

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Newfore Inc., Plaintiff/Defendant by Counterclaim

- and -

BCHQ Barton Holdings Inc., Defendant/Plaintiff by Counterclaim

BEFORE: MacNeil J.

COUNSEL: *A. Hora* – Lawyer for the Plaintiff

G. Mallia and N. Aresta – Lawyers for the Defendant

DECISION ON COSTS

[1] This decision deals with the costs of the trial of this lien action brought by Newfore Inc. (“the plaintiff”) against BCHQ Barton Holdings Inc. (“the defendant”) stemming from a construction contract. The plaintiff was substantially successful at trial and was awarded damages in the amount of \$258,453.04 minus a charge of \$13,135.40 plus HST; the defendant’s counterclaim was dismissed.

[2] The parties were unable to settle the issue of costs incurred in connection with the proceeding and have made written submissions.

Position of the plaintiff

[3] It is the plaintiff’s position that it was successful in both the main action and in dismissing the counterclaim. It served an offer to settle on January 6, 2023, in an amount of \$200,000.00 inclusive of all costs, interests and disbursements. This offer was greatly surpassed by the outcome at trial. In contrast, the defendant served an offer for the amount of \$60,000.00 all-inclusive, which fell well short of the trial outcome. The plaintiff submits that it is appropriate that it be awarded partial indemnity costs up to the date of its offer and substantial indemnity costs thereafter. As a result, the plaintiff seeks \$75,858.61 in costs, inclusive of HST and disbursements.

[4] The plaintiff’s bill of costs sets out the time spent by the lawyers involved and the disbursements incurred from the outset of the matter. The plaintiff submits that the legal fees claimed are proportionate to the matter, which was highly technical in nature, even though no expert witnesses were called, and required a thorough analysis of contractual agreements and voluminous construction documents.

[5] The plaintiff submits that time spent relating to a motion (to set a timetable) that was ultimately abandoned was not wasted time, since the action had stalled until the plaintiff started pushing for progress, and so those fees should not be discounted. Court orders regarding production and discovery were necessary in light of the defendant's reluctant and piecemeal approach to disclosure. The defendant's approach to the counterclaim prolonged matters unnecessarily and added to the plaintiff's preparation time. No proper accounting was included in support of the counterclaim which made the plaintiff's preparation more difficult.

[6] While detailed dockets have not been submitted by the plaintiff, they are not required and the court is still able to fix costs, including by applying the cost consequences imposed by Rule 49.10 for the defendant's failure to accept the plaintiff's formal offer to settle. The defendant's bill of costs demonstrates a similar amount of time and legal fees spent on the matter overall. Accordingly, the defendant cannot say that it did not reasonably expect to pay costs in the range requested, if unsuccessful at trial.

Position of the defendant

[7] The defendant takes the position that the amount of costs being requested by the plaintiff is outside reasonable expectations and is disproportionate given the time spent and complexity of the issues. Work was done by senior counsel that could have been performed by a more junior lawyer. All work associated with the timetable motion and documentary discovery, including work to complete an affidavit of documents, is excessive when compared to the hours spent and fees incurred by the defendant. Further, since the motion for a timetable was abandoned, the defendant is entitled to costs unless ordered otherwise by the court: Rule 37.09(3) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194; the defendant submits that costs should not be awarded to the plaintiff for this step in the litigation.

[8] The defendant also asks the court to consider that it paid approximately \$7,000 to MJV Masonry pursuant to a garnishment order MJV obtained against the plaintiff, for which the defendant was not reimbursed. The defendant requests that the costs awarded reflect its payment to MJV on behalf of the plaintiff in this regard.

[9] The defendant argues that the plaintiff's written costs submissions are deficient since they do not contain dockets, invoices and supporting documents as required. Given the amount of costs sought, the plaintiff should have produced redacted dockets which are necessary to assess the reasonableness of the work completed and number of hours claimed. Given the limited production by the plaintiff in support of its costs, neither the defendant nor the court can properly assess what amount of costs is reasonable in the circumstances.

[10] The defendant submitted a bill of costs that shows a partial indemnity total in the amount of \$59,777.51 and a substantial indemnity total in the amount of \$87,004.75, both inclusive of HST and disbursements.

General Principles

[11] Section 131(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, provides that an award of costs is in the discretion of the court.

[12] Rule 57.01(3) of the *Rules of Civil Procedure* provides that, when the court awards costs, it shall fix them in accordance with subrule (1) and the Tariffs. Tariff A establishes the fees and disbursements that are allowable under Rules 57.01 and 58.05.

[13] Rule 57.01(1) sets out factors to be considered by the court in exercising its discretion to award costs, including:

- the result in the proceeding;
- any offer to settle or to contribute made in writing;
- the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;
- the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;
- the amount claimed and the amount recovered in the proceeding;
- the complexity of the proceeding;
- the importance of the issues;
- the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
- whether any step in the proceeding was: (i) improper, vexatious or unnecessary, or (ii) taken through negligence, mistake or excessive caution;
- a party's denial of or refusal to admit anything that should have been admitted; and
- any other matter relevant to the question of costs.

[14] Rule 49.10 of the *Rules* provides costs consequences where a party fails to accept an offer to settle. Where a plaintiff makes an offer to settle that is not accepted and obtains a judgment as favourable as or more favourable than the terms of the offer, Rule 49.10(1) provides that the plaintiff is entitled to partial indemnity costs to the date the offer was served and substantial indemnity costs thereafter, unless the court orders otherwise. The intent of Rule 49.10 is to induce settlements and avoid trials. The Ontario Court of Appeal has held that a court should depart from the costs consequences imposed by Rule 49.10 only where, after giving proper weight to the policy of the rule and the importance of reasonable predictability and the even application of the rule, the interests of justice require a departure: see *Starkman v. Starkman*, [1990] O.J. No. 1627, 28 R.F.L. (3d) 208 (Ont. C.A.), at para. 31.

[15] Rule 1.04(1.1) provides that, in applying the rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

[16] Modern costs rules are designed to advance five main purposes: (1) to indemnify successful litigants for the cost of litigation, although not necessarily completely; (2) to facilitate access to justice, including access for impecunious litigants; (3) to discourage frivolous claims and defences; (4) to discourage and sanction inappropriate behaviour by litigants; and (5) to encourage settlements: see *Fong v. Chan*, 1999 CarswellOnt 3955, 128 O.A.C. 2 (Ont. C.A.), at para. 22; 394 *Lakeshore Oakville Holdings Inc. v. Misek*, 2010 ONSC 7238, at para. 10.

[17] Ultimately, in fixing costs, the primary principles remain fairness, reasonableness and proportionality.

[18] As stated by the Ontario Court of Appeal in *Boucher v. Public Accountants Council (Ontario)* (2004), 71 O.R. (3d) 291 (C.A.), at para. 26, when fixing costs, the calculation of hours and time rates is only one factor to be taken into account. The overall objective 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.” See also *Zesta Engineering Ltd. v. Cloutier*, 2002 CarswellOnt 4020, [2002] O.J. No. 4495 (Ont. C.A.), at para. 4.

Analysis

[19] The plaintiff’s offer to settle satisfies Rule 49.10: it was made at least seven days before the commencement of the hearing, it was not withdrawn and did not expire before the commencement of the hearing, and it was not accepted by the defendant. I am satisfied that the plaintiff achieved a result which was as favourable as or more favourable than the offer. Therefore, *prima facie*, the offer entitles the plaintiff to the costs consequences of Rule 49.10.

[20] While the plaintiff’s costs submissions do not contain detailed time dockets or receipts for disbursements, the attached Lawyer’s Certificate attests to the correctness of the hours claimed to have been spent and the disbursements incurred and can be considered acceptable evidence: see *El-Hawary v. Tam*, 2017 CarswellOnt 8935, 2017 ONSC 3549, at para. 8; *Animal House Investments Inc. v. Lisgar Development Ltd.*, 2009 CarswellOnt 5029, 179 A.C.W.S. (3d) 1065 (Ont. S.C.J.).

[21] In reviewing the plaintiff’s bill of costs, I find the hourly rates set out therein are on the high side but, considering that the plaintiff’s counsel is a Toronto law firm, they can be considered reasonable in that context.

[22] While the defendant argues that the costs amount sought by the plaintiff is excessive, a review of both parties’ bills of costs shows that the plaintiff’s request is actually in line with the costs incurred by the defendant. Further, it is often the case that there is more legal work involved for a plaintiff to prosecute his case than for a defendant to defend against it, so a plaintiff claiming an amount for legal fees greater than those of a defendant is not uncommon. I am of the view that, for the most part and except as discussed below, the fees amount sought by the plaintiff does not exceed what is fair and reasonable in the circumstances of this case and accords with the unsuccessful party’s reasonable expectations.

[23] With respect to the time claimed, there are two lawyers identified on the plaintiff’s bill of costs, one senior counsel and one more junior counsel. The time spent at the pre-trial stage does

appear to me to be somewhat excessive to the extent that the senior lawyer is claiming a not insignificant number of hours for the preparation/drafting of materials, when pleadings and affidavits of documents are frequently drafted by a law clerk or junior lawyer for a senior lawyer's review. I also accept the defendant's submission that, since the timetable motion was abandoned by the plaintiff, the defendant should not be required to pay the legal fees associated with same. As a result, I find an acceptable amount of "pre-offer to settle" legal fees to be \$19,450.00 to account for these factors. I also find that an acceptable partial indemnity rate is 60% of the actual rate charged. When this partial indemnity rate is applied to the allowed pre-offer legal fees, the calculation equals \$11,670.00 (i.e., \$19,450 X 60%).

[24] I accept the "post-offer to settle" legal fees claimed by the plaintiff in the amount of \$40,600.00. For the purposes of the Rule 49.10 costs consequences, I find that a reasonable substantial indemnity rate is 80% of the actual rate charged. When this substantial indemnity rate is applied to the allowed post-offer legal fees, the calculation equals \$32,480.00 (i.e., \$40,600 X 80%).

[25] Accordingly, I find that a fair, reasonable and proportional amount of legal fees to be awarded to the plaintiff is \$44,150.00 (i.e., \$11,670.00 + \$32,480.00) plus \$5,739.50 HST on that amount, for a total of \$49,889.50.

[26] With respect to the list of disbursements provided by the plaintiff, I accept these as reasonably necessary to be incurred for the orderly conduct of the matter. I allow the disbursements as claimed in the amount of \$5,035.86, inclusive of HST.

Disposition

[27] In the result, the defendant is ordered to pay to the plaintiff costs in the amount of \$54,925.36, inclusive of HST and disbursements. Costs are ordered to be paid within 30 days.

MacNEIL J.

Released: February 28, 2024