CITATION: ID Inc. v. Toronto Wholesale Produce Association, 2024 ONSC 1521
COURT FILE NO.: CV-16-00564151-0000
DATE: 20240318

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: **ID INC.**, Plaintiff

-and-

TORONTO WHOLESALE PRODUCE ASSOCIATION and STRATEGY CORP., Defendants

BEFORE: **Merritt J.**

COUNSEL: *James Zibarras* and *Richard MacGregor*, Counsel for the Plaintiff

Timothy Morgan and *Jennifer Lake*, Counsel for the Defendant Toronto Wholesale Produce Association

Robert Bell, Counsel for the Defendant StrategyCorp.

HEARD: Cost Submissions heard: February 7, 2024

COSTS ENDORSEMENT

OVERVIEW

[1] The plaintiff, ID Inc. seeks partial indemnity costs of the action against the defendant Toronto Wholesale Produce Association ("TWPA") in the amount of $715,392.34 ($591,787.50 for legal fees, plus HST of 76,932.38 and disbursements of $46,672.46). In addition, ID Inc. seeks costs of the motion relating to the pre- and post-judgment interest rate (the "interest motion") on a full indemnity basis in the amount of $99,684.10 ($87,649.65 for legal fees, plus HST of $11,394.45 and disbursements of $640.00).

[2] The defendant, StrategyCorp seeks its costs on a full indemnity basis against ID Inc. in the amount of $1,095,667.81 ($833,291.50 plus HST of $108,327.90 and disbursements of $154,048.41).

DECISION

[3] ID Inc. is awarded partial indemnity costs of $641,891.65 against TWPA.

[4] StrategyCorp is awarded partial indemnity costs of $665,354.31 against ID Inc.

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BACKGROUND FACTS

[5] On August 25, 2023, I released my Reasons for Judgment after the trial of this matter. I released my Reasons for Decision on the pre- and post-judgment interest rate issue on January 9, 2024.

[6] On February 7, 2024, I heard a full day of costs submissions.

[7] At trial, ID Inc. succeeded in proving a breach of the Sale and Maintenance Agreement (the "SMA") by TWPA. I found that TWPA breached the SMA when it contracted with AllVision to install and maintain the digital sign that was the subject of the SMA. I also found that TWPA waived the SMA's 360-day time limit for ID Inc. to obtain a permit for the sign when it instructed ID Inc.'s principal, John Kenny ("Kenny"), to withdraw the permit application while TWPA pursued the Provincial Path for approval. I further found that TWPA breached its duty of good faith by not informing Kenny that it had abandoned the Provincial Path and was pursuing the municipal permit again.

[8] I awarded ID Inc. damages in the amount of $949,899 and prejudgment interest at the contractual rate in the amount of $1,803,244.94. I also awarded post-judgment interest at the contractual rate of 26.8 percent.

POSITIONS OF THE PARTIES

[9] ID Inc. submits that, as the successful party, it is entitled to costs against TWPA on a partial indemnity basis for the trial. It further submits that it is entitled to costs on a substantial indemnity basis for the interest motion, because TPWA should not have opposed it. ID Inc. submits that there should be no reduction of costs based on divided success at trial because courts look at the overall outcome, not an issue-by-issue analysis of success, and the bulk of the evidence and documents were relevant to the issues upon which ID Inc. was successful. So, even if TWPA is entitled to a reduction for the time spent on issues upon which ID Inc. was not successful, the reduction would not be substantial.

[10] TWPA's position is that it is appropriate to look at divided success and ID Inc.'s costs should be discounted by 60 percent to account for divided success at trial. TWPA also says ID Inc. obtained a result at trial that is less favourable than TWPA's offer to settle, so ID Inc. is entitled to partial indemnity costs up to the date of the offer and no costs thereafter and TWPA should be awarded partial indemnity costs from the date of its offer. Aside from those two issues, TWPA does not take issue with the time spent, hourly rates, and disbursements claimed with three exceptions discussed below.

ISSUES

[11] There are two issues:

1. To what costs is ID Inc. entitled?

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2. To what costs is StrategyCorp entitled?

[12] Deciding these issues requires me to determine both the appropriate scale of costs and the appropriate amount of costs.

ANALYSIS

[13] The purpose of awarding costs is:

1) to indemnify successful litigants for the costs 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 in their conduct of the proceedings; and

5) to encourage settlements: *Harley v. Harley*, 2023 ONSC 4611, at para. 22; *Bender v. Dulovic*, 2023 ONSC 4753, at para. 23.

[14] The factors to be considered in determining costs are set out in r. 57.01(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the "*Rules*"), which provides:

> (1) In exercising its discretion under section 131 of the *Courts of Justice Act* to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,
>
> (0.a) 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;
>
> (0.b) 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;
>
> (a) the amount claimed and the amount recovered in the proceeding;
>
> (b) the apportionment of liability;
>
> (c) the complexity of the proceeding;
>
> (d) the importance of the issues;

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> (e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
>
> (f) whether any step in the proceeding was,
>
> (i) improper, vexatious or unnecessary, or
>
> (ii) taken through negligence, mistake or excessive caution;
>
> (g) a party's denial of or refusal to admit anything that should have been admitted;
>
> (h) whether it is appropriate to award any costs or more than one set of costs where a party,
>
> (i) commenced separate proceedings for claims that should have been made in one proceeding, or
>
> (ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer;
>
> (h.1) whether a party unreasonably objected to proceeding by telephone conference or video conference under rule 1.08; and
>
> (i) any other matter relevant to the question of costs.

[15] Rule 57.01(4) gives the court broad jurisdiction to award costs on a full or substantial indemnity basis or award no costs for part of a proceeding:

> (4) Nothing in this rule or rules 57.02 to 57.07 affects the authority of the court under section 131 of the *Courts of Justice Act*,
>
> (a) to award or refuse costs in respect of a particular issue or part of a proceeding;
>
> (b) to award a percentage of assessed costs or award assessed costs up to or from a particular stage of a proceeding;
>
> (c) to award all or part of the costs on a substantial indemnity basis;
>
> (d) to award costs in an amount that represents full indemnity; or
>
> (e) to award costs to a party acting in person.

[16] The awarding of costs is not an exact science. The overarching principle is that costs must be fair, reasonable, and proportionate: *Harley*, at paras. 34-35 and *Bender*, at paras. 24-25.

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[17] ID Inc. was successful in recovering a judgment against TWPA for damages. StrategyCorp was successful in having ID Inc.'s claim against it dismissed.

[18] Where there is mixed success in respect of multiple defendants, the general rule is that the unsuccessful defendant will pay the plaintiff their costs: *Moore (Litigation Guardian of) v. Wienecke*, 2008 ONCA 162, 90 O.R. (3d) 463, at para. 37.

[19] I do not find that there was any conduct of any party that unnecessarily lengthened the duration of the trial. Nor do I find that any party refused to admit anything that should have been admitted.

[20] The lawsuit was very important to ID Inc. and the contract with TWPA was unusually large for ID Inc.

[21] The litigation was moderately complex. It took over six years from when the Statement of Claim was issued, on November 16, 2016, for the trial to commence on March 13, 2023. The issues were factually complicated and involved dealings between the parties over a four-year period and three written agreements, in addition to the alleged oral agreement. There were 18 days of trial with 9 legal issues, approximately 150 pages of discovery evidence read into the record and approximately 300 exhibits marked. The written closing submissions of all parties totaled over 400 pages and the parties submitted a total of approximately 160 authorities in their Books of Authorities. There was a full day hearing on the interest motion and a full day hearing on costs.

[22] In *Portuguese Canadian Credit Union v. CUMIS*, 2010 ONSC 6701, at para. 12, the court found: "In contested commercial litigation, such as this, one of the best indicators about the reasonable expectations of the parties regarding their potential cost exposure in the event they lose a step in a proceeding is how much they paid their own lawyers."

[23] The total partial indemnity costs of the three parties (inclusive of HST and disbursements) are as follows:

ID Inc.: $783,061.74

TWPA: $920,246.80

StrategyCorp: $718,813.60

[24] I find that the amount of ID Inc's costs was within the reasonable expectations of TWPA and that StrategyCorp's costs were within the reasonable expectations of ID Inc.

[25] The parties did not agree on a joint exhibit book and as a result, much trial time was spent identifying, authenticating, and marking every individual exhibit when in fact the vast majority of the documents were authored by individuals who were called as witnesses at trial. This practice is to be discouraged, particularly when, in the final analysis, all of the exhibits were marked on consent.

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[26] Litigants are encouraged to turn their minds to what documents they will tender as exhibits at trial and not simply include every conceivable authentic document that they have exchanged in the litigation in a joint document book, which is not marked as an exhibit at trial.

[27] In almost every case, there are many exhibits which are not contentious. In accordance with the direction in *Girao v. Cunningham*, 2020 ONCA 260, 2 C.C.L.I. (6th) 15, at para. 33, prior to trial the parties should enter into a signed written agreement regarding authenticity. The agreement should address the following questions:

1. Are the documents, if they are not originals, admitted to be true copies of the originals? Are they admissible without proof of the original documents?

2. Is it to be taken that all correspondence and other documents in the document book are admitted to have been prepared, sent and received on or about the dates set out in the documents, unless otherwise shown in evidence at the trial?

3. Is the content of a document admitted for the truth of its contents, or must the truth of the contents be separately established in the evidence at trial?

4. Are the parties able to introduce into evidence additional documents not mentioned in the document book?

5. Are there any documents in the joint book that a party wishes to treat as exceptions to the general agreement on the treatment of the documents in the document book?

6. Does any party object to a document in the document book, if it has not been prepared jointly?

[28] The index to a joint exhibit book should describe in a concise manner the agreement as to authenticity with respect to each document so that the trial judge can discern with respect to each document what the agreement is, simply by looking at the index.

[29] Of course, the agreement is not binding on the trial judge, who remains the gatekeeper of the evidence: *Bruno v. Dacosta*, 2020 ONCA 602, 69 C.C.L.T. (4th) 171, at para. 55.

[30] I do not have evidence before me to determine whether the failure to agree on the admissibility of the exhibits is the fault of one party more than the others and, as a result, I cannot visit costs consequences on any party with respect to this issue.

ID Inc.'s Costs

Offers to Settle

[31] On January 16, 2023 (one week after the pre-trial conference), TWPA offered to settle for $450,000 plus prejudgment interest pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (the "*CJA*"), partial indemnity costs, and a dismissal of the action without costs. The next day,

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StrategyCorp offered to settle for $5,000 and confirmed it would not seek costs if ID Inc. accepted TWPA's offer.

[32] Where there are multiple defendants, r. 49.11 of the *Rules* applies. It provides:

> 49.11 Where there are two or more defendants, the plaintiff may offer to settle with any defendant and any defendant may offer to settle with the plaintiff, but where the defendants are alleged to be jointly or jointly and severally liable to the plaintiff in respect of a claim and rights of contribution or indemnity may exist between the defendants, the costs consequences prescribed by rule 49.10 do not apply to an offer to settle unless,
>
> …
>
> (b) in the case of an offer made to the plaintiff,
>
> (i) the offer is an offer to settle the plaintiff's claim against all the defendants and to pay the costs of any defendant who does not join in making the offer, or
>
> (ii) the offer is made by all the defendants and is an offer to settle the claim against all the defendants, and, by the terms of the offer, they are made jointly and severally liable to the plaintiff for the whole amount of the offer.

[33] The consequences of not accepting a defendant's offer are set out in r. 49.10(2):

> (2) Where an offer to settle,
>
> (a) is made by a defendant at least seven days before the commencement of the hearing;
>
> (b) is not withdrawn and does not expire before the commencement of the hearing; and
>
> (c) is not accepted by the plaintiff,
>
> and the plaintiff obtains a judgment as favourable as or less favourable than the terms of the offer to settle, the plaintiff is entitled to partial indemnity costs to the date the offer was served and the defendant is entitled to partial indemnity costs from that date, unless the court orders otherwise.

[34] TWPA submits that I should consider the total effect of the offers and the trial. After trial, ID Inc. recovered $949,899.00 in damages and it now owes StrategyCorp costs. TWPA submits

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that if StrategyCorp's costs are greater than $500,000, then ID Inc.'s judgment is less favorable than the TWPA offer, and this would normally entitle TWPA to partial indemnity costs from the date of the offer forward.

[35] TWPA concedes that its offer is not strictly complaint with r. 49 as it was not made by all defendants and StrategyCorp was not jointly and severally liable for the whole amount of the offer. Rule 49.11(b)(i) allows for an offer to settle to be made by one defendant where that defendant also agrees that it will pay the costs of any defendant who did not join in the offer. TWPA submits that even though its offer did not contain an agreement to pay StrategyCorp its costs, I should consider that StrategyCorp agreed that it would not seek any costs if ID Inc. accepted TWPA's offer.

[36] The fundamental flaw in TWPA's reasoning is that it fails to take into consideration that its offer included prejudgment interest pursuant to the rate under the *CJA*, while ID Inc. was successful in recovering prejudgment interest at the contractual rate.

[37] The total of TWPA's offer was $450,000 plus prejudgment interest pursuant to the *CJA*, which would be in the range of $25,000, whereas ID Inc.'s judgment is $2,753,143.94 ($949,899 in damages plus $1,803,244.94 prejudgment interest at the contractual rate).

[38] TWPA's offer does not trigger the costs consequences under r. 49.10 of the *Rules* to entitle it to costs.

[39] There are cases in which courts have considered offers which are not compliant with r. 49. The court should consider offers that demonstrate a genuine and continuing effort to settle an action: *Mudronja v. Mudronja*, 2022 ONSC 7151, 83 R.F.L. (8th) 184, at para. 10.

[40] TWPA's offer was made after the pre-trial conference, and it is technically not compliant with r. 49. Had ID Inc. accepted it, it would have been a position which is significantly less favourable than it is now, even taking into consideration the costs which it now owes to StrategyCorp.

[41] ID Inc. did not serve an offer to settle.

[42] ID Inc. is entitled to costs of this action on a partial indemnity scale.

Amount of Costs

[43] With respect to the amount of ID Inc.'s trial costs, TWPA does not dispute the time spent or hourly rates charged with a few exceptions. TWPA's main objection to the costs sought by ID Inc. relates to the issues of TWPA's offer to settle (discussed above) and the issue of divided success which I consider below.

[44] There are three items where TWPA disputes ID Inc.'s entitlement to trial costs. First, the inclusion of $8,185.20 in ID Inc.'s Bill of Costs for time spent in relation to costs sought by StrategyCorp. ID Inc. agrees this amount should be excluded. Second, TWPA disputes a

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disbursement of $2,539.30 for accommodations. I agree this amount should be excluded because ID Inc. chose the trial venue.

[45] The third objection relates to the disbursement for ID Inc.'s expert, Mr. Johnson. TWPA says much of the disbursement of $27,280 for Mr. Johnson should be excluded because much of his evidence related to the value of the advertising revenue, and ID Inc. was not successful on this aspect of its claim.

[46] Mr. Johnson's evidence was relevant to both the damages flowing from the alleged oral agreement and the breach of the SMA. With respect to the breach of the SMA, Mr. Johnson gave evidence concerning the expenses associated with maintaining the sign and the discount rate and ID Inc.'s profit level. Mr. Johnson's evidence was necessary for me to determine the damages flowing from TWPA's breach of the SMA. Mr. Johnson was the only expert with specific expertise regarding the sign industry. His evidence assisted the court in understanding the nature of the opportunity and the context of the dealings between and conduct of the parties. His contribution to the case was not marginal and the $27,280 disbursement for his report is a small fraction of the disbursements for TWPA's expert (which totaled $245,074) and StrategyCorp's expert (which totaled $133,183.60).

[47] I allow Mr. Johnson's full disbursement of $27,280.

Costs of the Interest Motion

[48] ID Inc. claims costs for the interest motion on a substantial indemnity basis in the amount of $99,684.10 ($87,649.65 in legal fees, $11,394.45 in HST on legal fees and $640.00 in disbursements) or alternatively, $66,669.40 for partial indemnity ($58,433.10 in legal fees, $7,596.30 in HST and $640.00 in disbursements).

[49] ID Inc. was successful on the interest motion, and it is entitled to have those costs included in its costs award.

[50] This issue was important to ID Inc. and resulted in a very substantial award of prejudgment interest.

[51] ID Inc. says the interest motion should not have been necessary: TWPA's position was unfounded, unnecessarily lengthened the proceeding, and it should not have denied ID Inc.'s entitlement to interest at the contractual rate.

[52] Substantial indemnity costs have been ordered where:

(a) one party to the litigation has behaved in an abusive manner, brought proceedings wholly devoid of merit, and unnecessarily run up the costs of the litigation: see for example *Standard Life Assurance Co. v. Elliott* (2007), 86 O.R. (3d) 221 (S.C.), at para. 9.

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(b) such a costs award is needed to sanction a party's vexatious, contumelious or oppressive conduct of the whole litigation or a step in it: see for example *Abrams v. Abrams*, 2009 CanLII 23375 (Ont. Div. Ct.), at para. 15.

See also: *Best v. Ranking*, 2015 ONSC 6269, at para. 142.

[53] Aside from cases involving offers to settle, substantial indemnity costs are reserved for rare and exceptional cases and are warranted where there is reprehensible, scandalous or outrageous conduct: *Young v. Young*, [1993] 4 S.C.R. 3, at p. 134; *Davies v. Clarington (Municipality)*, 2009 ONCA 722, 100 O.R. (3d) 66, at paras. 29-30. There is a difference between "hard-fought litigation that turns out to have been misguided, on the one hand, and malicious counterproductive conduct, on the other": *Davies*, at para. 45.

[54] TWPA's conduct in defending the interest motion is not deserving of costs sanction, particularly since ID Inc.'s Statement of Claim pled pre- and post-judgment interest pursuant to the *CJA*.

[55] ID Inc. is entitled to partial indemnity costs of the interest motion.

[56] TWPA does not dispute the time spent on or hourly rates charged for the interest motion, with a few exceptions. ID Inc. has included $6,948.00 for work related to enforcement of the judgment and I agree this amount should be excluded. TWPA also submits that the attendance of three lawyers on the interest motion was not necessary and the amount of $1,623.60 for the most junior lawyer should be excluded. I agree. Finally, TPWA says that 110 hours and fees in excess of $35,000 relating to preparation of the costs outlines and submissions is excessive and seeks a reduction of 60 percent of this amount. I agree that 110 hours is excessive; however, ID Inc. prepared detailed Bills of Costs covering a period of approximately seven years and made submissions relating to the issues raised by TWPA concerning divided success and TWPA's offer to settle and attended for oral submission. I think a reduction of 50 percent is warranted.

Divided Success

[57] TWPA seeks a 60-percent reduction of the costs sought by ID Inc. to account for the fact that ID Inc. was not successful in establishing that it had an oral agreement with TWPA to share in the advertising revenue generated by the digital sign, which was the subject matter of this litigation. If established, the oral agreement would have entitled ID Inc. to substantially more damages than it recovered at trial.

[58] ID Inc. says that a distributive costs award is not appropriate.

[59] Distributive costs awards have frequently been criticized by the Ontario Court of Appeal. Courts look at the overall outcome, not an issue-by-issue analysis of success: *Chippewas of Nawash Unceded First Nation v. Canada* (AG), 2023 ONCA 787, at para. 6; *Oakville Storage & Forwarders Lid v. Canadian National Railway* (1991), 5 O.R. (3d) 1 (C.A.); *Wesbell Networks Inc.. (Receiver of) v. Bell Canada*, 2015 ONCA 33, at para. 21; *Skye v. Matthews* (1996), 87 O.A.C. 381 (C.A.); and *William Allan Real Estate Co. v. Robichaud* (1990), 72 O.R. (2d) 595 (H.C.).

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[60] Courts may award costs or refuse costs in respect of a particular issue or part of a proceeding under to r. 57.01(4)(a). Costs awarded to a successful plaintiff may be reduced to take into consideration the time spent on issues upon which the plaintiff was not successful: In *Mihaylov v. 1165996 Ontario Inc.*, 2017 ONCA 218 at para 8, *Ontario Realty Corporation v. P. Gabriele & Sons Limited*, 2009 CanLII 68828 (Ont. S.C.), at paras. 27-36; *Georgian Flooring Centre Ltd. v. Goslin & Goslin* 2018 ONSC 1189, at paras. 45 and 68; *Mclaughlin v. Ariston Realty Corp. et al.*, 2004 CanLII 18174 (Ont. S.C.), at para. 10; and *Adatia v. A Farber Ltd.* (2005), 8 C.B.R. (5th) 165 (Ont. S.C.), at paras. 10-15.

[61] In *Adatia*, a reduction of 30 percent was appropriate given the following factors: 1) the applicants' success on two out of three claims; 2) the set-off claim, on which the applicants were unsuccessful, took up most of the proceeding's time; 3) the value of the successful issues against the total amount claimed by the applicants; and 4) the relative importance of the various issues and the much greater time devoted to the set-off claim than to the other issues: at paras. 14-15.

[62] It was the conduct of TWPA and not the conduct of ID Inc. that caused the litigation. ID Inc. identified the opportunity to convert the static billboard sign at the Ontario Food Terminal to a digital sign, brought the opportunity to TWPA, worked with StrategyCorp as TWPA requested, submitted the municipal permit required to convert the sign, waited while StrategyCorp pursued the Provincial Path, assisted when requested to do so, and signed non-disclosure and non-competition agreements with TWPA and StrategyCorp as requested.

[63] Almost every trial has some measure of divided success. There must be a very good reason to discount the successful plaintiff's case for divided success. The cases where the discount for divided success applies are cases where the plaintiff failed to establish facts to support its claim.

[64] Even though ID Inc. was not successful in establishing there was an oral agreement, the claim regarding the oral agreement was not specious or unsupported by any facts. ID Inc. did establish a number of outward manifestations of the alleged oral agreement.

[65] The bulk of the evidence and most of the exhibits were relevant to the issues upon which ID Inc. was successful. In order to decide the issues of whether TWPA breached the SMA and acted in bad faith and the issues of waiver and estoppel, it was necessary to understand how the SMA was formed, the steps Kenny took to perform the SMA including submitting the permit, the dealings between the TWPA and StrategyCorp, the circumstances surrounding the withdrawal of the permit, the pursuit of the Provincial Path, the switch back to the municipal process and the parties' conduct thereafter. To decide the issues, it was necessary to hear evidence about and have a full understanding of the history and full extent of the dealings between the three parties.

[66] There was, however, evidence that related only to the oral agreement and the issue of ID Inc.'s entitlement to advertising revenue: for example, the evidence of the initial meetings and discussions prior to entering into the SMA and the evidence of damages relating to the breach of the alleged oral agreement and advertising revenue, including a substantial portion of the expert evidence. There was also evidence regarding other issues upon which ID Inc. was not successful, for example breach of confidentiality and conspiracy.

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[67] I find that TWPA is entitled to a reduction of 15 percent for the time spent on issues upon which ID Inc. was not successful.

[68] ID Inc. is entitled to partial indemnity costs of the trial of $604,683.16 ($591,787.50 fees less $8,185.20 (for time responding to StrategyCorp's costs submission) and reduced by 15 percent or $87,540.35 (for divided success) for a total of $496,061.95 in fees, plus HST of $64,488.05 and disbursements of $44,133.16 ($46,672.46 less $2,539.30 (for the accommodation disbursement).

[69] ID Inc is entitled to costs of the interest motion of $37,208.50 ($58,433.10 for fees less $6,948.00 (time related to judgment enforcement) less $1,623.60 for the junior lawyer attendance and $17,500 reduction for excessive time on costs submissions), for a total of $32,361.50 for fees plus $4,207.00 for HST and $640.00 for disbursements).

StrategyCorp's Costs

[70] ID Inc.'s action against StrategyCorp was dismissed and StrategyCorp is entitled to costs. StrategyCorp seeks its costs on a full indemnity basis in the amount of $833,291.50 plus HST of $108,327.89 and disbursements of $154,048.41. It says it is entitled to full indemnity costs because of its offer to settle, the fact that ID Inc. did not make an offer to settle, and because Kenny made unsubstantiated allegations of dishonesty, conspiracy, deceit, and fraud, and attacked its professional reputation as well as the reputation of Ambassador MacNaughton, including alleging illegal kickbacks.

[71] ID Inc. submits that StrategyCorp's costs are excessive. It played only a minor role at trial, conducted only very cursory cross-examinations, and did not call its expert witness to testify.

[72] StrategyCorp made two offers to settle. On December 10, 2018, StrategyCorp offered to settle for $25,000. On January 24, 2023, StrategyCorp offered to settle for $5,000. Both offers comply with the provisions of r. 49.

[73] Rule 49 does not provide for costs payable to a defendant on a substantial indemnity basis. There are cases decided under r. 57.01 where a defendant has made an offer, the plaintiff's claim is dismissed, and the defendant recovered partial indemnity costs to the date of its offer and substantial indemnity costs thereafter: *S & A Strasser v. Richmond Hill (Town of)* (1990), 45 O.A.C. 394 (C.A.). However, no hard and fast rule was established in *S & A Strasser*: *Bilbija v. Whittington Engineering Ltd.* et al., 2024 ONSC 874, at para. 31.

[74] In my view, neither offer represented a genuine attempt to resolve the case. Had I found StrategyCorp liable for inducing breach of contract for example, the damages would have been close to $1 million. I do not find that StrategyCorp's offers to settle justify an award of substantial or full indemnity costs.

[75] Full indemnity costs are reserved for rare and exceptional cases and require a very high bar to apply: *Net Connect Installation Inc v. Mobile Zone Inc.*, 2017 ONCA 766, 140 O.R. (3d) 77, at para. 9; *Envoy Relocation Services Inc. v. Canada (Attorney General),* 2013 ONSC 2622, at para. 114. Full indemnity costs are an exception to the general rule and are only awarded under

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very limited circumstances, where the conduct of a party has been "reprehensible, scandalous, or outrageous": *Envoy*, at para. 117.

[76] Substantial indemnity costs are also the exception and are warranted in only two circumstances: 1) the operation of an offer to settle under Rule 49.10; and 2) where the losing party has engaged in behaviour worthy of sanction: *Davies*, at paras. 28, 40; *Elgin Mills 90 Inc. v. Romandale Farms Limited et al.,* 2020 ONSC 1621, at para. 20.

[77] I do not find that ID Inc. engaged in malicious, counterproductive, or reprehensible conduct or behaved in an abusive manner, made efforts to deceive the court, or was evasive or misleading or acted in bad faith: *Elgin Mills 90 Inc.*, at paras. 21-33.

[78] ID Inc.'s claims against StrategyCorp were for economic torts. ID Inc.'s Statement of Claim does not include allegations of fraud or deceit.

[79] I do not agree that ID Inc. has engaged in conduct in this litigation that qualifies as reprehensible and justifies an award of costs on an elevated scale.

[80] ID Inc.'s claims against StrategyCorp were not baseless or devoid of merit. I found that it was StrategyCorp's idea to purse the Provincial Path and StrategyCorp's involvement in the sign project caused problems: see my Reasons for Judgment, at paragraph 53. I also found that StrategyCorp withheld information from ID Inc., at paragraphs 262 and 266.

[81] Costs on a partial indemnity basis are appropriate.

[82] StrategyCorp's partial indemnity fees are $499,792.20.

[83] The case was very important to StrategyCorp. StrategyCorp is a professional services firm and the allegations against it were potentially damaging to its reputation and business.

[84] I agree with the submissions of counsel for StrategyCorp that focused cross-examination and correctly targeted, strategic choices in leading defence evidence are to be encouraged and certainly should not deprive a successful party of costs.

[85] StrategyCorp spent considerable time preparing to meet ID Inc.'s allegations of negligence, breach of contract, inducing breach of contract, conspiracy, breach of fiduciary obligations, and other economic torts. Costs for preparation for and attendance in court for each day of trial is properly claimed by StrategyCorp.

[86] In considering ID Inc.'s reasonable expectations, I note that ID Inc.'s full costs, including the interest motion, are $1,271,844.00 whereas StrategyCorp's full costs, including the interest motion, are $1,095,667.81. It cannot be said that StrategyCorp's costs were not within ID Inc.'s reasonable expectations.

[87] ID Inc. submits that with 21 timekeepers docketing time, there must be some unnecessary overlap. There may be a variety of reasons why it was necessary to have many timekeepers

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involved in this case, including the fact that the litigation spanned more than six years. StrategyCorp submits that rather than look at the hours in isolation, the court should consider the total fees because less-experienced timekeepers may take longer to do tasks, but their hourly rates are lower. I agree. I also note that the time spent by each of the three parties preparing for and attending trial is roughly the same.

[88] ID Inc. submits that I should reduce StrategyCorp's costs to exclude the time spent on the motion for partial summary judgment which it intended to bring but was not allowed to schedule.

[89] Myers J. declined to schedule a date for StrategyCorp's motion because of the risk of overlap and duplication. He said:

> Once I find that the motion faces risk of inconsistent verdicts and duplication, *Malik v. Attia,* 2020 ONCA 787 (CanLII), precludes me from even scheduling the motion. Moreover, I am unsure if the timing cutoff imposed in *Avedian v. Enbridge Gas Distribution Inc. (Enbridge Gas Distribution)*, 2021 ONCA 361 (CanLII), would apply because a trial date has been set.
>
> The motion proposed is a "trial in a box". It asks the judge to decide all of the issues for trial as a motion. It is very different than a discrete issue that may resolve the case without an assessment of the merits for trial. See: *Griva v. Griva*, 2016 ONSC 1820 (CanLII), at para. 19.

[90] I agree that the contemplated summary judgment motion was an unnecessary step, and StrategyCorp's costs are reduced by $41,668.52 for time related to the summary judgment motion.

[91] ID Inc. submits that I should reduce StrategyCorp's costs relating to the proceedings involving the Office of the Integrity Commissioner ("OIC"). I agree. Although Kenny brought the complaint against Mr. MacNaughton, the complaint before the OIC was a separate proceeding. StrategyCorp's costs are reduced by $11,790.76 for time spent on the complaint to the OIC.

[92] ID Inc. submits that I should disallow the disbursement relating to StrategyCorp's expert who prepared reports and attended trial but was not called as a witness.

[93] In this case, having heard the plaintiff's evidence and the evidence of TWPA, including its expert, StrategyCorp made a strategic decision not to call its expert witness.

[94] ID Inc. submits that StrategyCorp's expert duplicated the evidence of TWPA's expert. As StrategyCorp correctly points out, it had no way of knowing whether TWPA and ID Inc. would settle the case and therefore it would be very risky for StrategyCorp to simply rely on the evidence of TWPA's expert; StrategyCorp could well have been left holding the proverbial "bag." A strategic decision which ended up saving trial time should be encouraged and not punished. To require an expert to testify for the party to recover a disbursement would be counterproductive.

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[95] StrategyCorp is entitled to costs on a partial indemnity basis of $452,483.10 fees ($499,792.20, less $36,874.80 for the unscheduled summary judgment motion and less $10,434.30 for the OIC) plus HST of $58,822.80 and disbursements of $154,048.41 for a total of $665,354.31.

[96] StrategyCorp seeks costs against Kenny personally. StrategyCorp did put Kenny on notice that it intended to pursue costs against him personally.

[97] Costs may be awarded against a non-party where the "person of straw" test is met; meaning the non-party intentionally put forward a nominal plaintiff for the purpose of putting up a costs screen: *1318847 Ontario Ltd v. Laval Tool & Mould Ltd*, 2017 ONCA 184, 134 O.R. (3d) 641, at para. 83.

[98] There is no evidence ID Inc. is Kenny's alter ego or a shell corporation and StrategyCorp did not bring a motion for security for costs.

[99] I do not find that ID Inc. was a nominal plaintiff or that the action should have been brought in Kenny's name personally.

[100] Costs may also be awarded against a non-party where the non-party has initiated or conducted litigation in a manner which abuses the courts' process: *1318847 Ontario Ltd.*, at para. 86. Kenny did not abuse the courts' process.

[101] Costs may be awarded against a non-party who intentionally misleads the court: *Marcos v. Lad*, 2021 ONSC 4900, 75 C.P.C. (8th) 383, at para. 3.

[102] I do not find that Kenny intentionally misled the court or abused the courts' process.

[103] There is no basis to make an order for costs against Kenny personally.

[104] StrategyCorp also seeks an order that, if any amounts are payable by TWPA to ID Inc., the funds be directed to first satisfy the costs awarded in favour of StrategyCorp with any remaining balance to be paid to ID Inc.

[105] I was not referred to any authority in support of making such an order and decline to make an order directing funds payable by TWPA to ID Inc. be paid first to satisfy the costs award in favour of StrategyCorp.

[106] Even if I had jurisdiction to make such an order, I would not do so. I have no evidence that ID Inc. is impecunious or dissipating assets for the purpose of defeating StrategyCorp's costs award; and, as counsel for ID Inc. rightly points out, StrategyCorp did not bring a motion for security for costs or a *Mareva* injunction during the course of the action.

CONCLUSION

[107] I have considered the factors under r. 57.01(1), including the importance of the case to the parties, the time spent, rates charged, reasonable expectations of the parties, as well as the amount

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recovered by ID Inc. and the divided success. In my view, having regard to all the factors, I find that costs payable to ID Inc. by TWPA of $528,423.45 for fees ($496,061.95 trial fees plus $32,361.50 motion fees) is appropriate. I also find that costs payable to StrategyCorp of $388,553.90 is appropriate.

[108] The TWPA shall pay costs in the amount of $641,891.66 ($528,423.45 for fees plus $68,695.05 for HST and $44,773.16 for disbursements) to ID Inc.

[109] ID Inc. shall pay costs in the amount of $665,354.31 ($452,483.10 for fees plus $58,822.80 for HST and $154,048.41 for disbursements) to StrategyCorp.

Merritt J.

Date: March 18, 2024

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