

CITATION: Comeau v. 1140398 Ontario Ltd. et al., 2023 ONSC 5493
COURT FILE NO.: CV-17-586690
DATE: 20230929

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: GARY COMEAU, Plaintiff

AND:

1140398 ONTARIO LTD., SMP SPECIALITY METAL PRODUCTS INC.,
JOHN CUNERTY, MAY ANIS, BNP ADVISORS INC., 1570859 ONTARIO
INC. and BASS LAKE HOLDINGS INC., Defendants

BEFORE: Schabas J.

COUNSEL: Andrew Winton and John Carlo Mastrangelo, counsel for the Plaintiff

Scott Kugler, Jenna Kara and Morris Odeh, counsel for May Anis

HEARD: August 18, 2023

REASONS FOR PENALTY

Overview

- [1] On July 7, 2023 I granted the plaintiff's motion for a *Mareva* injunction and found the defendant, May Anis, to be in contempt as she had breached court orders by repeatedly lying and intentionally misleading the plaintiff and the Receiver. My Reasons on the Motion can be found at: *Comeau v. 1140398 Ontario Ltd. et al.*, 2023 ONSC 4070.
- [2] On August 18, 2023 the parties addressed the appropriate penalty to be imposed on Anis.
- [3] For the reasons that follow, I have decided that Anis should pay the plaintiff costs as a penalty in the amount of \$400,000.00. She shall also pay costs of this hearing on a substantial indemnity scale of \$44,118.46.

Background

- [4] As my Reasons on the Motion reviewed, this action deals with a dispute between the plaintiff and the two individual defendants, John Cunerty and May Anis, who were the shareholders in 1140398 Ontario Ltd. and SMP Specialty Metal Products Inc. (collectively "SMP"). The plaintiff was also an employee of SMP. Cunerty and Anis are husband and wife.
- [5] In 2017, the plaintiff parted company with SMP. In accordance with a unanimous shareholders agreement signed in 1995, the parties sought a valuation of SMP to allow

Anis and Cunerty to purchase the plaintiff's shares. The plaintiff disagreed with the valuation and commenced this action for, among other things, a determination of the value of SMP by the Court.

[6] Since at least June 2021, following a production order by Myers J., Anis repeatedly produced forged bank records and cheques and lied about them under oath in affidavits and under cross-examination. Her wrongdoing only came to light through the diligence of the plaintiff and his counsel and the release of information directly from financial institutions.

[7] My Reasons on the Motion describe the remarkable extent to which Anis, an accountant, went to forge records and lie about them, and of her dishonest conduct even after she was caught and ordered by Sanderson J. to explain herself and provide truthful evidence. As I stated at para. 16 of my Reasons on the Motion:

Anis, on behalf of the defendants, has repeatedly lied and forged documents specifically with respect to the valuation issue. She clearly wishes to hide the truth about the financial situation of what appears to have been a very successful business. When her lies and falsification of documents have been discovered, and courts have made orders for her to produce documents and to “come clean” (as counsel aptly put it), she has made up new lies and created new false records. This has occurred over at least the past two years of the litigation including, most recently, last month, in June 2023, when the latest falsehoods were discovered.

[8] Subsequent to the issuance of the *Mareva* injunction and the finding of contempt against her, Anis has confirmed that she has repaid almost \$1.4 million to Flying Walrus Investments, a company related to her employer, Polar Capital Corporation, from which she had embezzled money when she was Secretary and Treasurer. She has now resigned from Polar Capital and is unemployed. Anis has said that her “inappropriate decisions and actions” in this lawsuit were taken in order to cover up the fact she had been embezzling money from her employer.

[9] As she did before the motion in July, Anis has sworn an affidavit expressing regret for her conduct and apologizing to the plaintiff, the Receiver and the Court. When asked if she had anything to say to me when the penalty hearing began, she told me she was ashamed and embarrassed, and that she did not appreciate the gravity of her actions saying, “in my mind, I didn't think it would impact the litigation.”

[10] Since the issuance of the *Mareva* injunction, Anis has provided disclosure of her assets. There is no evidence that Anis is continuing to provide false testimony or that she is continuing to rely on any forged documents, although the plaintiff submits it is “likely” that there is “other deceptive conduct yet to be uncovered.”

[11] On July 18 and July 26, 2023, Koehnen J. made orders, on consent, allowing Anis to dispose of assets to facilitate the release of funds totaling over \$500,000.00 to Anis for living expenses, payment of legal fees, costs awards and Receiver fees. Most of the funds

were for legal fees, including \$283,489.41 to her current lawyers who began representing her in late May, 2023.

Positions of the parties

- [12] The plaintiff does not seek imprisonment, despite the fact that a term of imprisonment would not be inappropriate, considering the flagrant and repeated nature of the dishonest conduct by Anis. The plaintiff recognizes that imprisonment will do little to advance the action against Anis and the other defendants. In addition, Anis's husband and co-defendant, John Cunerty, has a serious illness and is unable to work.
- [13] Rather, the plaintiff submits that it should be awarded costs on a full indemnity basis for the past two years during which it has had to respond to, investigate, and expose the deceit and dishonesty of Anis. The plaintiff therefore seeks a penalty in the form of payment of costs thrown away in the amount of \$571,385.56. This, the plaintiff's counsel submits, "includes time spent by counsel reviewing and examining on the forged documents, the investigation into the discrepancies in BNP's statements and other documents, expert fees, correspondence, cross-examination on affidavits, two wasted pre-trial conferences, a voluminous motion for the appointment of an investigative receiver, and engagement with the investigative receiver after the discovery of forged cheques", all of which "are a direct consequence of Ms. Anis's contempt."
- [14] Anis does not dispute that the plaintiff is entitled to "reasonable costs thrown away on account of the contemptuous conduct" but submits that no costs should be ordered at this time. She relies on the statement at the end of my Reasons on the Motion where I said, at para. 40, that "[i]t should be left to the trial judge to consider the effect of Anis's dishonest conduct when fixing the costs of the action, if the plaintiff is successful." In the alternative, Anis submits that the plaintiff has failed to establish that all the costs claimed are "directly related" to her contemptuous conduct, and that, at most, those costs are \$173,054.73.

Applicable law: sentencing principles for contempt of court

- [15] Rule 60.11(5) of the *Rules of Civil Procedure*, RRO 1990, Reg 194, gives the Court broad remedial powers against a person found to be in contempt. The purpose is to "uphold the authority of the court and to bring the administration of justice back into repute": *Mendlowitz & Associates Inc. v. Chiang*, 2007 CanLII 12203 (ON SC) at para. 25. As Watt J.A. stated in *College of Optometrists of Ontario v. SHS Optical*, 2008 ONCA 685, 93 OR (3d) 139, at para 685, "[t]he underlying purpose of contempt orders is to compel obedience and punish disobedience".
- [16] Sanctions may include imprisonment, fines, "the payment of such costs as are just", and any other order that the Court deems necessary. As the sanctions are penal, the sentencing principles set out in the *Criminal Code* are applicable: *Duncan v. Buckles*, 2021 ONSC 5567 at para. 44. This includes the overarching principle that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. The principles also include that a sentence should be increased or reduced depending on

the presence of aggravating and mitigating factors, that sentences should be similar to those imposed on similar offenders committed in similar circumstances, and that sentences should denounce unlawful conduct, promote a sense of responsibility in the offender, and deter the offender and others from committing such offences. In addition, Courts should consider alternatives to imprisonment: *Criminal Code*, ss. 718, 718.1 and 718.2; *180 University Management Inc. v. Khan*, 2023 ONSC 1621 at para. 17.

- [17] Costs are frequently used to address contempt, usually on an elevated scale. In *1307347 Ontario Inc. v. 1243058 Ontario Inc. (c.o.b. Golden Seafood Restaurant)*, 2001 CarswellOnt 492, Nordheimer J., as he then was, stated at para. 5 that "[t]here ought to be something approaching a complete indemnity to the successful party in [contempt] motions since to do otherwise would involve some cost or punishment to the successful party arising solely out of the conduct of the other party in violating a court order." As the Chief Justice of Alberta put in *Dreco Energy Services Ltd v. Wenzel*, 2005 ABCA 185, 371 AR 11, at para. 11:

Requiring those in contempt to pay a part only of thrown-away costs related directly to the contempt does not bring home to the contemnors the seriousness of their actions and their responsibilities for the consequences attributable to that contempt. There is a public policy aspect to this entire issue. Generally, in principle, those who are found in civil contempt ought, at a minimum, to be required to accept responsibility for a substantial portion of the costs directly related to that contempt. It may be that a judge would also consider it appropriate to impose further monetary penalties or other sanctions, whether including striking of pleadings, drawing of adverse inferences, etc.

- [18] In *Canadian National Railway Company v. Plain*, 2013 ONSC 4806, [2013] OJ No 3392, at para. 27, Thomas J. observed at para. 27 that "[c]osts after a finding of contempt are meant to be coercive." He referred to cases in which costs were awarded on a substantial indemnity basis for "flagrant and intentional breaches of court orders", citing *SNC-Lavalin Profac Inc. v. Sankar*, [2009 ONCA 97, 94 OR \(3d\) 236](#), at para. 19.
- [19] In *Astley v. Verdun*, 2013 ONSC 6734, 118 OR (3d) 43, at paras. 52 -57, a decision affirmed by the Court of Appeal (2014 ONCA 668), Goldstein J. stated that authorities in Ontario "lean to the view that costs should generally be awarded on a substantial indemnity basis in contempt matters" and "there is a rebuttable presumption that substantial indemnity costs are appropriate." The Court should examine what is fair and reasonable in the circumstances, including whether the contemnor is "suitably contrite, has attempted to purge his or her contempt, has taken steps to minimize costs incurred by the other party, and [whether] the contempt itself is towards the lower end of the 'flagrant and wilful' scale."

Costs are an appropriate sanction

- [20] Counsel for Anis submits, as its initial position, that I cannot award costs in light of the statement at the end of my Reasons on the Motion that "[i]t should be left to the trial judge

to consider the effect of Anis's dishonest conduct when fixing the costs of the action, if the plaintiff is successful." However, my Reasons also contemplated the parties coming back before me to address sanctions for the contempt. I received no submissions on that point and my statement does not prevent me from considering costs as a sanction now. Nor is the trial judge precluded from considering Anis' conduct, if and when the matter is tried. Accordingly, I do not accept Anis's position that I am precluded from awarding costs as a sanction for contempt.

- [21] I accept the plaintiff's submission that a costs sanction is an appropriate way to penalize Anis for her conduct. Although other sanctions, including imprisonment, may also be justified, as far as I am aware Anis had never misconducted herself like this in the past and the need for incarceration as a deterrent has not been demonstrated. A punitive award of costs, on the other hand, will punish and deter Anis from repeating such conduct, and will provide compensation to the plaintiff for the harm caused to him.

Aggravating and mitigating circumstances.

- [22] In my Reasons on the Motion at para. 33, I stated:

This is an extreme case. Ms. Anis's conduct is egregious, repetitive and flagrant. She has engaged in very deliberate wrongdoing in the face of court orders, doubling down on her dishonest conduct when she was told to do the opposite. Compliance with court orders has only occurred because of discoveries and demands by the plaintiff. While she appears contrite, she has appeared contrite previously, only to breach further orders and engage in more dishonest conduct. Further, an acknowledgement of wrongdoing is not, in my view, a purging of contempt; it is a factor in exercising my discretion, but is not determinative.

- [23] The conduct of Anis raises a number of aggravating factors that have been well-recognized in the case law: see, *e.g.* *Devathasan v. Ablacksingh*, 2018 ONSC 7557 at para. 28. They include the following:

- A deliberate course of conduct over a lengthy period of time, in this case almost two years;
- Multiple breaches of court orders;
- Lying repeatedly under oath and to lawyers and the Receiver, even after being caught and ordered to provide honest testimony;
- Disrespecting the court by offering an insincere apology and continuing to lie and rely on false records while purporting to tell the truth;
- Forging numerous bank records;
- Seeking to cover up other financial wrongdoing;

- Committing these acts in order to benefit financially;
- Anis is a professional accountant and was the controller of SMP; and
- Anis's actions had a serious financial impact on the plaintiff who was required to retain experts in forensic accounting and document examination to analyze financial records produced by the defendants in order to uncover forged documents. Her actions have also prolonged the litigation which had been set down for a 20-day trial commencing in May 2023, which has now been delayed to 2024.

[24] There are also mitigating factors:

- There is no evidence that Anis has previously engaged in dishonest activity, and this is the first time she has been held in contempt;
- She has now apologized again to the Court and expressed remorse for her conduct;
- Anis has now, it seems, finally been honest in disclosing her wrongdoing, repaying her employer and becoming unemployed, losing her job and in disclosing her assets, which are subject to a *Mareva* injunction and the direction of the Court;
- Anis's husband has a serious illness and is unable to work and she is caring for him; and
- Anis has been obliged to pay additional amounts for the Receiver as part of the *Mareva* order.

[25] I also take into account that Anis is now 62 years old and may have difficulty finding new employment. Her dishonest conduct may well be a barrier to getting work in her field as an accountant – a regulated profession that requires honesty because of the trust people place in accountants. At the same time, I do not accept that she has “purged” her contempt. She cannot cure the harm she has caused, but only apologize for it – something she did insincerely previously.

[26] Anis has provided evidence of the financial stress that she and her husband are now facing as a result of the uncovering of her dishonesty. But, as my Reasons on the Motion noted, and Anis's subsequent financial disclosure confirms, Anis and Cunerty have significant liquid and property assets. They are also vigorously litigating the valuation of their company, which is not included in the statement of assets. Their main concern appears to be that they may have to encumber or sell their cottage to pay for the costs arising from the litigation.

Quantum

[27] A significant award of costs is warranted in this case. But how much?

- [28] The plaintiff submits that he should not be out of pocket and requests costs on a full indemnity basis for the fees and disbursements he has incurred, calling them “costs thrown away as a result of Ms. Anis’s contempt.” The plaintiff has provided a detailed Bill of Costs totaling \$573,385.56 in fees and disbursements broken down under a number of headings: (1) correspondence and litigation strategy development capturing counsel’s time; (2) document review and examinations; (3) correspondence with and consideration of expert opinions; (4) pre-trial conferences which turned into discussions of Anis’s dishonesty; and (5) costs associated with the appointment of an investigative receiver.
- [29] Counsel for Anis argues that the amount claimed includes time for work unrelated to her contemptuous conduct, pointing out, for example, that the plaintiff’s counsel has claimed reimbursement for correspondence over the past three years, without identifying which correspondence. They argue that not all time spent on the lawsuit, which involves many issues, was “thrown away”, noting, for example, the discoveries that covered other issues unrelated to the false financial evidence. In the same vein, not all of the work of the experts was thrown away due to the false information. Accordingly, Anis submits that the costs incurred by the plaintiff which are attributable to the contempt are \$173,054.73.
- [30] In *Shibish v. Honda of Canada Inc.*, 2011 ONSC 2989, 205 ACWS (3d) 635, at para. 21, L.B. Roberts J., as she then was, stated the following:
- It is not this Court's function to second-guess successful counsel on the amount of time spent on the case or the allocation of counsel to the tasks at hand, unless the time spent is so grossly excessive as to be obvious overkill. At the same time, the Court must determine the amount of costs that reflects more what the Court views as a fair and reasonable amount for the particular proceeding, having regard to the parties' reasonable expectations, rather than what is reasonable as between solicitor and client.
- [31] This approach is well-recognized and long pre-dates the decision in *Shibish*: see, e.g., *Murano v. Bank of Montreal*, 41 OR (3d) 222, 1998 CanLII 5633 (ON CA).
- [32] In my view, there can be no doubt that the costs to the plaintiff arising from Anis’s conduct have been very significant and are supported by the costs Anis herself has incurred recently in retaining new counsel, which she has had to do twice since the beginning of 2023. Her current counsel, who were only retained in late May, have already billed her approximately \$400,000.00.¹
- [33] Not all of the work completed by Anis’s new counsel relates to the contempt, as the lawyers have had to familiarize themselves with the entire case; however, bills of this magnitude drive home the point that this is high-stakes litigation in which both sides have retained leading and expensive law firms. Anis would have been aware that her fraudulent conduct

¹ In addition to the payment of \$283,489 for legal fees which was disclosed in order to have Koehnen J. release funds, a further invoice from counsel dated August 8, 2023 billed another \$95,528.73. Since then, there has been the sanction hearing and, no doubt, other work that has been done by her counsel.

caused the plaintiff to spend large sums having his lawyers and others investigate it. Had Anis contemplated being caught for her wrongdoing – and of course she was caught but didn't stop the first time – she ought to have reasonably expected to face a serious financial penalty for her behaviour.

- [34] At the same time, I accept Anis's position that not all the costs claimed by the plaintiff are related to her fraudulent conduct, as even counsel for the plaintiff acknowledged in oral argument. There are, indeed, many contested issues in the lawsuit.
- [35] In my view, Anis's counsel's proposed amount is too low, but the accurate number is somewhere between the two positions. Uncovering the fraudulent conduct, and the work to bring it before the court has undoubtedly taken a great deal of time. I do not accept Anis's position that only a small fraction of the time attributed to correspondence and document review relates to the contempt. The cost of the two pre-trials was indeed thrown away as the trial needed to be adjourned when Anis obtained new counsel, and another pre-trial will need to be conducted based on new information.
- [36] The costs associated with the motion to appoint a Receiver, which ultimately proceeded on consent, were "reserved to a judge hearing a future motion or by the trial judge." However, the appointment of an Investigative Receiver arose following the failure to make proper disclosure and after the initial dishonest conduct came to light. It was not anticipated at that time that there would be further dishonest conduct and a finding of contempt. As I am a judge "hearing a future motion", in light of the developments since the appointment of the Receiver I am of the view that it is appropriate for me to attribute those costs to the contempt.
- [37] Making adjustments, I fix the costs attributable to the contempt, on a full indemnity basis, at \$400,000.00. I reach this amount by taking Anis's proposal of \$173,054.73 and adding the approximately \$120,000 in costs attributed to the motion to appoint a Receiver and subsequent correspondence. I also add approximately \$33,000 for costs of the pre-trial conferences, and an additional \$30,000 for correspondence and document review. After including HST, the total is about \$400,000. I am not able to resolve the differences over how much of the experts' work is attributed to Anis's dishonest conduct – an issue perhaps better addressed by a trial judge who will be familiar with the evidence.
- [38] Given the extraordinary steps taken by Anis, and the extensive investigation and other steps taken to uncover and address her wrongdoing, and the context of this expensive litigation, in my view \$400,000 is an amount Anis should have reasonably expected to pay. To the extent, if at all, that the award may exceed the direct costs associated with Anis's conduct, it is justified because the award is a penalty denouncing her behaviour and provides compensation to the plaintiff for the less tangible harms he has suffered, such as the aggravation of dealing with Anis's dishonesty and the delays it has caused in bringing the matter to trial.

Conclusion

[39] In conclusion, as a sanction for her contempt, I order Anis to pay the plaintiff \$400,000.00 in costs within 75 days of the release of these Reasons. The plaintiff shall also be awarded costs of this sanction hearing on a substantial indemnity scale in the amount of \$44,118.46, also to be paid within 75 days of the release of these Reasons.

Date: September 29, 2023

Paul B. Schabas J.