CITATION: MIDDLESEX CONDOMINIUM CORPORATION NO. 387 v. ALUMINIUM WINDOW DESIGN LTD, 2024 ONSC 7065
COURT FILE NO.: CV-20-00000013-0000
DATE: 2024 12 18

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	
MIDDLESEX CONDOMINIUM CORPORATION NO. 387 Plaintiff	Garett HARPER, for the Plaintiff
- and -	
ALUMINIUM WINDOW DESIGN LTD. Defendant	Gregory HEMSWORTH, for the Defendant
	HEARD: In Writing

COSTS ENDORSEMENT

LEMAY J.

[1] The parties had a dispute over whether the Defendant was liable for the improper manufacturing of windows that were installed in the Plaintiff's building back in 2014. The claim was advanced in tort, contract and warranty, and was

litigated over twelve days late last year and early this year. The Plaintiff's claims were in excess of $2 million.

[2] In reasons released October 1st, 2024, I dismissed all of the Plaintiff's claims except for approximately $15,000 in claims under the warranty. I invited costs submissions if the parties were unable to agree on the costs of the action. The parties provided those submissions but as will be seen, I had to follow up on points I had specifically raised in my trial judgment that the parties originally did not comment upon.

Brief Background and Process Issues

[3] There are some elements of both my decision and of the trial itself that require some elaboration before I outline my disposition of the costs issues.

a) The Trial Process

[4] This was a virtual trial conducted as part of the Southwest Region's virtual trial blitz in November of 2023. The goal of this blitz was to attempt to reduce the backlog of cases in the Region that had built up as a result of various factors, including the COVID-19 pandemic. As a result, matters were selected for this blitz based in large part on whether they were ready for trial and were amenable to a ZOOM trial.

[5] It is well-known that ZOOM trials come with their own unique challenges. Those challenges include the fact that the Court must manage all of the documents electronically. This case had significant issues in terms of the documents and other items (including a full-sized window) that the parties sought to enter into evidence. Marking the full-sized window as an exhibit over ZOOM presented some challenges, but those were not insurmountable.

[6] Some of the other problems with the evidentiary record are described at paragraphs 59 to 63 of my reasons. The problems that I identified in my reasons included the failure to agree on a joint book of documents and the failure to hyperlink the documents that each side filed on CaseLines. As a result, I adjourned the trial for a day in order to provide the parties with an opportunity to come to an agreement on the documents that should be admitted as well as the basis for the admission of those documents. At the outset of trial and prior to adjourning it, I directed the parties' attention to the Court of Appeal's decision in *Girao v Cunningham* 2020 ONCA 260. Neither counsel seemed familiar with that decision.

[7] In any event, the parties were unable to agree on a joint book of documents, or even on which documents were admissible, at the outset of the trial. As a result, each side filed their own books of documents. Neither book of documents was particularly helpful.

[8] The Plaintiff's book of documents, which was a single item uploaded to CaseLines, contained no hyperlinks when it was viewed on CaseLines. It is possible that there were hyperlinks in the document, but the document was so large (more than a gigabyte) that every time I tried to download it, my computer crashed.

[9] The Defendant's documents were somewhat easier to navigate through, as they were divided into several volumes. However, the Defendant's CaseLines versions of their document books also did not include any hyperlinks and I could not seem to find any links to specific documents when I downloaded them either.

[10] This brings me to the overlap between the two sets of documents. To give a sense of the scope of the duplication between the parties' books of documents, the following documents all appeared **at least** twice in the materials that were filed at trial:

a) The contract between the parties.

b) The warranty that the Defendant provided.

c) The various observation reports (31 of them) that were prepared by the consultant during the course of the project.

d) Some, but not all, of the correspondence and meeting minutes from the Plaintiff.

e) Various portions of the expert reports and expert communications.

[11] In short, the duplication was significant. It meant that several hundred pages of documents without hyperlinks were duplicated as between the two sets of documents.

[12] To make matters more difficult, counsel used different page references to refer to the same documents when they were leading witnesses through evidence. For example, Plaintiff's counsel would refer to the contract in her book of documents and provide the page reference for it. The Defendant's counsel would then refer to the contract in his book of documents and provide a different page reference for it. There were occasions where witnesses were referred to different copies of the same document depending on whether they were in examination in chief or cross-examination.

[13] The astute observer will have noted that, in the previous paragraph, I did not use the phrase "CaseLines page reference". That is because Plaintiff's counsel (not the counsel making these submissions) did not use CaseLines page references when she was referring witnesses to evidence. Instead, she used the page references from the PDF that she had filed. As a result, on each occasion that Plaintiff's counsel referred to a document, I was required to provide the CaseLines page reference for the Court record. It was much like what I imagine

conducting a group reading of a novel from two different editions of the same book would be like. Chaotic, somewhat confusing and frustrating for the participants.

[14] Ultimately, I directed the parties to prepare written submissions. As part of my directions for these submissions, I required the parties to refer to the CaseLines page numbers for documents. They did that, but they continued to refer to different versions of the same documents.

[15] At the conclusion of the evidence, I provided the parties with a series of questions. Those included directions requiring the parties to consider the Court of Appeal's decision in *Cunningham*. Specifically, the parties were to advise me as to whether all copies of the documents were acknowledged to be true copies of the documents, whether any documents that had been challenged had been authenticated and whether I should treat all of the e-mails and other documents in the exhibits as having been proven. The parties confirmed their answers to these questions, but not until final written submissions had been received.

[16] I released my reasons in this matter on October 1st, 2024. That decision found that there were approximately ten (10) windows that had problems that should be covered by the Defendant's warranty and directed the payment of $15,000. to replace these windows. The Plaintiff's claims were otherwise dismissed.

b) The Costs Submissions

[17] In my reasons for judgment, I directed the parties to specifically address the issues that this case had with documents. Paragraphs 59 to 61 of my reasons state:

> [59] At the outset of the trial, there were some considerable issues in respect of the organization and presentation of the evidence. The parties had not agreed on a joint book of documents, and there was considerable duplication in the documents. I adjourned the trial for the parties to attempt to come to an agreement

> about the documents and to hyperlink them. They were not able to resolve that issue. As a result, there remains considerable duplication in the documents that were admitted into evidence. This duplication of evidence ultimately made the trial longer than it needed to be and is a factor that I will consider in assessing the costs of this action.
>
> [60] I would also add that, when the documents were filed, they were not hyperlinked. As a result, it was more difficult for the Court to navigate the documents while both listening to testimony and in preparing these reasons. This is also a factor that I will consider in assessing costs.
>
> [61] In that respect, I would direct the parties to the decision of Trimble J. in *Seelal v. Seelal et al.,* 2024 ONSC 4176. I would also direct their attention to the Consolidated Provincial Practice Direction for Civil Proceedings. I would also remind them of the expectations set out in, *inter alia*, *Girao v. Cunningham* 2020 ONCA 260 in respect of books of documents Each side was invited to provide costs submissions and then provide responding submissions. The original submissions were to be served and filed by October 22nd, 2024, and the reply submissions were to be served and filed by November 12th, 2024.

[18] I received the parties' first round of submissions prior to October 20th, 2024. Neither party had addressed, in any meaningful way, my observations and directions in paragraphs 59 to 61 of the decision on the merits. As a result, I provided the parties with further directions on October 20th, 2024. Those directions invited each party to provide submissions specifically on paragraphs 59 to 61 of my judgment.

[19] The parties duly provided additional submissions on these paragraphs. I will now turn to the positions of the parties.

Positions of the Parties

[20] The Plaintiff argues that it should be entitled to its partial indemnity costs in the sum of $119,059.06 inclusive of HST and disbursements. The Plaintiff argues that they were successful in proving that the warranty had been breached. Although the Plaintiff's recovery was much more modest than the amount that they had sought in its' claim, the Defendant refused to honour the warranty. The Plaintiff argues that, while proportionality is an applicable principle, it is of limited assistance in this case because of the Defendant's refusal to honour the warranty.

[21] The Plaintiff also argues that the costs that they incurred were reasonable given both the nature of the work that had to be done and the length of time that the trial took. Finally, in respect of the documents issues, the Plaintiff argues that the appropriate approach is for the Court to reduce the costs by twelve hours, which is the amount of in-Court time that was specifically spent on document management issues. This reduces the Plaintiff's costs claim by just over $4,000 to $115,000.00 all inclusive.

[22] The Defendant seeks costs on a partial indemnity basis in the sum of $178,902.93, inclusive of HST and disbursements. The Defendant argues that the Plaintiff was unsuccessful in most of the issues that it advanced. For example, the claim under the *Sale of Goods Act*, the claim of negligence, the claim for pure economic loss and the claim for general damages were all dismissed. The Defendant also argues that the Plaintiff's claims of more than $2.5 million need to be compared to the damages that the Plaintiff was actually awarded. That amount was a much more modest $15,000.00. As a result, the Defendant argues that it was successful and that it should be entitled to its partial indemnity costs.

[23] In response to my concerns about the documents in this case, the Defendant takes the position that the time spent in Court on November 14th and 15th, 2023 should be removed from the bill of costs as the failure of the parties to agree on the documentation "essentially wasted the court's time and resource for the whole of November 14 and one-half of November 15, 2023."

[24] Each party also provided reply submissions. Those submissions set out various grounds for challenging the positions taken by each side in their original costs submissions.

Issues

[25] Based on the positions of the parties, there are two main issues that I have to resolve, as follows:

a) Which party is entitled to costs? In other words, who was successful?

b) How do the factors under Rule 57.01 apply to the facts of this case?

[26] I will deal with each issue in turn.

Issue #1- Who Was Successful?

[27] Counsel for the Plaintiff argues that the Plaintiff was successful because they obtained a declaration in respect of the warranty which was, somehow, significant. Counsel for the Defendant argues that the Defendant was successful because they were successful in resisting most of the Plaintiff's legal claims, and virtually all of the Plaintiff's monetary claims.

[28] In order to understand who was successful, it is useful to consider the discussion in *Scipione v. Scipione* 2015 ONSC 5982. In that decision, the Court stated (at paragraphs 1-7):

> 1. Why do written costs submissions frequently try to lead us into some sort of parallel universe where losers are actually winners?
>
> 2. If you lost, don't re-write the facts to argue that you won. It only makes the judge go back – repeatedly – to see if we're talking about the same case.
>
> 3. And if the best you got was a mixed result on *one* of the issues, don't claim you were right to relentlessly pursue *all* of the issues. Especially when you ignored repeated opportunities to pursue only the claims which might have had some merit.
>
> 4. Rules 18 and 24 of the Family Law Rules set out many important and complex considerations in dealing with costs. In making submissions, counsel would be remiss if they didn't vigorously advance every potential argument on behalf of their client. Because in determining costs, fairness to both the winner and the loser is paramount.
>
> 5. But the starting point – determination of success – shouldn't be so muddy.
>
> 6. Who got what they asked for?

7. *That question* shouldn't be so complicated.

[29] While *Scipione* is a family law case, the discussion of how to define success applies beyond family law. It also applies in cases such as this. In my view, the Defendant was the successful party. I will now explain why I reached that conclusion.

[30] First, there is the argument that the Plaintiff obtained "significant" relief with my decision that the warranty applied to a few of the windows. The Plaintiff is correct that there was very little communication between the Plaintiff and the Defendant in the year before the litigation started. However, it must also be remembered that all of the Plaintiff's correspondence in this time period was focused on obtaining compensation for the condensation issues. In addition, the Defendant had previously addressed warranty claims, so there was no real dispute that the warranty was valid and could be claimed against. Finally, while I allowed some warranty claims, the warranty did not cover the condensation issues that were the Plaintiff's focus.

[31] Beyond the warranty issue, the Plaintiff advanced a series of other claims in both contract and negligence. In light of all of these claims, it must be remembered what the Plaintiff was asking for. They were seeking to have the Defendant pay for the entire replacement costs of the windows for the Plaintiff's building, which was a sum of over $2 million. The Plaintiff was also seeking general damages in the sum of $500,000. The basis for the general damages claim was never made clear to me (see paragraph 173 of the merits decision).

[32] It is difficult to say that the Plaintiff was substantially successful when they had a $2.5 million claim and ended up being given damages of $15,000, especially when this very modest damage award was based on only one part of the claim. The rest of the Plaintiff's claims were dismissed.

[33] This brings me to the decisions that the Plaintiff relied upon in order to argue that it had been successful and/or that it should be entitled to costs. First, there is the decision in *A and A Steelseal Waterproofing Inc. v. Kalovski*, 2010 ONSC 2652. In that decision, the facts are different from what we have here. In *Kalovski*, the Plaintiff had been prepared to forego the entire claim when it was dismissed for delay. It was the Defendant who had resurrected the claim and insisted on pursuing a substantial counterclaim. The counterclaim was dismissed at trial, and the trial judge determined that the Plaintiff should have its costs.

[34] This case is different. The only offers that the Plaintiff made that I am aware of are as follows:

a) A May 9th, 2023, offer for $1,056,663 and, if the offer was not accepted by May 24th, 2023, costs on a substantial indemnity basis and disbursements would be added to this figure.

b) An October 27th, 2023, offer to settle (incorrectly dated October 27th, 2022) for $900,000 plus partial indemnity costs and, if the offer was not accepted by November 3rd, 2023, substantial indemnity costs would be sought.

[35] These two offers would both have required the Defendant to pay the Plaintiff a total in excess of $1 million. Given the fact that the value of the Defendant's original contract was approximately $300,000.00, it is understandable as to why neither of these offers were particularly attractive to the Defendant.

[36] This brings me to the next case that the Plaintiff relied on, *Prasher Steel Ltd. v. BWK Construction Company Ltd. and Peel District School Board*, 2023 ONSC 3494. In that decision, McGee J. stated (at para. 14) "[a] failure to make an offer to settle is unreasonable litigation conduct." I generally agree with that observation, although it is not always applicable, as I will discuss below.

[37] However, in this case, there are two reasons why *Prasher* does not assist the Plaintiffs. First, the Plaintiff's offers (as described at paragraph 34) were unreasonable enough that they do not really amount to offers to settle either. Put simply, offering to settle a negligence/contract claim for three times the amount you paid the other party is, absent special circumstances, an unreasonable offer. Second, the Defendant eventually made an offer to settle. That offer, made after the trial started, was for $100,000 all inclusive. Given the outcome of the trial (and the outcome of this costs decision), that offer was more than reasonable.

[38] The Plaintiff also relies on a series of other decisions. A review of one of them will demonstrate why these decisions do not support the Plaintiff's position. In *Persampieri v. Hobbs*, 2018 ONSC 368, the Court was considering the Plaintiff's claim after a motor vehicle accident. The parties had reached an agreement that liability would be admitted in exchange for the damages claim being limited to the policy limits in the insurance policy. However, the Defendants were not prepared to admit that the Plaintiff had suffered any damages as a result of the accident, and a trial was required.

[39] Ms. Persampieri succeeded in obtaining damages from the jury that amounted to just over $20,000.00 after the deductibles under the *Insurance Act* had been applied to the jury's actual award, which was considerably higher. The Court found that the Plaintiff should be entitled to costs, as she had been successful, and that those costs should not be limited by the principle of proportionality.

[40] This case is different from *Persamperi*. In *Persamperi,* the Plaintiff was successful on the only real issue: whether she had suffered damages as a result of the car accident. In this case, the Plaintiff advanced claims that the condensation on the inside of the windows was caused by the Defendant's negligence, as well as a very substantial claim for economic damages. Those

claims, which had to be (and were) vigorously defended, were all resolved in the Defendant's favour. *Persampieri* is distinguishable from the case before me, as are the other decisions that Plaintiff's counsel provided me with.

[41] Defendant's counsel points me to the decision in *Bell Canada v. Olympia & York Development Ltd.*, 1994 CanLII 239 (ON CA), (1994) 17 O.R. (3d) 135. In that decision, the Court was considering a multi-million dollar claim that Bell Canada had made against O & Y. O & Y made no offers to settle the action beforehand. During the middle of the trial, O & Y offered to settle the claim for $2 million. Bell Canada recovered only $25,000 at trial. The Court noted that this was "non-recovery in any meaningful sense."

[42] The trial judge declined to order any costs to Bell Canada, as the modest recovery was non-recovery in any meaningful sense. However, the trial judge also declined to order any costs in O & Y's favour, in large part because O & Y had not made any offers to settle until after the trial had been going on for two years. The Court of Appeal overturned this decision, stating:

> I do not back away from my comment in Armak Chemicals Ltd. v. Canadian National Railway Co. (1991), 1991 CanLII 7060 (ON CA), 5 O.R. (3d) 1 at p. 9, 84 D.L.R. (4th) 326 (C.A.):
>
> At the same time, every litigant should be encouraged to be single-minded in attention to the need to make and consider reasonable offers which may dispose of the litigation.
>
> The question is, what is reasonable when the claim is dismissed? The defendant's position has been vindicated, and to deprive that party of the normal fruits of success is to say to all defendants that an offer to settle must be made simply because the lawsuit was launched. To put it another way, the trial judge cannot dispute the reasonableness of his own decision and, thus, cannot be critical of a party who anticipated it.
>
> The courts must also be careful not to become too paternalistic with litigants or to unnecessarily discourage recourse to the trial as a forum for the resolution of disputes. Concern is properly directed to unreasonable conduct in the course of litigation which leads to unnecessary or prolonged trials. However, the judicial system is here to serve the public and no barriers to access should be imposed by

> warnings as to cost consequences arising from the court's assessment of how litigants should conduct their business.
>
> There are many reasons not to offer settlement, and they should remain the private preserve of the litigants. In a libel suit, for example, vindication may be a legitimate consideration for either party, standing above recovery or payment of money. We have no evidence of why O & Y made no offer in this case but it may have been to protect its reputation as a builder or operator of buildings, or to protect against other lawsuits that might be commenced when word of a settlement reached the business community. Malpractice actions are often tried through to judgment in an attempt to protect reputations. A defendant may not be in a position to pay a settlement and, even if wealthy, may have a better business use for the money pending trial. None of these litigants should fall from grace in the eyes of the trial judge if they succeed on the merits.

[43] In my view, this passage applies to the case before me. The Defendants were faced with a very large claim and had good reasons to resist that claim. The very modest recovery on one issue does not assist the Plaintiffs in either establishing an entitlement to costs or in resisting the Defendant's entitlement to costs as the successful party.

[44] In the end, the Defendant was almost entirely successful in this case and should be entitled to their costs on a partial indemnity basis. However, the Plaintiff had a very modest success on one small issue. It should also be remembered that the Plaintiff's success on the warranty issue was not complete. This success should entitle the Plaintiff to a very modest deduction in the total costs that were payable. With that in mind, I now turn to the other factors under Rule 57.01.

Issue #2- The Rule 57.01 Factors

[45] Usually, the most important factor under Rule 57.01 is the idea that the successful litigant should be entitled to their costs on a partial indemnity basis. I have already addressed that factor above. Of the other factors set out under Rule 57.01, the following are the most relevant to this case:

a) The complexity of the proceeding;

b) The reasonable expectations of the parties, including the principle of proportionality; and

c) The conduct of any party that tended to shorten or lengthen unnecessarily the duration of the proceedings.

[46] I will deal with each in turn.

a) The Complexity of the Proceeding

[47] The key issue in this case was the question of whether the condensation that was appearing on the inside of windows in many of the units in the Plaintiff's building was the Defendant's responsibility, in warranty, contract, or tort. Resolving that issue required an understanding of how a building envelope works as well as how windows were designed. Conveying that understanding to the Court required expert evidence of a technical nature.

[48] In other words, this matter was moderately complex. This is a factor that favours a higher costs award and justifies the Defendant's disbursements on the expert.

b) The Reasonable Expectations of the Parties

[49] This factor also includes arguments about proportionality and is focused on whether the costs incurred are reasonable. Some of the issues of proportionality are addressed above.

[50] I start with the observation that more time was spent on this matter by the Plaintiff's counsel than the Defendant's counsel. The Plaintiff, in their submissions, does not really take issue with the amount of time spent on this matter by Defendant's counsel. The Defendant, on the other hand, does point to the fact that there were more hours spent by the Plaintiff's counsel.

[51] The difference in the amount of time spent is not surprising to me, as the Defendant's counsel has been practicing for significantly longer than the Plaintiff's counsel, has more experience in these types of matters and a higher hourly rate. In short, the bills submitted by both parties do not appear to be unreasonable and I see no basis to adjust the Defendant's bill.

c) The Conduct of the Parties

[52] This is, in my view, a significant factor in this case. I have described at paragraphs 7 to 13 above, the **joint** failure of the parties to either organize or rationalize the documents in this case in a way that would meaningfully assist the Court.

[53] In their first round of submissions, both counsel either did not recognize or chose to ignore my concerns in this regard. It was only after I specifically directed the parties to make submissions on this issue that I actually got submissions.

[54] Both counsel took essentially the same position. They were prepared to forego a claim for costs for the day and a half of time that was spent in Court trying to organize the documents. This was between $4,000 (for the Plaintiff's costs) and $6,000 (for the Defendant's costs).

[55] In my view, this is not nearly enough of a reduction in costs for this lack of organization. The **joint** failure of the parties to organize the materials both delayed the hearing of the matter and made the consideration of the issues significantly more difficult once the evidence had been received. I will spell out what the organizational expectations for a trial (particularly a ZOOM trial) are, and then I will address some of the case-law on this issue.

Expectations At Trial

[56] I directed the parties to *Cunningham* on several occasions, including at the outset of the trial. In that decision, which was released more than three years before the trial in this matter, the Court stated (at paras. 33 and 34):

> [33] In my view, counsel and the court should have addressed the following questions, which arise in every case, in considering how the documents in the joint book of documents are to be treated for trial purposes:
>
> 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?
>
> [34] It would be preferable if a written agreement between counsel addressing these matters were attached to the book of documents in all civil cases. In addition, it would be preferable if the trial judge and counsel went through the agreement line by line on the record to ensure that there are no misunderstandings.

[57] The preparation of a joint book of documents is something that counsel should do prior to appearing in Court to conduct a trial. This task is especially important when the matter is a trial that is proceeding remotely. It is essential for all parties to be, literally, “on the same page” during the trial. The preparation of this joint book is the **joint** responsibility of the parties’ counsel. It is not sufficient

to say, “well the other side didn’t want to do it” or “we couldn’t agree” or “we didn’t discuss it”.

[58] The Court’s expectation is that parties represented by counsel will agree on documents that can be agreed upon prior to trial and will ensure that only one copy of those documents is provided to the Court. Where a party does not participate in that exercise, they run the risk of adverse cost consequences. While it takes two to actually reach an agreement, **both** sides have an obligation to try and get an agreement. The parties are also expected to answer the questions in *Cunningham* **before** the start of the trial.

[59] Agreeing on the joint book of documents is one of the pre-trial steps that parties should be expected to take in order to streamline the trial. These steps are more generally set out in The Advocates Society’s *Best Practices for Civil Trials*, which was published in June of 2015. Those practices have also been approved by the Courts, including the Divisional Court: *Saleh v. Nebel* 2018 ONSC 452 at para. 139.

[60] That was not the only problem in this case. The lack of hyperlinking was directly contrary to the Consolidated Provincial Practice Direction that was in place at the time, and more specifically the following provisions:

a) Paragraph 29 requires the compendium to have a table of contents that is hyperlinked.

b) Paragraph 59 (b) of the Consolidated Practice Direction that was in force at the time required the indexes to **all** records to include hyperlinked bookmarks. Surely this includes the index to a book of documents filed on a trial that was several hundred pages long.

[61] Not hyperlinking documents in a trial with electronic records is much like, in the old world of paper records, filing a book of documents with no tabs. I cannot

claim credit for this observation, as I know it has been made by more than one of my colleagues at various advocacy courses since CaseLines was introduced. It has also been noted in previous case-law: *Lepp v. The Regional Municipality of York,* 2022 ONSC 6978 at para. 9.

[62] In this case, some of the document books were in excess of 500 pages. The lack of hyperlinks on the table of contents was, to put it mildly, a problem when it came time for me to navigate through the evidence and reach my decision.

[63] Then, there are the CaseLines page references. This is not specifically addressed in the Practice Direction. However, to state the obvious, the Court needs to be directed to the page references in the actual Court file rather than the page references in counsel's copy of the materials. Otherwise, time will be wasted by the Court in cross-referencing the pages.

[64] All three of these issues were significant enough for me to require counsel to comment on them in their costs submissions. Defendant's counsel acknowledged that there was a failure on the part of counsel to properly and cooperatively agree on documentation and ensure that it was hyperlinked in advance of trial. The Plaintiff's counsel spent some time explaining the unsuccessful efforts that were taken after the trial started to organize the documents. Regardless of the explanations, the Court's requirements were not met. With these problems and explanations in mind, I now turn to the law.

The Law

[65] As part of my reasons, I directed counsel to the decision in *Seelal v. Seelal*, 2024 ONSC 4176. In that decision, Trimble J. outlined some significant problems with the materials that the parties had submitted for a long motion that he was scheduled to hear. The materials were so poorly organized that Trimble J. could

not conduct the hearing. Although Trimble J. was able to conduct a pre-trial instead of hearing a long motion, he made the following observations:

> [7] The materials for this Motion for Directions, on their face, suggest that they were prepared in ignorance of the requirements of the Practice Direction and uploading electronic documents to Case Center, indifference to it, and/or in ignorance of how to do what should have been done.
>
> [8] The materials for this Motion for Directions, on their face, suggest that they were prepared in ignorance of the concept that the materials filed should help the Court to navigate through them and to make a decision efficiently, or in indifference to the concept.
>
> [9] I accept both counsel's apologies for the problems with each of their files. The time is long past, however, for apologies for not doing what is required by the Practice Directio n and good advocacy. Most counsel are compliant. In some quarters, however, announcements from the Chief Justice's office, Practice Directions, the availability of on-line resources, and seminars by the Advocate's Society, the OBA, District and County Law Associations, have had no effect. Perhaps the Court's refusing to hear matters will be an effective call to the bar to do what is required by Practice Direction and good advocacy. I can only repeat the admonitions of Edwards, RSJ in Lepp v. The Regional Municipality of York, 2022 ONSC 6978.

[66] Had Trimble J. not been able to use the day to conduct a pre-trial, he went on to observe that he would have ordered that neither party's counsel could charge their parties for the costs of either the day or of reconfiguring or re-uploading their materials.

[67] Other judges have considered the issue of what should be done when parties and counsel fail to follow the Court's practice directions or otherwise engage in conduct that tends to lengthen the litigation. For example, in *Ramdoo v. Houlden*, 2024 ONSC 5994, the Court was faced with a circumstance where the practice directions were not being followed in respect of factums. The Court found that it was not appropriate to order costs against counsel personally in those circumstances. The Court was vexed by Counsel's conduct but determined that there were no real tools available to the Court under the *Family Law Rules* to impose sanctions.

[68] However, in *Carroll v. McEwen*, 2018 ONCA 902, (2018) 143 O.R. (3d) 641, the Court observed (at para. 65):

> [65] Where a trial judge has reduced the amount of costs awarded to a party by reason of her counsel's conduct, an appeal court can intervene where the amount of the reduction is not warranted by, or is disproportionate to, the specific conduct of counsel: *Jarbeau v. McLean*, [2017] O.J. No. 717, 2017 ONCA 115, 410 D.L.R. (4th) 246, at paras. 80-81. The appellants claim the trial judge made an unwarranted and disproportionate reduction of the costs award in this case, committing a serious error in sanctioning them when they were entitled to treat the respondents' joint September 11, 2015 offer as an offer to settle only the accident damages action.

[69] In other words, a trial judge has the jurisdiction to reduce the costs of a successful party on the basis of their counsel's conduct as long as that reduction is warranted and proportionate.

[70] In terms of finding an amount that is warranted and proportionate, it is worth considering the decision in *Rodas v. Toronto Transit Commission* 2012 ONSC 5662. In that case, the Court observed (at para. 25):

> [25] On long trials, particularly those tried with a jury, it is the obligation of counsel to work together to make the trial proceed as smoothly and efficiently as possible. There will always be matters upon which counsel disagree and the court must make a ruling. However, every effort ought to be made between counsel to co-operate in the filing of joint document briefs, the calling of witnesses and other trial management issues. When this is not done, the trial becomes protracted and the jury is required to retire while the court deals with fundamental issues which ought to have been the subject of agreement between counsel. This obviously results in longer trials, which are more costly to the parties

[71] Although this was not a jury trial, Wilson J.'s (as she then was) observations still apply. The failure of parties to agree on basic trial management issues will, of necessity, make the trial longer. The time wasted by that failure will not just be limited to the time that the Court spent trying to achieve an agreement. Although it will be difficult to quantify, the wasted time will run throughout the trial.

Conclusion on the Conduct Issue

[72] Ultimately, costs are discretionary. However, costs are also not automatic. They have to be earned. Uploading the work of organizing the case and tracking the documents to the Court is not earning your costs. All it does is lengthen the trial and make the Court's job harder. Similarly, the lack of organization and adherence to the practice direction in this case was a significant issue that, again, lengthened the trial and made the Court's job harder.

[73] I agree with Trimble J. that the time when only an apology is sufficient for these sorts of failures is long past. We are at the point where the Court must enforce the expectations that are set out in the Practice Direction and required by good advocacy.

[74] The proposal that the Court should simply not allow costs for the day and a half of actual Court time that was thrown away because the organizational work was not done is also not sufficient to address the significance of the omissions. In this case, the deduction to the Defendant's costs would be approximately three (3) percent, which is a rounding error. Instead, these types of omissions should attract a more substantial reduction in costs as the problems that these types of omissions create are more substantial than the mere loss of a day of in-court time and the rules are well known.

[75] I acknowledge that the deduction in costs from the Defendant may advantage the Plaintiff because they do not have to pay costs that were otherwise payable. However, the responsibilities are a joint responsibility and the only way that the Court can enforce these responsibilities is through the vehicle of costs awards.

[76] As a result, on the facts of this case, I am reducing the Defendant's costs by $25,000.00 on account of the failures to prepare, or even attempting to prepare, a joint book of documents, file documents that were properly hyperlinked and generally adhere to the practice directions. While costs are discretionary, going

forward all counsel should keep the risk of these types of deductions in mind when they are preparing for and conducting motions, applications and trials.

Conclusion

[77] The Plaintiff had some very modest success on this matter in respect of the warranty, and should be entitled to an appropriately modest deduction in respect of the costs otherwise payable to account for that success. I would normally have reduced the Defendant's costs from $178,902.93 to approximately $150,000.00 to account for that modest success.

[78] I also have set out my reasons for a further deduction of $25,000.00 from the Defendant's costs on account of the record in this case. Accordingly, I fix costs in this matter in the sum of $125,000.00, inclusive of HST and disbursements payable by the Plaintiff to the Defendant. Costs are to be payable within thirty (30) days of today's date.

LEMAY J

Released: December 18, 2024

CITATION: MIDDLESEX CONDOMINIUM CORPORATION NO. 387 v. ALUMINIUM WINDOW DESIGN LTD, 2024 ONSC 7065
COURT FILE NO.: CV-20-00000013-0000
DATE: 2024 12 18

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

MIDDLESEX CONDOMINIUM CORPORATION NO. 387

Plaintiff

- and -

ALUMINIUM WINDOW DESIGN LTD

Defendant

COSTS ENDORSEMENT

LEMAY J

Released: December 18, 2024