CITATION: Infor v. Centrilogic 2023 ONSC 3375
COURT FILE NO.: CV-20-00643083-0000
DATE: 20230605

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: INFOR FINANCIAL INC.

Plaintiff

AND:

CENTRILOGIC, INC.

Defendant

BEFORE: Koehnen J.

COUNSEL: *Matthew P. Gottlieb, Michael A. Currie* for the plaintiff

Anthony Scane, Luigi Iantosca for the defendant

HEARD: In Writing

COSTS ENDORSEMENT

[1] The plaintiff seeks costs of $511,762.22 arising out of a four-day trial in respect of which I released reasons indexed as *Infor v. CentriLogic*, 2023 ONSC 2396. The defendant submits that the plaintiff's request is excessive and proposes a costs award of no greater than $225,000 including disbursements and HST.

[2] I am satisfied that the plaintiff is entitled to an award of $511,762.22 and fix its costs in that amount.

[3] The plaintiff's claim for costs is based on partial indemnity costs of $88,422.90 plus HST up to July 12, 2021 and substantial indemnity costs after that date. The claim for substantial indemnity costs is based on a settlement offer served on July 12, 2021 in which the plaintiff offered to settle the action in exchange for a payment of $595,000 including principal, interest, taxes and costs. The plaintiff obtained judgment of $689,375.85 including HST on the principal amount of the judgment, and prejudgment interest. The judgment at trial was more favourable to the plaintiff than its settlement offer, as a result of which it is presumptively entitled to costs on a partial indemnity scale up to the date of the offer and costs on a substantial indemnity scale from the date of the offer to the end of trial.

Proportionality

[4] The defendant submits that the amount the plaintiff seeks for costs is disproportionate to the amount at issue in the action. While I agree that the costs incurred are high in relation to the amount at issue, that is not necessarily unusual. The fact that a costs award amounts to a significant proportion of the damages sought or even exceeds the amount of the claim does not, in and of itself, render the award inappropriate. As a Daley J. noted in *A & A Steelseal Waterproofing Inc. v. Kalovski*,[1] it is "regrettable but it is well known to counsel that this is one of the risks involved in pursuing or defending a case."[2]

[5] Moreover, as the Ontario Court of Appeal noted in *Jarbeau v. McLean*,[3] although proportionality is a relevant factor to take into account in each case, it should not be used to deprive a plaintiff who obtained a judgment superior to its settlement offer of substantial indemnity costs after the date of the offer.[4] One reason for delivering a settlement offer is that an action may be disproportionately expensive to litigate. One purpose of a settlement offer is to put pressure on an opposing party to consider, long and hard, both the offer and its consequences. To deprive the offering party of the beneficial consequences of a settlement offer would eviscerate the purpose of Rule 49.

[6] In an effort to demonstrate the disproportionate nature of the plaintiff's request, the defendant presents a costs calculation in its submissions that would award the defendant partial indemnity costs up to the date of its own offer to settle for $50,000 on February 4, 2021 followed by substantial indemnity costs after that. That calculation comes to $323,735.47.[5] As noted, the plaintiff seeks costs of $511,762.22. The difference between the plaintiff's and defendant's costs is, however, smaller than appears at first blush.

[7] The defendant calculated its substantial indemnity costs at 80% of its actual rate. The norm is to calculate substantial indemnity costs at 90% of its actual rate. If that is done, the defendant's comparable cost award would be $382,222.40.[6] Although that is still well shy of the plaintiff's request, there are further factors to take into account when comparing the two numbers.

[8] The defendant's billing rates are lower than those of the plaintiff. By way of example, Mr. Scane, for the defendant is of roughly the same seniority as Mr. Gottlieb and billed hourly rates of between $710 and $800 at varying times in the litigation. Mr. Gottlieb, billed at hourly rates of between $985 and $1200; a billing rate of between 38% and 50% higher.

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[1] *A & A Steelseal Waterproofing Inc. v. Kalovski*, 2010 ONSC 2652 at para 21.
[2] *Ibid*. at para. 21
[3] *Jarbeau v. McLean*, 2017 ONCA 115
[4] *Jarbeau v. McLean*, 2017 ONCA 115 at para. 84.
[5] See para. 3 of defendant's cost submission which breaks the figure down as costs of $265,547.90 plus HST ($34,521.22) plus disbursements of $23,666.34
[6] I arrive at that using the defendant's total partial indemnity costs of $211,537.50 calculated at 60% of actual costs, multiplying that by 1.5 to arrive at 90% to arrive at $317,306.25 plus HST of $41,249.81 plus disbursements of $23,666.34.

Rates of more junior counsel showed comparable differences. The lawyer who did the lion's share of the work for the plaintiff was Michael Currie. He was called in 2015 and billed at rates varying between $485 and $725. The closest counterpart on the defendant's bill of costs is a 2013 call who billed at $540 when Mr. Currie was billing at $725: a difference of 34%.

[9] The billing rates of both counsel are reasonable and reflect the general range of hourly rates for commercial litigation in Toronto. The difference in rates reflects the different profiles of counsel and their firms and the different market segments they target. Those differences in rates have a material difference on the total costs of the matter.

[10] If for example, one takes the defendant's adjusted costs from footnote 6 above, and applies a 34% billing rate difference, one arrives at costs and disbursements of $504,131.45;[7] an amount not materially different from what the plaintiff seeks.

[11] The directing minds behind the defendant are highly sophisticated American venture capital players. They can be expected to be aware of the range of billing rates in commercial centres like Toronto and should not be surprised by the rates charged by the plaintiff's lawyers.

[12] It also appears that the bill of costs the defendant submitted omitted approximately 29 hours of time that the defendant's counsel billed but did not include in its bill of costs and omitted approximately $10,876 in disbursements (including HST).

[13] Finally, it should be noted that the costs of a plaintiff are generally higher than those of a defendant because the plaintiff bears the burden of proof and generally has a more difficult task than defendants do.[8] In this regard, I note for example that here, plaintiff's counsel bore the costs of preparing litigation tools like a joint book of documents, a chronology, a cast of characters and a transcript brief.

[14] When taking these various factors into account I do not view the plaintiff's request for costs as disproportionate from what the defendant would have sought.

Amount of Time Spent on Various Tasks

[15] The defendant next submits that plaintiff's counsel spent excessive time on various tasks in the litigation. As an overarching response, I note that the overall request for costs of the two parties is not especially different when one normalizes their bills of costs to have more

[7] To arrive at this figure, I take the defendants adjusted costs of $317,306.25 multiply that by 1.34 I arrive at a figure of $425,190.37. To that I add HST of $55,274.74 plus disbursements of $23,666.34 for a total of 501,131.45

[8] See for example: *Gardner v. Hann*, [2012] O.J. No. 1440 at para 42; *Hanisch v. McKean*, 2013 ONSC 5086, [2013] O.J. No. 3599 at para 59; *Frazer v. Haukioja*, [2008] O.J. 5306 at para 18 – 20; *Shearer v. Sewchand*, [2013] ONSC 6760 at para. 24, 30-32, 40-41; *Cheesman et al v Credit Valley Hospital et al*, 2020 ONSC 1729 at para. 89.

of an apples to apples comparison. That apples to apples comparison suggests that the plaintiff's lawyers did not spend excessive time on any particular tasks.

[16] That said, I now turn to the defendant's submissions about allegedly excessive time. The defendant notes that two junior lawyers spent 103 hours on document production and review.

[17] As always, the analysis turns on the context, not just the number. The defendant produced over 8,500 documents. When I calculate the total amount of time plaintiff's counsel spent on document review it comes to approximately 1.4 minutes per document, excluding any documents the plaintiff produced. That does not strike me as an excessive amount of time.

[18] The defendant objects that plaintiff's counsel Michael Currie spent 65.2 hours on examinations for discovery. Mr. Scane's bill of costs for the defendant shows him having spent 70.2 hours on discovery in addition to a further 17.8 hours spent by a law clerk Megan Saxe. I am hard-pressed to see how Mr. Currie's time preparing for discovery is excessive when it is less than the time defendant's counsel spent.

[19] The defendant submits that Mr. Currie's billing of 40.3 hours for mediation is excessive. Mr. Scane spent 29 hours on mediation. I do not see that difference as excessive. Whether Mr. Currie's time was well spent turns on the nature and quality of the mediation materials and the degree of time and energy a party wished to devote to mediation. Given the end result and the plaintiff's costs, it made good sense for the plaintiff to devote considerable time to mediation in an effort to arrive at a settlement and avoid the cost of trial.

[20] Mr. Currie spent 202.1 hours for trial preparation which the defendant notes is the equivalent of more than a month's worth of ordinary dockets plus an additional 101.9 hours by a law clerk. As noted above, the plaintiff spent time preparing trial tools such as an agreed book of documents, chronologies, and so forth. In addition, as noted above the plaintiff would ordinarily spend more time on a matter than a defendant.

[21] This matter was also more importance to the plaintiff that it was to the defendant. The plaintiff is a smallish Canadian investment advisory firm. The fundamental issue was whether the defendant could terminate its investment banking retainer with the plaintiff but then turn around and take the benefit of the work the plaintiff had done to date, without paying the plaintiff the fee set out in the agreement. It was important for the plaintiff not to set a precedent that would allow others to use their advisory work without paying them for it. That sort of precedent would have significant adverse long-term consequences for the plaintiff and would risk destroying its business. For the defendant, this was simply a one off opportunity to avoid paying a fee the defendant did not want to pay.

[22] This means the plaintiff was highly incentivized to prepare fully for trial. That preparation was readily evident in the performance of plaintiff's counsel at trial. They were extremely well prepared, conducted highly focused and effective examinations in chief and cross examinations. They prepared equally focused and effective written closing submissions in

very short order. Work of that quality is of immense assistance to the court but takes a great deal of time to prepare. It would be unreasonable of courts to expect counsel to come to trial fully prepared, demand that counsel make efficient use of court time but then fail to compensate parties for the time required to meet those demands. Courts should be incentivizing parties and counsel to prepare, not disincentivizing them from doing so.

The Interests of Justice

[23] The defendant submits that the plaintiff's costs submission is nothing but a mechanical calculation of hours multiplied by billing rates to justify a "remarkable" award of $511,762.22 for a four-day trial. The defendant submits that the interests of justice demand that the amount be reduced. Instead, the defendant submits that the plaintiff should be awarded costs throughout on a partial indemnity scale. I disagree.

[24] Awarding costs on a partial indemnity scale would entirely ignore Rule 49.10.

[25] In my view, the interests of justice in this case do not demand a reduced cost award but demand that the plaintiff be awarded the costs it seeks.

[26] One of the reasons the defendant argues that the interests of justice demand a reduced cost award is because the plaintiff spent time on matters that did not make it into the court record like a request to admit and an agreed statement of facts. Requests to admit and agreed statements of fact should be encouraged, not discouraged. In most civil litigation, the vast majority of facts that are introduced at trial end up not being in dispute. The number of disputed facts is usually relatively small in proportion to the overall number of facts introduced at trial. This results in trials that are longer than necessary. The proper use of admissions and agreed statements of fact would result in a considerably more efficient use of court resources than currently occurs. Far from punishing a party for having sought admissions or having proposed an agreed statement of facts, courts should be ensuring that such efforts are compensated for in cost awards.

[27] As set out in the underlying reasons, they retained the plaintiff to provide investment banking advice to find capital for the defendant. They ultimately terminated the plaintiff before it could finish its retainer. After terminating the plaintiff, the defendant finalized its own financing with parties whom the plaintiff had already contacted and with whom the plaintiff had already had discussions about the financing. In doing so, the defendant used work product that the plaintiff had given the defendant as part of its retainer.

[28] The defendant appears to have taken a hard nosed approach to the issue throughout. It used the plaintiff's work product but did not want to pay for it. Although the defendant offered to pay $50,000 to settle the action, the sources and uses document that it prepared for its lenders after terminating the plaintiff showed that approximately $450,000 of the financing would be used to pay the plaintiff its fee. The lenders did not object to this. Instead of offering to pay what it had told its lenders it would be paying, the defendant took a hard nosed approach and limited its offer to $50,000. After that, the defendant took an equally

hardnosed approach and refused to consider requests to admit or an agreed statement of facts.

[29] While parties are entitled to take those sorts of approaches, they must bear the cost of doing so if the tactic turns out to be unsuccessful. The interests of justice do not demand that intransigent parties be relieved of the costs to which their intransigence gives rise. The interests of justice demand that those who pursue tactics of intransigence bear the full costs of doing so.

[30] For the reasons set out above I award the plaintiffs their costs on a partial indemnity scale up to July 12, 2021 and on a substantial indemnity scale from that date forward which I fix at $511,762.22 including disbursements and HST.

Date: June 5, 2023

Koehnen J.