CITATION: Sjostrom Sheet Metal Ltd. v. Geo A. Kelson Company Limited, 2024 ONSC 3183
COURT FILE NOS.: CV-19-616159 & CV-20-643699
DATE: 2024 06 04

ONTARIO
SUPERIOR COURT OF JUSTICE

IN THE MATTER OF the *Construction Act*, RSO 1990, c. C.30, as amended

B E T W E E N:	
SJOSTROM SHEET METAL LTD.	R. Lepore, *for the plaintiff*
Plaintiff	
- and -	
GEO A. KELSON COMPANY LIMITED	J. Armel and L. Kung, *for the defendant*
Defendant	
A N D B E T W E E N:	
A. AMAR AND ASSOCIATES LTD.	K. MacDonald and J. Allingham, *for the plaintiff*
Plaintiff	
- and -	
GEO A. KELSON COMPANY LIMITED	J. Armel and L. Kung, *for the defendant*
Defendant	
	HEARD: In writing

REASONS FOR DECISION ON COSTS AND INTEREST

Robinson A.J.

[1] Following trial of these two actions, which took place over eight days, I held that Sjostrom Sheet Metal Ltd. ("Sjostrom") had failed to prove its lien and contract claims and dismissed its action. I also found that A. Amar and Associates Ltd. ("Amar") had proven its contract claim

against Geo A. Kelson Company Limited ("Kelson") and awarded judgment in favour of Amar for the full amount that it claimed at trial, plus pre-judgment interest. I directed that the parties file costs submissions and, in the case of Amar and Kelson, submissions on calculation of pre-judgment interest if they could not agree. Neither costs nor pre-judgment interest were agreed. I have now had an opportunity to review and consider the parties' submissions.

[2] Kelson seeks its substantial indemnity costs of Sjostrom's lien action and the reference against Sjostrom in the amount of $216,953.57, including HST and disbursements. Alternatively, Kelson seeks costs of $196,602.89, representing partial indemnity costs to the date an offer to settle served in late September 2022 and substantial indemnity costs thereafter. Sjostrom's position is that I should decline to award any costs or at least fix costs in an amount much less than what is claimed by Kelson.

[3] Amar seeks its costs of its non-lien action and the reference against Kelson in the amount of $187,366.53, including HST and disbursements, representing partial indemnity costs to the date of an offer to settle made in October 2020 and substantial indemnity costs thereafter. It also seeks pre-judgment interest on the judgment amount at the rate of 2% *per annum* calculated from August 1, 2019, a date after holdback was released to Kelson on the project. Kelson's position is that Amar cannot rely on its first offer to settle to support substantial indemnity costs from October 2020 and that pre-judgment interest should accrue from the issuance date of Amar's statement of claim.

[4] Having considered the parties' submissions and the circumstances of these two cases, including offers to settle, I am awarding Kelson its costs of Sjostrom's action fixed in the amount of $123,270.92, including HST and disbursements. I am also awarding Amar costs of its action fixed in the amount of $173,025.17, including HST and disbursements, and fixing pre-judgment interest on the judgment amount pursuant to the *Courts of Justice Act*, RSO 1990, c C.43 from the date of Amar's claim being issued.

Relevant legal framework

[5] Pursuant to s. 87.3 of the *Construction Act*, RSO 1990, c C.30, the act as it read on June 29, 2018 (*i.e.*, the former *Construction Lien Act*) (the "*CLA*") continues to apply to the subject improvement and Sjostrom's lien action. I accordingly refer to the provision of the *CLA* in this costs decision.

[6] With respect to Sjostrom's lien action, costs are are governed by s. 86 of the *CLA*, which provides me with broad discretion to award costs against a party, including on a substantial indemnity basis. Also relevant to costs is the requirement that procedure in lien action be as far as possible of a summary character having regard to the amount and nature of the liens in question: *CLA*, s. 67(1).

[7] By operation of s. 67(3) of the *CLA*, the *Rules of Civil Procedure*, RRO 1990, Reg 194 (the "*Rules*") apply except to the extent of any inconsistency with the *CLA*. Subrule 57.01(1) of the *Rules* outlines non-mandatory and non-exhaustive considerations for the court in assessing

costs. The court has repeatedly held that rule 57.01 is not inconsistent with the *CLA* and is applicable in the court's exercise of its discretion under s. 86.

[8] With respect to Amar's action, both s. 131 of the *Courts of Justice Act* and rule 57.01 of the *Rules* afford me broad discretion to fashion a costs award that I deem fit and just in the circumstances. The list of factors in subrule 57.01(1) of the *Rules* are in addition to considering the result of the proceeding and any written offers to settle under rule 49. Rule 1.04(1.1), which is also applicable, requires the court to make orders that are proportionate to the importance and complexity of the issues and to the amount involved in the proceeding.

[9] As I have stated in many of my prior costs decisions, whether made in a lien action or a non-lien action, costs awards are intended to reflect what the court views as a fair and reasonable amount that should be paid by an unsuccessful party rather than any exact measure of the actual costs to the successful litigant: *Davies v. Clarington (Municipality),* 2009 ONCA 722 at para. 52. The overall objective is to fix an amount that is fair and reasonable in the particular proceeding, having regard to the parties' reasonable costs expectations: *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 OR (3d) 291 (CA) at paras. 26 and 38.

Costs factors – Sjostrom's action

[10] I reject Sjostrom's submission that I should decline to award Kelson any costs. Sjostrom has not directed me to any conduct by Kelson in the course of the action or the reference before me that would warrant or justify such a result. Kelson was successful in defending Sjostrom's lien and contract claims and is entitled to costs.

[11] Sjostrom submits that I should consider the financially disastrous impact on it from the trial result. It submits that imposing a costs award in the amounts sought by Kelson would mean financial ruin for Sjostrom. I do not find Sjostrom's financial circumstances to be a relevant consideration here. There is no evidence before me on the alleged financial impacts on Sjostrom from losing at trial or from an adverse costs award. No request was made to tender such evidence in support of Sjostrom's position on costs. Regardless, in my view, absent exceptional circumstances or improper conduct by the defendant, a lien claimant who unsuccessfully advances a lien claim at trial and thereby causes a defendant to incur costs should not be insulated from an adverse costs award solely because of their current financial situation.

[12] At trial, Sjostrom succeeded in proving a direct contract with Kelson, but failed to prove its lien and contract claims. I made no finding that Kelson caused or contributed to any financial problems suffered by Sjostrom. In my view, it would be unjust to deny Kelson costs based on unsubstantiated allegations about Sjostrom's financial status.

[13] Sjostrom has challenged Kelson's fees, but has not challenged any of the claimed disbursements. Sjostrom submits that Kelson's aggregate time claimed in both Sjostrom's action and Amar's action is "stratospheric" and is not fair, reasonable, or proportionate to reasonable expectations. Sjostrom submits that the nature of the action did not require an "army of lawyers", including a second lawyer at trial. It points out that a review of Kelson's bills of costs in each of

the two actions discloses an aggregate of 1,019 hours of time, which given the overlapping procedural and factual issues between the two actions cannot reasonably have been incurred.

[14] Proportionality is a consideration here. The aggregate total legal fees claimed by Kelson in respect of both actions is in excess of $500,000, with roughly half of that amount claimed as costs of each proceeding. Kelson's total actual legal fees from this action alone are more than three times the total actual legal fees claimed by Sjostrom in its bill of costs and about one and a half times greater than the amount pursued by Sjostrom at trial.

[15] Kelson submits that its costs claim is justified. It argues that the nature of Sjostrom's claim, which depended on proving significant working hours claimed, combined with a lack of particularity and backup documentation, resulted in a need for extensive trial preparation to anticipate various alternatives for Sjostrom's evidence at trial. That includes the impact of Sjostrom planning to call eight witnesses, including its labourers, but ultimately calling only five witnesses. I agree with Kelson that these are factors in deciding costs.

[16] I also agree with Kelson that more trial time was spent dealing with Sjostrom's claim than with Amar's claim. Sjostrom submits that trial of its action did not materially increase the total time required for trial of Amar's claim. However, Sjostrom called more witnesses, did not ultimately tender affidavits as originally anticipated, and the aggregate length of examination time was greater for Sjostrom's witnesses than it was for Kelson's and Amar's respective witnesses. Notably, Sjostrom's main witness, Bill Preston, was examined in chief for the equivalent of a full day of trial time, well in excess of the three hours set aside for his examination in chief.

[17] Conversely, though, Kelson maintained that it had no contract with Sjostrom, which I did not accept at trial. I found that Kelson had admitted the direct contractual relationship in its statement of defence and that, in any event, the evidence supported a direct contract. In my view, Kelson's denial of a contract at trial resulted in additional trial time and expense to Sjostrom that was not required. This militates against awarding Kelson its full costs claim.

[18] Overall, I find the hours claimed by Kelson to be quite high. While the number of lawyers involved is not necessarily a concern in and of itself, I question the need for the aggregate hours spent by Kelson's lawyers and law clerk on the two actions and, in respect of Sjostrom's action, whether the total time spent was genuinely required. For example, total legal fees of $32,449 (74.6 hours) are claimed to prepare for Kelson's closing submissions for Sjostrom's lien action and attend the last day of trial, which is in addition to the $32,324 (74.3 hours) claimed for closing submissions in Amar's action. That is compared to the attendance fees of $42,973 (107.5 hours) for Sjostrom's action and $42,110 (108 hours) for Amar's action claimed for the 7 days of trial before closing submissions. Further total fees of $98,279 (254 hours) are claimed for trial preparation in Sjostrom's action, plus another $97,980 (255.4 hours) for trial preparation in Amar's action.

[19] I have no reason to doubt that the time claimed was spent. Kelson was entitled to prepare for each step of the litigation as it felt was necessary to best advance its positions. However, that does not mean that the hours actually expended at the rates charged by Kelson's lawyers are fully recoverable. The measure is always what is fair and just having regard to the reasonable

expectations of the parties. Although the time claimed in certain blocks in Kelson's bill of costs are reasonable, I do find that, overall, the costs claimed by Kelson for Sjostrom's action, particularly in context of the bill of costs in Amar's action, are beyond reasonable expectations in the circumstances of the case.

[20] With respect to Kelson's claim for substantial indemnity costs, I am not convinced by Kelson's arguments that a substantial indemnity award should be made for the entirety of the action. I am convinced, though, that Kelson should be awarded substantial indemnity costs from the date of its offer to settle, which was made shortly before trial.

[21] As noted above, s. 86 of the *CLA* provides discretion to award costs on a substantial indemnity basis. Kelson points to two cases (including one of mine) in which the court has awarded substantial indemnity costs to deter lien claimants from pursuing wilfully exaggerated liens: *Brian T. Fletcher Construction Co. v. 1707583 Ontario Inc.* (2009), 80 CLR (3d) 143 (SCJ), at paras. 43-44, and *GTA Restoration Group Inc. v. Baillie*, 2020 ONSC 6327 at paras. 10 and 12. In my view, neither case is applicable here. The factual circumstances of both cases were quite different. They each dealt with circumstances in which the court found the liens to be exaggerated. In my view, there is a distinction between failing to prove a lien and preserving an exaggerated lien. I made no finding that Sjostrom's lien was exaggerated. I held only that, on a balance of probabilities, Sjostrom had failed to prove its claimed supply of services in excess of the amounts already paid by Kelson.

[22] It is relevant to costs, though, that Kelson made an offer to settle Sjostrom's action on September 28, 2022, prior to trial, for payment of $40,000, inclusive of interest and costs. The offer also provided that Sjostrom would pay Kelson's partial indemnity costs incurred after September 30, 2022. That offer was not accepted and remained open for acceptance until trial.

[23] In support of its position that substantial indemnity costs should be awarded from the date of its offer, Kelson points to the Court of Appeal's decision in *S & A Strasser Ltd. v. Richmond Hill (Town)* (1990), 1 OR (3d) 243, 1990 CanLII 6856 (CA). In that case, the Court of Appeal addressed the seeming discrepancy in rule 49.10 of the *Rules*, whereby a successful defendant is only entitled to partial indemnity costs from the date of its offer under subrule 49.10(2). The Court of Appeal held that the defendant in that case, who was entirely successful in the action, should be awarded substantial indemnity costs from the date of the offer to settle. Subrule 49.10(2) was noted to only contemplate a circumstance where the plaintiff still obtains judgment, but for less than the offered amount.

[24] Sjostrom's lien action is governed by the *CLA*, not the *Rules.* Rule 49 of the *Rules* does not apply in a lien action in the same manner as a non-lien action. Its structured costs consequences are inconsistent with the broad discretion under s. 86 of the *CLA*. Since the *Rules* only apply to the extent that they are not inconsistent with the *CLA*, the specific language of rule 49 and case law developed under it is not, in my view, binding in a lien action under the *CLA*.

[25] Nevertheless, the rationale discussed by the Court of Appeal in *S & A Strasser Ltd.* is equally applicable in a lien action where a defendant offers to settle by payment and the action is ultimately dismissed in its entirety. Kelson was entirely successful in its defence at trial that no

amounts were due and owing to Sjostrom. It was prepared to make a payment to Sjostrom before trial that was clearly more favourable to Sjostrom than the result at trial. Kelson also submits that Sjostrom made no offers to settle throughout the litigation, which Sjostrom has not disputed.

[26] The Court of Appeal has held that modern costs rules serve three main purposes: (i) to indemnify successful litigants for the costs of litigation, (ii) to encourage settlement, and (iii) to discourage and sanction inappropriate behaviour by litigants: *Fong v. Chan,* 1999 CanLII 2052 (ON CA) at para. 22. In my view, a substantial indemnity award in favour of Kelson from the date of the offer serves the first two purposes and is appropriate in the circumstances of this case, particularly given my dismissal of Sjostrom's lien and contract claims in their entirety.

[27] I accordingly fix costs of Sjostrom's action in the amount of $105,000, including HST, plus the claimed and Kelson's unopposed disbursements of $18,270.92.

Costs factors – Amar's action

[28] Amar's action was commenced under the simplified procedure in rule 76 of the *Rules.* In opposing Amar's costs claim, Kelson did not raise or rely on the limit on costs provided in subrule 76.12.1(1). Nevertheless, I agree with Amar's submissions on why it should not apply.

[29] On consent of the parties, trial in this action did not proceed in accordance with rule 76.12, but instead proceeded as a hybrid trial heard concurrently with the trial in Sjostrom's lien action. Both Amar and Kelson have made costs claims in excess of the costs cap in subrule 76.12.1(1). Kelson's bill of costs outlines costs higher than those claimed by Amar. In its responding costs submissions, Kelson does not challenge the hours, rates, or disbursements claimed by Amar. Kelson's only challenge is to Amar's claim for substantial indemnity costs.

[30] Strictly applying rule 76.12.1 in the circumstances of this case and this reference, which included a trial that was not conducted in accordance with rule 76.12, would be somewhat like forcing a square peg into a round hole. Amar has already applied a 20% discount to its costs claim in its bill of costs. In my view, that is a fair acknowledgement that this action was formally commenced and continued under the simplified procedure, albeit not ultimately tried in accordance with rule 76.12.

[31] Given Kelson's own higher costs claim, Amar's partial indemnity costs claim are evidently within Kelson's reasonable expectations. In my view, I need only address Amar's submissions that Kelson's conduct should be a factor in costs and that Amar should be awarded substantial indemnity costs from its first offer to settle.

[32] With respect to Kelson's alleged conduct, I find no conduct significantly increasing he duration of the proceeding or costs. Kelson was indeed unsuccessful in its position at trial that there was no direct contractual relationship with Sjostrom and did acknowledge an amount owing under Amar's subcontract. However, I am not convinced that the overall duration of the proceeding was materially extended or costs increased as a result of Kelson's positions.

[33] With respect to Amar's offers to settle, Amar relies on beating both of its rule 49 offers in support of its claim for substantial indemnity costs. The first offer was made on October 6, 2020, offering to settle upon payment by Kelson of the all-inclusive sum of $205,000, if accepted within 15 days, else $205,000 plus pre-judgment interest at 2% *per annum* from July 9, 2020 to the date of acceptance, with partial indemnity costs to be agreed, determined by motion, or assessed. The second offer was made on July 18, 2022, on the same terms, but with the reduced amount of $170,000.

[34] Subrule 49.10(1) of the *Rules* provides that a plaintiff who obtains judgment that is as favourable or more favourable than an offer to settle is entitled to partial indemnity costs to the date of the offer and substantial indemnity costs from the date, unless the court orders otherwise. The offer must have been made at least seven days before trial, was not withdrawn or did not expire prior to trial, and must not have been accepted by the defendant.

[35] Amar submits that neither of its offers were withdrawn or expired prior to trial, and neither were accepted by Kelson. It accordingly submits that it should be awarded substantial indemnity costs from the date of the first offer in accordance with subrule 49.10(1).

[36] I agree with Kelson that the first offer to settle is not material to costs. The costs consequences in subrule 49.10(1) apply "unless the court orders otherwise." Case law supports that the absence of an element of compromise in an offer may be taken into account when applying the discretionary exception in rule 49.10(1): *Walker v. York Finch General Hospital* (1999), 43 OR (3d) 461, 1999 CanLII 2158 (ON CA). Amar's first offer was a modest reduction from its total claim. It was made prior to documentary and oral discoveries. In my view, it did not represent a compromise that fairly attracts heightened costs. I accordingly need not consider Kelson's arguments on whether the offer was revoked.

[37] Amar's second offer is a different matter. Amar offered to settle on payment of $170,000, including HST. At trial, Kelson conceded that a higher amount had been earned and remained unpaid under Amar's subcontract. Kelson justified non-payment by its position that it had no contract with Sjostrom and that any lien amount proven by Sjostrom would be payable from those funds. That position was unsuccessful at trial. I found that a separate contract was entered between Kelson and Sjostrom.

[38] Amar's offer to settle was evidently more favourable to Kelson than the outcome at trial. The offer remained open until trial and was not accepted by Kelson. The bulk of Amar's litigation costs were incurred after the second offer. Subrule 49.10(1) is engaged and I find it appropriate to award Amar its substantial indemnity costs from the date of the second offer. I am excluding Amar's pleadings amendment motion argued at the outset of trial from the higher scale of costs. In my view, costs of that successful opposed motion are properly awarded on a partial indemnity basis.

[39] I accordingly fix costs of Amar's costs of its action in the amount of $160,000, including HST, plus the claimed disbursements of $13,025.17.

Disposition on costs

[40] For the above reasons, having considered the factors in subrule 57.01(1) of the *Rules* and the impact of the offers to settle, I order as follows:

(a) Sjostrom shall pay to Kelson costs of Sjostrom's action and the reference in the amount of $105,000, including HST, with disbursements fixed in the amount of $18,270.92, for a total costs award of $123,270.92, payable within thirty (30) days following confirmation of my report; and

(b) Kelson shall pay to Amar costs of Amar's action and the reference in the amount of $160,000, including HST, with disbursements fixed in the amount of $13,025.17, for a total costs award of $173,025.17, payable within thirty (30) days following confirmation of my report.

Prejudgment interest

[41] Amar's position is that pre-judgment interest should accrue from August 1, 2019. In support of that date, Amar relies on my finding that final payment and holdback were due and payable by Kelson to Amar in mid-2019. It also points to cross-examination of Josh Kelson that Kelson received its holdback and final payment in June or July 2019. Amar accordingly argues that pre-judgment interest on the judgment amount should commence on August 1, 2019 at the rate of 2.0% *per annum*, which is the pre-judgment interest rate at that time pursuant to the *Courts of Justice Act*.

[42] Kelson disagrees. It argues that pre-judgment interest should accrue from the date on which Amar's statement of claim was issued, namely July 9, 2020, at the rate of 0.5% *per annum* in effect at that time pursuant to the *Courts of Justice Act*. Kelson points to Amar's statement of claim as the source of Amar's claim for pre-judgment interest.

[43] I agree with Kelson. Amar's statement of claim asserts a claim for pre-judgment interest in accordance with the terms of the parties' contract or, in the alternative, pursuant to the *Interest Act*, RSC 1985, c I-15 or, in the further alternative, pursuant to the *Courts of Justice Act*. The last is the only pre-judgment interest rate pursued by Amar in its submissions.

[44] It is now trite law that issues in an action are framed by the pleadings. Although not cited by either party, the Court of Appeal has expressly held that it is fundamental to the litigation process that lawsuits be decided within the boundaries of the pleadings: *Rodaro v. Royal Bank of Canada* (2002), 59 OR (3d) 74, 2002 CanLII 41834 (ON CA) at para 60. The statement of claim pleads no specific date on which a breach of contract is said to have occurred or from which interest is claimed. I find it unfair to impute a date for calculating pre-judgment interest nearly a year before the claim was issued that was not pleaded or directly addressed in evidence at trial.

[45] I accordingly fix pre-judgment interest on the judgment amount from issuance of the statement of claim on July 9, 2020, to the date of my report, at the rate of 0.5% *per annum* pursuant to the *Courts of Justice Act*.

Reports

[46] The parties have submitted a draft report for each action. I agree that issuing separate reports is appropriate. Although procedural steps and trial of the two actions occurred together on consent of all parties, the actions were never consolidated and were each subject to separate reference orders. Sjostrom's lien action is governed by the *CLA* and Amar's non-lien action is governed by the *Rules*. There are procedural differences between the two actions.

[47] I will be revising both draft reports in light of this decision on costs and interest. My reports in each action will issue in an amended form of the draft reports submitted. Prior to doing so, my proposed revisions will be circulated to the parties for comment. Since neither reference order requires a report back, the parties should refer to the confirmation process outlined in rule 54.09 of the *Rules*.

ASSOCIATE JUSTICE TODD ROBINSON

DATE: June 4, 2024