

OVERVIEW

[1] This is the costs endorsement arising from the application decision dated February 26, 2024, finding that a dog belonged to the applicant estate and ordering the respondent to return the dog by March 15, 2024¹.

PROCEDURAL HISTORY RELEVANT TO COSTS

[2] This application was hard fought. Oral argument took a half-day. The parties filed over 2000 pages of material, including 25 affidavits. 18 cross examinations were conducted over three days.

[3] In requesting costs submissions, the parties were to disclose offers and address all costs factors from Rule 57.01, with an emphasis on proportionality.

[4] Ms. Carvalho, estate trustee for the applicant estate, seeks full indemnity costs of \$212,025.52 or, in the alternative, substantial indemnity costs of \$191,335.61. Partial indemnity costs were calculated at \$129,345.90.

[5] The costs outline from the respondent, Ms. Verma, discloses costs of \$55,395.77 (substantial indemnity) and \$37,795.74 (partial indemnity).

Law/Analysis

[6] Costs are discretionary: s. 131 of the *Courts of Justice Act*.

¹ The applicant's costs submissions suggest that the dog was not returned in accordance with the court order. I have not considered that information in this endorsement as it is not relevant to setting costs.

[7] Generally, costs should follow the event (see *Bell v. Olympia & York Developments Ltd.*, (1994), 17 O.R. (3d) 135 (C.A.)). Costs should be proportional to the issues in the action and the outcome, and be reasonable for the losing part to pay, all circumstances considered (see *Boucher v. Public Accountants Council for the Province of Ontario*, (2004) 71 O.R. (3d) 291 (C.A.) and *Moon v. Sher et al.*, [2004] OJ No 4651 (C.A.)).

[8] The court's overall approach to fixing costs requires an overall consideration of whether the costs awarded are fair and reasonable. The task is more than a mere calculation using the hours docketed: *Boucher v. Public Accountants Council for the Province of Ontario*.

[9] Proportionality requires that costs be proportional to the issues in the action and amount awarded. Proportionality, however, should not override other considerations, and determining proportionality should not be a purely retrospective inquiry based on the award. It should not be used to undercompensate a litigant for costs legitimately incurred². The trial judge should make an award that is, overall, fair and appropriate.

[10] The court specifically requested submissions on proportionality in this case. Ms. Carvalho asserts that the applicant's costs ranging from \$191,000 to \$212,000 are proportionate and sets out various arguments for this. Ms. Verma simply asserts that the costs are not proportionate. None of these submissions were helpful to the court.

² *Accurate v. Tarasco*, 2015 ONSC 5980 (S.C.J.) at para. 13 to 17.

[11] In fixing costs, the court may consider the factors set out in Rule 57.01. The factors relevant to this case are:

- a. principle of indemnity, including experience of successful counsel and their rates: the hourly rates are within the realm of reason given the experience of counsel. The hours incurred by both sides were high and, in my view, unreasonable.
- b. reasonable expectation of the unsuccessful party: Ms. Verma has offered little assistance to determine her expectations. She offered to pay \$100,000 for the dog on April 12, 2023, just over seven months before the hearing. She incurred \$55, 395.77 in legal costs. She offers contradictory positions on the value of this case, stating that the value of the dog was only \$800 (costs submissions) but that the dog was her “son” (application materials).
- c. amount claimed and amount recovered: this was a non-monetary application seeking a factual finding about the ownership of a dog.
- d. complexity of proceeding: the matter was not legally complex.
- e. importance of issues: the issue was clearly of great importance to the parties (who collectively spent over \$265,000 in legal fees to determine the ownership of a dog). However, the issues were of not novel. Indeed, the parties agreed on the applicable law.
- f. conduct of the parties: both parties accuse the other of scandalous behaviour and actions. None of this odious evidence will be dignified

in this endorsement. I find that both parties went low and kept going lower, making accusations and recriminations that were designed to embarrass and humiliate, yet this evidence failed to advance either case. Indeed, much of this evidence was irrelevant.

- g. improper, vexatious or unnecessary steps: see comments above. Both parties took an aggressive, uncompromising approach to this litigation. To the extent that any steps were improper, vexatious or unnecessary, that criticism applies equally to both sides.
- h. Offers: There were some offers to settle, each of which was “all or nothing” in that one party or the other got exclusive possession of the dog. Ms. Verma argues that neither offer from Ms. Carvalho was a “formal Rule 49 Offer to settle”³. Ms. Carvalho does not argue that either offer engages Rule 49 consequences, which is correct.

Date	Offer By	Summary	Expiry Date
April 6, 2023	Carvalho	Dog to Carvalho; each party bears its own costs	April 11, 2023
April 12, 2023	Verma	Verma will pay \$50,000 for dog	None
April 12, 2023	Verma	Verma will pay \$100,000 for the dog	None
August 9, 2023	Verma	Dog stays with Verma; each party bears its own costs	August 24, 2023
October 27, 2023	Carvalho	Dog to Carvalho; each party bears its own costs	1 minute after commencement of Nov 1, 2023 hearing in another file

³ Respondent's costs submissions dated April 5, 2024, at para. 25.

[12] I find that the appropriate scale of costs is partial indemnity. Elevated costs are warranted in only two circumstances, neither of which are met here. The first involves a Rule 49.10 offer and the second is where the losing party engaged in behavior worthy of sanction: *Davies v. Clarington* (2009), 100 O.R. (3d) 66 (C.A.) at para 28.

[13] The challenge in this case is how to reasonably compensate a winning party when the collective costs, effort and behaviour by both parties are completely disproportionate to the factual question decided by the court. The court does not doubt the importance of the dog to both parties. However, the court cannot endorse overall legal costs of over \$265,000, nor can it endorse partial indemnity costs of \$129,345.90 for the successful party. At the same time, Ms. Verma chose to respond to this application. She was aware of all the evidence, the applicable law, had the benefit of legal advice throughout the litigation and elected to take the application through to oral argument.

[14] Taking into account all of the factors noted above, and the costs claimed by both parties, the court awards costs in the amount of \$83,570 (inclusive of legal fees, disbursements and taxes) to the applicant.

[15] This sum represents the court's estimate of what is fair and reasonable in all of the circumstances of this case, particularly the time and effort spent by counsel for both parties. It is the halfway point between the partial indemnity costs incurred by both parties. It is also less than what the paying party, Ms. Verma, offered to pay for the dog.

[16] The respondent is to pay \$83,570 to the applicant within 30 days of this endorsement.

A handwritten signature in blue ink, appearing to read 'L. B. Stewart J.', is positioned above a solid black horizontal line.

L. B. Stewart J.

Released: July 10, 2024

CITATION: Carvalho v. Verma, 2024 ONSC 3915
COURT FILE NO.: CV-23-00001149-00ES
DATE: 2024 07 10

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

CAVALHO, ARLETE

Applicant

- and -

VERMA, ALIESHA

Respondent

REASONS FOR JUDGMENT

L. B. Stewart J.

Released: July 10, 2024