB 355 (CA), Drapeau CJNB explained, in discussing equivalent provisions in New Brunswick, that "conciseness is not merely a pious wish: it is mandated" (at para 13).

[10] The requirements that a factum must be concisely drafted and cannot exceed a prescribed page limit, without leave, forms part of the practice of every appellate court in Canada (see Donald JM Brown with the assistance of David Fairlie, *Civil Appeals* (Toronto: Thomson Reuters, 2021) vol 1 (loose-leaf updated 2021, release 2), ch 9). These requirements are necessary for the proper administration of justice to ensure that appeals are properly focused while, at the same time, enabling the court to efficiently manage its business (see *R v Van Wissen*, 2016 MBCA 108 at para 7; and *OZ Merchandising Inc v Canadian Professional Soccer League Inc*, 2020 ONCA 532 at paras 4-5).

[11] Several principles are well-established in relation to exercising the discretion as to whether to grant leave to file a lengthier factum. In reaching my decision, I have taken these principles into account.

[12] First, the discretion to grant leave to file a lengthier factum cannot be exercised in a vacuum. The moving party has the onus of demonstrating, not merely asserting, a reasonable basis for a lengthier factum (see *Canada v General Electric Capital Canada Inc*, 2010 FCA 92 at para 5(b)). Normally, a copy of the proposed factum should be provided to the chambers judge so that an informed assessment of whether to grant leave to file a lengthier factum can be undertaken (see *ibid* at para 5(h); *Van Wissen* at para 4; and *Ma v Vansanten*, 2017 BCCA 441 at para 14). That has occurred here.

[13] Second, significant weight should be given to the opinion of counsel for the moving party and counsel for the responding party for the need for a lengthier factum, but ultimately the court has "the final say" as to whether an exception should be made and to what extent (*R v Candir*, 2008 ONCA 773 at para 5; see also *General Electric Capital* at paras 2, 5(c); and *OZ Merchandising Inc* at para 8).

[14] Third, complicated appeals are common. Prescribed page limits are accepted to be adequate to argue a reasonably complex appeal; history teaches that the quality of a factum does not turn on its length (see *OZ Merchandising Inc* at para 4). There are no automatic exceptions to page limits for matters which may raise "important and complicated questions" (*General Electric Capital* at para 5(d)), such as lengthy jury trials for serious offences (see *Candir*; and *Van Wissen*); sophisticated commercial cases (see *OZ Merchandising Inc*); important public law cases (see *Chief Mountain v Canada (AG)*, 2012 BCCA 69 at paras 6-7; and *Sagkeeng v Government of Manitoba et al*, 2020 MBCA 100 at para 14); or an appeal having a lengthy record or judgment in the court below (see *Ma* at para 14; and *OZ Merchandising Inc* at para 7).

[15] Fourth, leave to file a lengthier factum is a remedy that is seldom granted. As Roberts JA explained in *OZ Merchandising Inc*, such relief "is exceptional and granted sparingly in special circumstances" (at para 5). Roberts JA went on to explain, "The overarching question is whether the extension is required in the interests of procedural fairness and justice 'to advise the other side of the issues in dispute so it can prepare properly for the appeal and to assist the division of the Court that hears the appeal to deal effectively with the issues'" (at para 6).

Analysis

[16] In addition to the benefit of the oral submissions of counsel, I have read the decision of the trial judge, the notice of appeal, the proposed draft factum contained in the supporting affidavit and the plaintiffs' memorandum of argument on the motion.

[17] The trial judge stated that the "deep underlying issue" (at para 6) in the trial was a factual one that related to the deceased's capacity and how his advisors dealt with his diminished capacity in the real estate deals.

[18] For my purposes, it is sufficient to say that the trial decision can be divided into three parts: mental capacity, professional advice, and the fair market value of the land sold. On each of these disputed issues, the trial judge had conflicting lay and expert evidence. In each instance, he preferred the evidence of the defendants over that of the plaintiffs.

[19] Approximately 10 pages of the proposed factum are devoted to introducing the appeal and summarizing the facts and issues. The remainder of the proposed factum, except for a modest amount devoted to alleged legal errors of the trial judge, challenges the trial judge's findings of fact as to mental capacity, professional advice and the fair market value of the land sold.

[20] In his oral submission, counsel for the plaintiffs advised that the 43-page proposed factum was already the product of significant editing. It was suggested that this case is exceptional because, on every contested factual issue, the trial judge preferred the evidence of the defendants when he could have accepted the evidence of the plaintiffs. Counsel submitted that, because the trial judge committed so many palpable and overriding errors (he

estimated in his oral submission that there are between 20 to 30 while, in contrast, the defendants' counsel said that there are none), this Court must engage in "a more thorough review of the trial evidence than usual". Counsel argues that it is important for the Court to have the assistance of a lengthier factum in this appeal and it would be unfair to the plaintiffs to deny leave to file a lengthier factum as it would impair their ability to effectively advance their appeal. I disagree.

[21] A factum should illuminate the essence of an appeal as opposed to concealing it. It should be concise, informative and user-friendly. This requires that a party engage in "selection, distillation and synthesis" (*General Electric Capital* at para 5(e)). A factum that has the qualities of being discursive, repetitive or prolix is contrary to what is expected.

[22] It is well-understood that modern appeals are writing-centered as opposed to speech-centered; appellate judges have the advantage of reading the legal equivalent of a libretto before experiencing the sights and sounds of an appeal in person. I reject the premise of the plaintiffs' submission that this case will require members of the panel to read the record more thoroughly than usual. While appellate judges are different in how they go about preparing for an appeal, their intimate familiarity with the record and written submissions, before an appeal is heard, is what a litigant will typically encounter at the appeal hearing.

[23] Leaving aside the legal errors alleged, in order for the plaintiffs to succeed in this appeal, they will need to identify the obvious error(s) in the trial judge's reasons that are determinative of the deceased's mental capacity, the professional advice he received or the fair market value of the land sold.

Attempting to have this Court substitute an alternative factual finding than the trial judge reached by retrying the evidence is a path this Court will likely decline to follow (see *Albo v The Winnipeg Free Press et al*, 2020 MBCA 50 at para 19).

[24] The proposed factum is prolix because it presents "a mass of detail" about the evidence, which is unlikely to help the plaintiffs' appeal instead of clearly identifying specific factual errors that are palpable and overriding (*R v Port Chevrolet Oldsmobile Ltd*, 2008 BCCA 443 at para 11).

[25] Because of the extensive pre-hearing preparation that appellate judges undertake, often it will be sufficient for a party to succinctly state the nature of the alleged error in the factum, together with any relevant pinpoint references to the record and/or casebook (see *Jachimowicz v Jachimowicz*, 2009 NSCA 36 at para 8; and *General Electric Capital* at para 5(g)). The point can be developed further, if necessary, in oral submissions.

[26] The following example I have taken from the decision of Costigan JA in *Kurtz v Nicholson*, 2006 ABCA 203, is the kind of distillation and synthesis which a concise factum should emulate (in conjunction with pinpoint references). This one paragraph says all that needs to be said about a reversible error and is an example of clear legal reasoning (at para 21):

> The trial judge made a palpable and overriding error in finding the testator lacked testamentary capacity. There is no evidence to support that finding. Indeed the evidence, particularly that of [the testator's lawyer,] Carter, establishes the contrary. Carter specifically questioned the testator with a view to gauging his capacity during their first two meetings. Although Carter did not do this when he met with the testator for the third time, the meeting lasted two and a half hours and he had no reason to conclude the testator's capacity had changed. Carter noted the testator was in

> good spirits and spoke clearly. He read the entire will to the testator and was satisfied it expressed the testator's wishes. A finding of lack of testamentary capacity cannot be sustained in the face of such evidence.

[27] While I place significant weight on the opinion of counsel as to the need for a lengthier factum, particularly in light of an extensive record and reasons of the trial judge, in my respectful view, the plaintiffs have also not yet sufficiently prioritized which arguments are their best ones to challenge the trial judge's findings of fact. That has yet to occur, given that counsel believes the trial judge made 20 to 30 palpable and overriding errors. The plaintiffs are not entitled to a lengthier factum simply to pursue a "shotgun approach to appellate advocacy"; the plaintiffs are obligated to focus their appeal (*R v Henderson (WE)*, 2012 MBCA 93 at para 51; *OZ Merchandising Inc* at para 10; and *Van Wissen* at para 7; see also paras 5-6).

[28] Finally, the proposed factum gives the impression that the plaintiffs are requesting leave to file a lengthier factum to make extensive arguments about the evidence in the hope that this Court will retry the factual findings decided against them by the trial judge. That is not an appropriate basis for leave to file a lengthier factum (see *Van Wissen* at para 8).

[29] In my view, the normal page limit of 30 pages is sufficient, given the complexity of this appeal, for the fair and effective presentation of the plaintiffs' appeal.

[30] In conclusion, I have not been persuaded that there is anything exceptional about the nature of the case or the questions it raises to warrant a lengthier factum. An extension is not required, in the interests of procedural

fairness and justice, to advise the defendants of the issues in dispute so they can prepare properly for the appeal and to assist the Court to deal effectively with the issues.

Disposition

[31] In the result, the motion is dismissed. In accordance with r 29(3), the plaintiffs will have 10 days from the signing of the order dismissing this motion to file a factum of no greater than 30 pages that otherwise conforms to the rules and practice guidelines of this Court. There will be no order as to costs.

Mainella JA