CITATION: Wiener Städtische Versicherung AG v. Infrassure Ltd., 2023 ONSC 6433
COURT FILE NO.: CV-19-00632073-00CL
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2023 ONSC 6433 (CanLII)

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

RE: WIENER STÄDTISCHE VERSICHERUNG AG Vienna Insurance Group, Plaintiff

and

INFRASSURE LTD., Defendant

BEFORE: Conway J.

COUNSEL: *William McNamara, Chris Hunter* and *Morag McGreevey*, for the Plaintiff

Robert B. Bell, Shannon M. Gaudet, Emily Y. Fan and *Lucy Sun*, for the Defendant

HEARD: In writing

REASONS FOR DECISION (COSTS)

[1] Following a 15-day trial, I granted judgment to Wiener Städtische Versicherung AG Vienna Insurance Group ("**VIG**") against Infrassure Ltd. ("**Infrassure**") for $8,969,760.17 plus pre-judgment interest: *Wiener Städtische Versicherung AG v. Infrassure Ltd*., 2023 ONSC 5256.

[2] VIG claims costs of $3,496,810.81, representing costs on a partial indemnity basis to March 13, 2023, the date of its Rule 49.10 offer, and on a substantial indemnity basis thereafter.

[3] Infrassure submits that VIG should only be entitled to costs on a partial indemnity basis, discounted by 25%, for a total of $1,981,616.56, including disbursements. Alternatively, Infrassure submits that if costs are awarded on a substantial indemnity basis after March 13, 2023, they should be discounted by 25% and fixed at $2,419,539.46, including disbursements.

Scale of Costs

[4] On March 13, 2023, VIG served an offer under Rule 49.10 to settle the action for $8,500,000.00 in damages and interest, plus costs to be agreed upon or assessed.

[5] Infrassure submits that the amount of VIG's offer was not a true compromise and was inconsistent with the spirit of Rule 49.10. I do not accept this submission. The amount recovered by VIG at trial, inclusive of pre-judgment interest, was over $10 million before costs. This is $1.5 million more than the amount of its Rule 49.10 offer. Infrassure would have saved this amount had it accepted the offer. I also note that both sides offered modest discounts in their settlement positions — Infrassure's Rule 49 offer on January 30, 2023 was $818,178.80, inclusive of claims, interest, costs and disbursements.

[6] VIG recovered a judgment that was more favourable than the terms of its offer to settle. Under the provisions of Rule 49.10, it is entitled to recover costs on a partial indemnity basis to the date of the offer and on a substantial indemnity basis thereafter.

Rule 57.01(1) Factors

[7] There is no question that VIG was the successful party at trial. VIG prevailed on the central issues of (i) whether Infrassure was contractually required to follow the settlement entered into by Zurich and Vale and (ii) whether there was any reason to relieve Infrassure from following the settlement. VIG received judgment for the full amount of its breach of contract claim.

[8] The case itself was factually and legally complex. The factual issues related to the failure in the north-east tap block in flash furnace 2 at the Vale smelter in Sudbury, the adjustment of Vale's business interruption claim over a three and a half-year period, and the associated technical engineering, mineralogy, and accounting issues. Legally, the case involved the interpretation of reinsurance and retrocession agreements, analysis of policy exclusions, and consideration of the elements of the follow the settlement obligation.

[9] Infrassure could reasonably have expected that VIG would vigorously pursue the action and expend considerable resources in doing so. VIG, as the fronting reinsurer, had paid its portion of the settlement to Zurich ($8,442,931.00) and was seeking to recover 99.89% of that amount from Infrassure under the retrocession agreement. Infrassure took the position that it did not have to pay VIG anything. Although VIG paid Zurich in March 2015, it did not obtain judgment against Infrassure until 2023.[1]

[10] Moreover, Infrassure challenged both its contractual obligation to follow the settlement and the settlement itself. VIG therefore had to adduce evidence on, among other things, the proper and businesslike steps taken by Zurich to enter into the settlement. This was particularly difficult for VIG since it was not an active part of the adjustment and settlement process. Moreover, the evidence it adduced came from non-parties that it did not control — for example, Vale, Zurich, and Cunningham Lindsey.

[1] VIG originally sought to recover damages from Infrassure through arbitration but was unsuccessful on jurisdictional grounds. It then pursued its claim in this court. By the end of 2017, the parties were exchanging pleadings and moving on to productions and discoveries.

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[11] I agree with VIG that Infrassure unnecessarily lengthened the proceedings by failing to make any inquiry as to the circumstances in which Infrassure entered into the retrocession agreement. Mr. Bachmann could have spoken to Mr. Bailey (the individual who negotiated the agreement for Infrassure and who testified at trial) as to whether Infrassure secured claims approval rather than pursuing its argument based on Mr. Bachmann's assumption that Infrassure had secured that approval.

[12] Infrassure takes issue with the proportionality of the costs incurred. VIG's actual costs are almost $4.6 million on a claim of $8.96 million plus pre-judgment interest. Although the claim was lengthy and complex, I accept that the costs incurred are high relative to the amount in issue.

[13] With respect to the $384,848.95 in disbursements claimed by VIG, Infrassure argues that $298,176.11 is not recoverable. I address each of Infrassure's arguments.

[14] The travel expenses for VIG's representatives to attend trial and instruct counsel in person are recoverable. I am not disallowing those disbursements simply because the representatives might have been able to watch the trial by Zoom. Indeed, Infrassure's representative Mr. Bachmann attended the trial in person.

[15] VIG claims "participant expert expenses" for Allan MacRae, Brad Ebel, Phil Turner, Taleb Talaat, Peter Munro, and Jorma Tuppurainen, for a total of just over $109,000. Infrassure submits that these expenses are non-recoverable. I disagree. In *D.W. Matheson & Sons Contracting Ltd. v. Canada*, 2000 NSCA 44, 187 N.S.R. (2d) 62, at paras. 84–91, Cromwell J.A. (as he then was) considered the recoverability of fees paid to fact witnesses. He stated that payment of fees to a fact witness for preparation may be recoverable in a particular case where there has been detailed preparation in complex matters. The allowance of the disbursement and its amount are discretionary. The amount of the allowance should reflect the nature of the preparation that was reasonably required and the nature of the evidence given. Where the witness' involvement as a fact witness arises from his or her professional activities, an allowance closer to the normal professional charges of the witness may be appropriate.[2]

[16] In my view, those principles apply in this case. Those witnesses, although fact witnesses, were involved in their professional capacities at the time. In order to prepare for trial, they had to review their voluminous files and the opinions or advice they gave between 2011 and 2014. It is appropriate to compensate them for that time. However, I am discounting those disbursements slightly because there is no breakdown as between preparation time and time testifying at trial. Only the former is recoverable: *Matheson*, at paras. 87–90.

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[2] There is a suggestion in *Legault v. TD General Insurance Company*, 2022 ONSC 3367, 86 C.P.C. (8th) 364, at paras. 20–27 that the payment should be disclosed to the other side, preferably well before trial so that objections can be discussed at the pretrial or in enough time to seek a ruling on the admissibility of the witness' evidence before trial. *Legault* was not a costs decision; rather it was a motion to exclude the testimony of witnesses who received financial compensation. I do not read *Legault* as imposing a rule that no fees paid to fact witnesses can be recovered without prior disclosure. I note that the court in *Matheson* did not include any prior disclosure requirement in its analysis of the recoverability of witness preparation fees as disbursements.

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[17] VIG claims $50,000 as a disbursement for Tom Weitzman, an expert on English insurance law. He did not end up testifying (although VIG submits that it repurposed his evidence for closing argument). Since he did not provide any expert evidence at trial, I am disallowing the disbursement.

[18] VIG claims $56,634.72 in disbursements for document management database fees. Those are mostly for e-discovery services and are recoverable: *Harris v. Leikin Group*, 2011 ONSC 5474, at paras. 37 and 43. See also *LeRoy v. Timberwest Forest Corp.*, 2021 BCSC 2346, at paras. 13–34. This was a document intensive trial with a substantial amount of documentary evidence. It is appropriate for VIG to recover this disbursement.

Decision on Costs

[19] The overriding principle in awarding costs is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding, rather than an amount fixed by the actual costs incurred by the successful litigant: *Boucher et al. v. Public Accountants Council for the Province of Ontario et al*. (2004), 71 O.R. (3d) 291 (C.A.).

[20] Overall, considering the result in the proceeding and taking into account the factors in Rule 57.01(1), I consider that a fair and reasonable costs award for the action is **$2,800,000**, inclusive of disbursements and taxes. I exercise my discretion under s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 accordingly.

[21] Infrassure shall pay $2,800,000 to VIG within 30 days.

Conway J.

Date: November 15, 2023

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