CITATION: Clost v. Rennie, 2024 ONSC 1012
COURT FILE NO.: CV-22-89302
DATE: 2024/02/16

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
Norman Harry John Clost	)	Kelli Day, C. Katie Black for the Applicant
Applicant	)	
– and –	)	
Laureen Rennie and June Drysdale	)	Carmen M. Baru for the Respondents
Respondents	)	
	)	**HEARD:** In writing

2024 ONSC 1012 (CanLII)

REASONS FOR DECISION ON COSTS

RYAN BELL J.

Overview

[1] The respondents, Laureen Rennie and June Drysdale, alleged that their uncle, the applicant Norman Henry John Clost, signed a lease agreement in 2005.[1] Norm denied signing the alleged lease and claimed fraud in its execution. The parties proceeded to a preliminary jurisdiction motion before an arbitrator who found the arbitration clause in the alleged lease was valid.

[2] In his court application, Norm successfully challenged the arbitrator's ruling on jurisdiction. I concluded that the application was a hearing *de novo* under s. 17(8) of the *Arbitration Act, 1991*[2] and declared the alleged lease invalid because the "Norm Clost" signature is not the signature of the applicant. I set aside the arbitrator's preliminary ruling on jurisdiction, with costs of the jurisdiction motion to Norm.[3] I also awarded Norm costs of the application.

---

[1] In these reasons, I will refer to the parties by their first names.
[2] S.O. 1991, c. 17.
[3] *Clost v. Rennie*, 2023 ONSC 6998.

[3] The parties have been unable to agree on costs of the preliminary jurisdiction motion before the arbitrator and the court application. I have received the parties' written submissions on costs including, with leave, reply submissions on behalf of Norm.

Positions of the parties

[4] Norm seeks fees on a substantial indemnity basis of the court application, the jurisdiction motion before the arbitrator, and associated procedural motions of $342,230.24, inclusive of HST, and disbursements of $66,594.52. Norm submits that this is one of the rare cases where the respondents' conduct was such that substantial indemnity costs are warranted. He argues that the respondents engaged in dishonest behaviour, made bad faith allegations against him and his counsel, repeatedly changed their evidence, made baseless claims, and submitted falsified documents as evidence. Norm argues that the quantum of costs he claims are fair, reasonable, and fall within the respondents' reasonable expectations having regard to the nature, complexity, and length of the proceedings.

[5] Laureen and June argue that the costs sought by Norm are neither reasonable nor proportionate. They argue that much of the time spent on the file was within Norm's control and that, while their failure to meet their burden to prove the lease was signed by Norm may justify an "enhanced award [of costs]", costs should not be awarded on the substantial indemnity scale. They submit that Norm is attempting to recover for pre-litigation costs that were neither incidental to the proceeding nor a step in the proceeding. Laureen and June also dispute Norm's characterization of certain steps taken within the jurisdiction motion and the court application.

[6] The respondents' bill of costs discloses costs incurred in the jurisdiction motion before the arbitrator of $75,705.48 (fees) and $92,676.18 (disbursements). The respondents' bill of costs discloses costs incurred in the application of $31,181.22 (fees) and $471.70 (disbursements).[4]

Scale of costs

[7] Elevated costs may be warranted in two circumstances. The first is where, as a result of an offer to settle under r. 49 of the *Rules of Civil Procedure*,[5] substantial indemnity costs are explicitly authorized. The second circumstance is where the unsuccessful party has engaged in behaviour worthy of sanction.

[8] Only the second circumstance is relied upon by Norm in this case. In relation to the jurisdiction motion before the arbitrator, the r. 49 offer to settle circumstance would not have been available because, as pointed out by Norm in his submissions, there was no agreement or order adopting the *Rules of Civil Procedure* to that proceeding. While Norm refers to a r. 49 offer to settle he made with respect to the motion to strike, he does so in support of his submission that the respondents' conduct unnecessarily lengthened the proceeding.

---

[4] The respondents acknowledge that there are some "missing" dockets.

[5] R.R.O. 1990, Reg. 194.

2024 ONSC 1012 (CanLII)

[9] Where a party has engaged in conduct that is reprehensible, scandalous, or outrageous, a court may sanction this conduct through an award of elevated costs: *Davies v. Clarington (Municipality)*, 2009 ONCA 722, at para. 28; *Young v. Young*, [1993] 4 S.C.R. 3, at p. 134. Substantial indemnity costs are to be awarded "in rare and exceptional cases to mark the court's disapproval of the conduct of the party in the litigation": *Hunt v. TD Securities Inc.* (2003), 66 O.R. (3d) 481 (Ont. C.A.), at para. 123.

2024 ONSC 1012 (CanLII)

[10] The kind of conduct that will justify an elevated level of costs is not limited to conduct in the proceedings and can include the circumstances that gave rise to the litigation: *Mortimer v. Cameron* (1994), 17 O.R. (3d) 1 (C.A.), at p. 23, as cited in *Mars Canada Inc. v. Bemco Cash & Carry Inc.*, 2018 ONCA 239, at para. 43. In *Mars Canada*, the Court of Appeal for Ontario upheld the motion judge's award of substantial indemnity costs based on the motion judge's findings that the appellants had "brazenly breached" the settlements, relied on an "obvious slip" to try to avoid living up to their agreements, altered a document in "a transparent attempt to hide their illicit activities", and engaged in tactics that increased costs. (at paras. 42 and 44)

[11] In my view, this is one of those rare and exceptional cases in which substantial indemnity costs should be awarded. The respondents' litigation conduct was worthy of sanction based on the following findings and the evidentiary record:

(i) The respondents' evidence evolved over time and was revisionist in nature.

(ii) Laureen took deliberate steps so that it would be undetectable that the date of the alleged lease had been changed.

(iii) June failed to disclose in her first affidavit her participation in these steps taken by Laureen.

(iv) Laureen and June withheld information from Adam Clost in order to obtain his signature on the alleged lease in the summer of 2020.

(v) Laureen and June wanted to hide that their copies of the alleged lease were not signed by them or by Adam in 2005.

(vi) Only after Norm retained an ink dating expert, did the respondents advise for the first time that they and Adam did not sign their counterparts of the alleged lease in 2005 as previously sworn.

(vii) The respondents displayed a deliberate disregard for the truth. For example, Laureen proffered an excuse for altering a document that was inconsistent with her admission that the alleged lease was blank when she found it.

(viii) The respondents made several bad faith allegations against Norm. They alleged that his request to inspect was for "improper purposes" and that Norm must have "some cognitive impairment" given that he wanted to inspect the alleged lease.

(ix) The respondents further alleged that the forgery issue was a “made-up position” to find an excuse to justify the transfer of the property to Mr. Clost’s son.

(x) The respondents submitted and relied on falsified evidence.

[12] I have no hesitation in concluding that the respondents’ conduct, including their unfounded allegations of improper conduct against Norm, is deserving of judicial sanction. The respondents provided no authority in support of their position that their failure to meet their burden of proof “may justify an enhanced award, but not one on the substantial-indemnity scale.”

[13] Norm is entitled to costs on a substantial indemnity basis.

Quantum of costs

[14] The costs fixed by the court “should reflect more what the court views as a fair and reasonable amount that should be paid by the unsuccessful parties rather than any exact measure of the actual costs to the successful litigant”: *Boucher v. Public Accountants Council for the Province of Ontario*, (2004), 71 O.R. (3d) 291 (Ont. C.A.), at para. 24.

[15] While the time spent by Norm’s counsel was considerable, I am of the view that the time spent and the quantum claimed are reasonable for the following reasons.

[16] The respondents submit that this dispute “concerns the right to transfer land” and that two transfers were contemplated in the summer of 2020; “[i]n each case, the consideration was [for] $150,000.” This amount is advanced by the respondents as a reference point for the court in determining the reasonableness and the proportionality of Norm’s actual costs and the steps taken in the proceedings. With respect, the dispute was not about the right to transfer land. It was about whether Norm had signed a lease agreement in 2005 and whether the signature on the alleged lease was his. I determined that it was not. I agree with Norm that the consideration for the transfer of the property is not the appropriate metric to determine the reasonableness of the costs incurred. There is no evidence of the fair market value of the property. The respondents themselves incurred $166,840.29 in costs in the preliminary jurisdiction motion, more than their proposed metric.

[17] I have reviewed the bill of costs and the supporting documentation provided by Norm in support of his position on costs. I am satisfied that the fees and disbursements claimed do not overlap with costs incurred in the action commenced by the prospective purchasers for the property against Norm’s son and Mr. Barrer to whom Norm in fact sold the property in June 2020. The references in Norm’s submissions to the action specifically relate to the respondents’ conduct, which is relevant to my assessment of costs in relation to the jurisdiction motion before the arbitrator and the court application. For example, as I found, Laureen used white out to delete the incorrect date on June’s copy of the alleged lease, inserted the correct date, made a copy of the revised copy, and then provided a copy of that document to Scott to use on the certificate of pending litigation motion brought in the action: *Clost*, at para. 57.

[18] Laureen and June take issue with Norm having more than one lawyer present during the 11 days of cross-examination prior to the adjudication before the arbitrator; they say that Norm had two lawyers present during the cross-examinations of the lay witnesses and the respondents’

2024 ONSC 1012 (CanLII)

expert witnesses, and three lawyers present during the cross-examinations of Norm's expert witnesses. There is no claim made for the attendance of the third counsel (Ms. Mitchell). Given the complexity of the case and the fact that the respondents' own evidence evolved over time, it was reasonable for Norm to have two lawyers present during the cross-examinations.

[19] Laureen and June also take issue with the lengthy written submissions made by Norm to the arbitrator. They point to Norm's factum of 166 pages, to which they responded with a factum of 102 pages, and Norm's reply factum of 131 pages. It bears noting, however, that the hearing before the arbitrator was one day in duration. There were, as I have noted, 11 days of cross-examinations and four expert witnesses. Again, the revisionist nature of the respondents' own evidence increased the size of the evidentiary record and, no doubt, the length of the written submissions. I do not find that these written submissions were excessive, particularly given that the hearing before the arbitrator was only one day. By contrast, on the court application, where the parties were constrained by the local practice direction regarding the length of their factums, the oral hearing lasted five days. I hasten to add that all parties' materials were well-organized and of great assistance to the court.

2024 ONSC 1012 (CanLII)

[20] I do not accept that Norm is in some way responsible for the disbursements incurred by Laureen and June in respect of their experts or that this is a factor that should reduce the amount of costs to which Norm is entitled. The suggestion that Norm's experts ought to have revised their opinions once they received all versions of the alleged lease would have increased Norm's costs.

[21] Laureen and June submit that I should consider the fact that they made multiple offers to settle the jurisdiction motion while Norm made none. There was no offer made until after the jurisdiction motion. The April 28 and May 9, 2022 offers required an acknowledgement of the validity of the lease and contained no element of compromise. Moreover, the offers were incapable of acceptance because they required Norm to transfer the property to the respondents and non-parties. Norm had already sold the property by this time, a fact known to the respondents.

[22] Laureen and June also argue that the costs claimed by Norm in relation to the court application were excessive, "all the more so on an application where a significant portion of the records and facta reiterate the Arbitration materials, with no cross-examinations." I disagree with the respondents' characterization of the court application being largely a reiteration of the jurisdiction motion. I agree with Norm that, as the unsuccessful party on the jurisdiction motion, it was reasonable that his counsel would spend more time and incur more costs in revisiting the record and presenting their argument than would counsel for the respondents. The court application was heard approximately two years after the preliminary jurisdiction motion before the arbitrator. It was argued over five days, in three separate sittings. Norm was entirely successful on the application.

[23] In addition, but for the position taken by the respondents, the court application would have proceeded solely under s. 17(8) of the *Act*, that is, as a hearing *de novo*. In the fall of 2022, the respondents contemplated a motion to determine whether the arbitrator's ruling was an award or a ruling on a preliminary objection. A notice of motion to strike and supporting affidavits were served by the respondents. While Kaufman J. ultimately determined at a case conference that it would be more efficient to have these arguments made in response to the application – which is

how matters unfolded – Norm's counsel was required to review these materials. More importantly, these positions had to be addressed and responded to in the alternative, both in written submissions and at the court hearing.

[24] Before the arbitrator and at the court hearing, the respondents submitted that Laureen's supplementary affidavit sworn April 5, 2022 should be accepted into evidence. The arbitrator denied the request. I, too, declined to admit the affidavit into evidence, in part because the parties agreed to put before the court the same evidentiary record that was before the arbitrator – a record that did not include Laureen's April 5, 2022 affidavit. Norm's counsel was required to respond to these requests.

[25] I find that the rates claimed for counsel for Norm are reasonable having regard to their years of experience. The respondents do not take issue with the rates charged.

[26] In my view, having regard to the respondents' conduct throughout, the complexity of the proceedings, the adjudication of the jurisdiction motion before the arbitrator, 11 days of cross-examination, including of four experts, the court application, the need for Norm's counsel to address, in the alternative, the appeal argument to respond to Laureen and June's argument that s. 17(8) of the *Act* did not apply, the fees claimed by Norm are fair and reasonable and should have been within the reasonable expectation of the respondents.

[27] The respondents do not challenge the amount of disbursements claimed by Norm. Indeed, the amount of the respondents' disbursements exceeds those claimed by Norm. I find the disbursements claimed by Norm were properly incurred.

Conclusion

[28] For these reasons, Norm is entitled to costs on a substantial indemnity basis. In all the circumstances, and having regard to the principles enunciated in *Boucher*, as well as the factors listed in r. 57.01 of the *Rules of Civil Procedure*, I find that the fees and disbursements claimed by Norm in respect of the jurisdiction motion and the court application are fair and reasonable. Costs are to be paid by Laureen and June in the total amount of $408,824.76, inclusive of disbursements and taxes.

___

Justice R. Ryan Bell

Released: February 16, 2024

2024 ONSC 1012 (CanLII)

CITATION: Clost v. Rennie, 2024 ONSC 1012
COURT FILE NO.: CV-22-89302
DATE: 2024/02/16

2024 ONSC 1012 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

Norman Harry John Clost

Applicant

– and –

Laureen Rennie and June Drysdale

Respondents

REASONS FOR DECISION ON COSTS

Ryan Bell J.

Released: February 16, 2024