CITATION: Heywood Innovative Solutions Inc. v. The State Group Inc., 2025 ONSC 813
COURT FILE NO.: CV-18-00607867
DATE: 20250530

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
HEYWOOD INNOVATIVE SOLUTIONS INC.	)	*Angela Assuras,* for the Plaintiff
	)	
Plaintiff	)	
	)	
– and –	)	
	)	
THE STATE GROUP INC.	)	*Rui Gao* and *Matthew Milne-Smith,* for the Defendant
Defendant	)	
	)	
	)	**HEARD:** in writing.

PAPAGEORGIOU J.

Costs Endorsement

Overview

[1] This case was about a pipeline project that the State Group Inc. ("State Group") was working on. As part of that project, pipes had to be coated. State Group hired Heywood Innovative Solutions Inc. ("Heywood") to provide inspection services in respect of the coating.

[2] Heywood failed to provide State Group certain Daily Inspection Reports. State Group refused to pay the invoices in respect of the work related to the missing reports. The trial concerned whether there was a contractual requirement to provide these reports, and if so, whether State Group had waived that requirement. It also concerned whether Heywood's failure to provide the reports was a fundamental breach and whether State Group suffered damages by virtue of this failure.

[3] I found that there was a contractual requirement that Heywood provide Daily Inspection Reports to State Group. State Group had not waived that requirement, and Heywood breached it by failing to provide the reports. Heywood's breach, however, was not a fundamental breach. Finally, I found that State Group had suffered damages.

[4] In the end, I found that Heywood should be paid its outstanding invoices in the amount of $247,976.24 which was set off by State Group's damages in the amount of $83,398.70, such that the amount payable by State Group to Heywood was $164,577.54.

[5] Heywood seeks costs in the amount of $73,700 on a partial indemnity scale up to November 23, 2023, and $424,144 on a substantial indemnity scale after November 23, 2023.

[6] State Group says that success was divided and argues that there should be a no costs order.

Decision

[7] For the reasons that follow, I award Heywood $60,000 in partial indemnity costs, plus disbursements in the amount of $12,902.74, and HST on both.

[8] I also award Heywood pre-judgment interest, in the amount of $18,288.39, which is both parties' calculation.

Issues

- Issue 1: What is the appropriate scale of costs?
- Issue 2: What costs if any, would Heywood have been entitled to on a partial indemnity basis in the absence of any offers to settle?
- Issue 3: Taking into account the costs I would have awarded, did Heywood beat its offer?

Issue 1: What is the appropriate scale of costs?

[9] Heywood relies upon offers to settle it made in support of substantial indemnity costs.

[10] It references the following offers it made:

- On July 25, 2019, for $226,000 plus prejudgment interest with costs to be agreed or fixed by a Judge.
- On September 14, 2022, for $210,000 plus prejudgment interest with costs to be agreed or fixed by a Judge.
- On November 23, 2023, in the amount of $210,000 inclusive of prejudgment interest and HST plus $7,000 in disbursements inclusive of HST, plus $59,000 in fees plus HST on fees in the sum of $7,700. This would have resulted in a total offer of $283,700.

[11] State Group also made two offers as follows:

- On September 23, 2022, in the amount of $210,000, inclusive of pre-judgment interest and costs.

- On October 7, 2022, in the amount of $150,000, inclusive of pre-judgment interest and costs.

[12] I will pause to say here that both parties would have ultimately been better off if they had continued to negotiate or even accepted some the above offers given the costs that the parties appear to have incurred in this matter, the outcome, and the fact that they will not be able to recover all the exorbitant costs they both appear to have incurred.

[13] It is trite that where a party makes a r. 49 offer and obtains a judgment as favourable or more favourable than the terms of the offer to settle, the party is entitled to costs on a substantial indemnity basis after the offer, unless the court orders otherwise.

[14] However, Heywood did not beat its November 23, 2023 offer or any of the other offers it made.

[15] Initially, Heywood relied upon *Merrill Lynch Canada v. Cassina* (1992), O.J. 2230 (Ont. C.J. Gen Div) for the proposition that in determining whether a judgment is more favourable than an offer to settle, which is stated to be inclusive of costs and interest, the proper test is to compare the amount offered to the amount recovered plus interest and costs up to the date of the offer. That case involved an offer to settle for a fixed amount that was inclusive of interest and costs. This case has been followed in a number of cases, perhaps thirty or more.

[16] The rationale for this approach is that a plaintiff's offer can only be more favourable than a judgment if the defendant would, on the date of the offer, have been better off to accept the offer than suffer the eventual award. That is, it is inconsistent with the objectives of the *Rules* on formal offers to say that a plaintiff or a defendant can, by running up costs between the date of the offer and the trial, achieve a more favourable result. For this reason, when the offer is inclusive of costs, (or where the amount for costs and interest is expressly set out) the proper approach is to compare that offer to the outcome at trial with regards to the damages awarded, but to only consider the costs and interest on that judgement as at the date of the offer.

[17] State Group then provided the following analysis of the offer to settle compared to the amount awarded at trial and the costs and interest up to the date of the offer as per *Merrill Lynch*:

Costs	Offer to Settle dated November 23, 2023	Actual Judgment
Base Amount	$210,000	$164,577.54
Pre-Judgment Interest	Included in Base Amount	$14,959,88 to the date of the offer

Partial Indemnity Fees and Taxes up to November 23, 2023	$66,700. I note that Heywood did not provide a breakdown of its partial indemnity costs as at that time. I infer it was the partial indemnity costs it sought in its offer.	$66,700 to the date of the offer assuming they would be awarded
Disbursements	$7,000	$7,000 to the date of the offer
Total	$283,700	$253,237.42 inclusive of costs or $186,537.42 without costs

[18] State Group's analysis, above, showed that Heywood had not beat its offer. Heywood did not challenge these calculations.

[19] Rather, Heywood then requested leave to reply which I gave. It then referenced another case, *Rooney v. Graham* (2001), 53 O.R. (3d) 685 (ONCA), at para. 57, and argued that this case stood for the proposition that the proper date for the comparison to be made to determine if the offer was more favorable than the judgment is the date of the judgment for all items including the judgment, pre-judgment interest and costs.

[20] Relying on *Rooney*, Heywood took the opposite position it took when it relied upon *Merrill Lynch.* Based upon *Rooney*, Heywood says that it beat its offer to settle based upon it being awarded all of the partial indemnity costs it incurred as at trial for the time it has spent and pre-judgment interest as at the final judgment.

	Recovery at trial	Offer
Claim	$164,577.54	$210,000
Pre-judgment Interest	$18,288.39	Included
Costs partial indemnity basis	$453,737.09 (actually incurred as at trial)	$73,700
Total	$636,239.02	$283,700

[21] Heywood, however, has misread *Rooney*. In *Rooney* the r. 49 offer was for a fixed amount plus pre-judgment interest and party costs as assessed by an officer or agreed upon, up to the date of the offer, and afterwards, the reasonable solicitor and client costs as assessed or agreed upon. The main issue in the case was whether the offer was certain enough to constitute a Rule 49 offer at all, because the amount of the solicitor and client costs were not fixed but escalating.

[22] At paragraph 57 in *Rooney*, the court made clear that under r. 49.10, all terms of an offer including a provision for costs must be compared with all the terms of the judgment, ordinarily including the disposition of costs. The court explained: "When the offer contains a provision for ongoing costs and ongoing prejudgment interest, the proper date for comparison is the date of the judgment."

[23] In this case, the November 23, 2023 offer does not contain any ongoing costs or ongoing pre-judgment interest. Rather, the judgment in the offer is expressed to be fixed and inclusive of interest, and the costs were fixed at $73,700 inclusive of HST ($66,700 in fees and $7,000 in disbursements). Therefore, *Rooney* does not apply and I note that it did not address, much less overturn, the many cases that have followed *Merrill Lynch*.

[24] To reiterate, *Merrill Lynch* is applicable here. The purpose of r. 49 is to encourage parties to make reasonable offers and then impose cost consequences on those who do not reasonably assess the actual value of the case before trial and who fail to accept a reasonable offer. Where a specific amount is set out for costs and interest in the offer, then to assess whether the party who received the offer acted reasonably or not in failing to accept that offer, and whether the other side beat that offer, the court should consider the judgment at trial but only interest and costs as at the date of the offer to do the comparison.

[25] Therefore, I accept State Group's calculations above that show that Heywood did not beat its November 23, 2023 offer.

[26] Even if I am wrong and the proper calculation should include Heywood's partial indemnity costs at trial, I disagree that these would be its full partial indemnity costs claimed based upon what it has listed in its Bill of Costs.

[27] In this case there is a serious contest over whether Heywood should be entitled to any costs, on the basis that success was divided. There is also a question of whether Heywood's costs claim is disproportionate to the damage award and the initial judgment sought. In that regard, Heywood's cost claim is almost double what its best-case scenario in the case would have been.

[28] Again, even if Heywood's approach to its offer to settle is correct and even if *Rooney* applies, then in considering whether State Group acted reasonably in not accepting the offer, one must consider the actual costs award that Heywood would be entitled to, not its best-case scenario under its Bill of Costs, assuming that it would get every penny that it billed, which is what Heywood has done.

[29] When this analysis is done, and even if *Rooney* is applicable, it is still the case that Heywood did not beat its offer.

Issue 2: What costs if any, would Heywood have been entitled to on a partial indemnity basis in the absence of any offers to settle?

[30] Pursuant to section 131(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, costs are in the discretion of the court. Rule 57 of the *Rules of Civil Procedure* sets out the factors which courts

should have regard to when awarding costs. The overall objective is "to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding, rather than an amount fixed by the actual costs incurred by the successful litigant": *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.), at para. 26; *Davies v. Clarington (Municipality)*, 2009 ONCA 722, 100 O.R. (3d) 66, at para. 52; and *G.C. v. Ontario (Attorney General)*, 2014 ONSC 1191, at para. 5.

[31] State Group argues that the most fair and reasonable outcome in this case is a no costs order because success was divided. It says that Heywood's costs claim is unreasonable and grossly disproportionate in relation to the amount recovered. Further, Heywood's conduct of the case was inefficient, improper and unnecessarily lengthened the proceedings.

[32] I agree with some of these submissions, but I do not agree that a no costs order necessarily follows.

[33] Where success is divided a court has the discretion to make a no costs order: *Bentley v. Charters*, 2023 ONSC 4056, at para. 24. Further, "the most important consideration in terms of costs at trial remains divided success of the parties and their general approach to [the] litigation": *Hansom Crossborder Tax Inc. v. Bazar McBean LLP*, 2024 ONCA 645, at para. 6.

[34] In *Vallie Construction Inc. v. Carol Minaker*, 2012 CanLII 41798, at para. 249, additional reasons, 2012 ONSC 4577, at para. 69, the court found that even though there was a residual judgment owing to the plaintiff after taking into account the counterclaim, the defendant's success on the counterclaim which substantially reduced the plaintiff's claim constituted divided success. In that case the plaintiff had claimed approximately $35,000, the defendant resisted paying anything, had a large counterclaim and reduced the plaintiff's claim to approximately $12,000 or 33 % of its original claim.

[35] In *St. Laurent Automotive Group Inc. v. Sami's Garage Ltd*, 2019 ONCA 941, at paras. 2 and 13 the court upheld a trial judge's no costs order on the basis of divided success and indicated that it was within the trial judge's discretion to make such order.

[36] I conclude that there was divided success because Heywood won its claim and State Group won its counterclaim. I note here that State Group's pleaded counterclaim was larger than what it was awarded and Heywood succeeded in reducing State Group's counterclaim by approximately 20 %. State Group had originally claimed $103,013 by way of counterclaim and this was reduced to $83,398.70.

[37] At the end, as a result, Heywood was granted $247,976.24 and after the award in favour of State Group in the amount of $83,398.70, the net judgment in favour of Heywood was $164,577.54. The counterclaim reduced Heywood's claim by approximately 33 %. I disagree that taking into account the fact that State Group won its counterclaim would result in a distributive cost award. This analysis does not require focusing on the extent to which Heywood or State Group succeeded or refuted certain arguments: *OrthoArm Incorporated v. GAC International LLC*, 2017 ONCA 418, at para. 42.

[38] I also disagree with Heywood's submission that *Reddock v. Canada*, 2019 ONSC 615 is applicable. In that case the argument was made that there was divided success based on the plaintiff's lack of success on certain issues. That is not the same thing as this case where State Group has actually succeeded on a counterclaim.

[39] In my view, where there is divided success the Court's discretion includes the ability to reduce the cost to the ultimately successful party to reflect the divided success even where a no costs order is not appropriate.

[40] Heywood won its claim and is presumptively entitled to costs for that, but State Group won its counterclaim and is presumptively entitled to its costs for that. But ultimately, despite the divided success, Heywood was still more successful because it won significantly more than State Group and also succeeded in reducing State Group's counterclaim. The weight and significance of the order that State Group pay its outstanding invoices made Heywood more successful than State Group but State Group's success also needs to be taken into account in the overall order.

[41] Therefore, my determination of the reasonableness, fairness, and proportionality of an award of costs in favour of Heywood will be informed by the divided success.

[42] My determination will also be informed by Heywood's approach to this litigation which unnecessarily drove up the costs. I have taken into account the following:

- Heywood prepared its own massive five-volume exhibit books containing all of its productions. Most of these contained thousands of pages each and this caused Case Center to become unresponsive. The Practice Direction specifically directs that parties should not file records with this many pages, and counsel had not taken it into account. We lost a day because of this while a process had to be undertaken to have the materials on Case Center be in a workable format. Heywood's response to this is that while it may have uploaded 7,093 documents, State Group uploaded 7173. Even if this is true, Sate Group's documents were uploaded either individually or in records that were small enough that it did not interfere with the workings of Case Center. What Heywood did is divide these 7,093 documents into five volumes which made Case Center unworkable.

- Heywood's counsel frequently could not find documents and took several minutes to ask a single question and/or find a document to assist with the question. State Group's junior counsel began locating the documents that Heywood's counsel needed to ask her question and then pull that document up on Case Center for Heywood's counsel.

- I do not accept Heywood's counsel's argument that she had difficulty finding documents because she had the impossible task of having to organize her cross examination on the fly as State Group repeatedly provided new compendiums for each witness. This is a mischaracterization. The parties could not agree to a joint document brief. And so, each party prepared their own document brief despite a court order directing them to prepare a joint brief. I add that there was nothing contentious about most of these documents

that should have prevented the parties from arriving at some agreement at least on some documents. Each party blames the other for this, but Heywood is to blame the most.

Then, prior to State Group's cross examination of Heywood witnesses and the examination of its own witnesses, it created compendiums for each witness by assembling documents it drew out of the documents it had already uploaded and which would be put to the witness. These compendiums were uploaded right before the witness testified. Each document had the exact same Case Centre number as the document that State Group had already uploaded.

In this way, instead of searching for the document through page searches within the documents uploaded, State Group's counsel was able to go through the examination and cross examination compendiums chronologically with each witnesses. This was efficient, simple, and a great time savings. It is unclear how this could have caused Heywood any confusion or surprise as Heywood had already seen all these documents when uploaded.[1] In the absence of the compendiums, Heywood would have had to make a note of each document shown to a witness. Instead, it had all the documents shown to that witness in chronological order in separate compendiums related to each witness. In fact, this should have simplified things for Heywood.

As well, Heywood's counsel did not need to use the examination and cross examination compendiums at all if she thought that was confusing. She should have prepared her cross examination based on the documents that had been uploaded already. In the absence of the examination and cross examination compendiums, this is what she would have had to do, and she still would have had to know where the documents were and their number.

- In its closing argument, Heywood asked the court to draw inferences from documents that it had never shown any State Group witnesses for the purpose of invalidating their evidence. This led to the need for further submissions. I concluded that the rule in *Browne v. Dunn* applied, and that it was unfair "to pluck out a few documents post-trial and put them forward for propositions that entirely contradict these witnesses' evidence

[1] In her submission Heywood's counsel raised the fact that she did have a health issue with her eye that arose the second week on the third last day of trial and the remainder of the trial had to be rescheduled. There was no evidence or submission that this impacted her ability to be prepared before the health issue arose and/or that it was the reason why she took several minutes to ask questions before the health issue arose. It does not seem to me that this issue impacted her before it arose as she never said anything. If she had prepared for trial and knew the Case Centre number where the documents were but simply had trouble with her vision, she could have told me at that time, and I would have called up the document myself and/or adjourned the trial immediately. Nevertheless, I am taking it into account to explain some issues throughout the trial in the event that this may have been a developing situation even if she was unaware of it.

in respect of their counterclaim without giving them an opportunity to address the issue they [were] being put forward for."

- I had requested post-closing submissions on damages for my assistance and Heywood objected, again, unreasonably. This led to multiple rounds of correspondence with the Court and two case conferences.

- Heywood pursued arguments (and evidence to support such arguments) that could not possibly succeed. Heywood's main opposition in this case was that the Daily Inspection Reports were not a contractual requirement. They argued and devoted a great deal of time to this even though there were explicit emails between the parties where Heywood agreed to provide the reports, and even though its own witnesses said that this was something that they provided as part of their usual work. Heywood also sought to rely on multiple contractual arguments that had to be addressed by the parties, but which had no hope of success. This wasted time. I make the same point here about State Group to some extent. Its argument that Heywood had fundamentally breached their agreement such that no amount would be paid to Heywood was completely at odds with the law and its own conduct in continuing to employ Heywood for more than nine months after Heywood had breached the agreement, but for the most part, it did not pursue pointless issues.

- Even in this cost submission, Heywood took one position with the *Merrill Lynch* case, and when it did not pan out, it requested the opportunity to make further submissions which also increased costs. Then, *Rooney*, the new case it cited, did not apply.

[43] In my view, Heywood's conduct directly increased the time and costs associated with the litigation.

[44] Even still, I would have awarded Heywood some costs because it was more successful since it won the fundamental breach argument and was awarded more than twice the amount of State Group's counterclaim. However, there is no basis to award it anything remotely close to what it seeks. Its claim for fees in the amount of $497,844 plus disbursements is wholly disproportionate to the award which is less than one third of the costs claim. This is excessive and disproportionate. For example, the amount billed for the preparation of closing submissions was $147,300 in partial indemnity costs. As well the amount billed for trial preparation and attendance was $142,800. This is highly excessive for a trial that actually only took 6.5 days in court time as set out in Heywood's submission. This amounts to approximately $50,000 per trial day taking into account preparation, for a case that was essentially about recovery of unpaid invoices with a fundamental breach argument. The time spent on closing submissions at counsel's rate means that she would have worked on nothing but these submissions for approximately four months, which again is highly excessive given what the issues in this case were about.

[45] Courts have repeatedly held that they must not fix costs awards in a manner that is grossly disproportionate to the amount recovered (and sought): *Elbakhiet v. Palmer*, 2014 ONCA 544, 121 O.R. (3d) 616, at paras. 35-39, *Boucher* at paras 26-20. The fact that a costs award may exceed a

damage award does not necessarily mean that it is unreasonable, but the principle of proportionality is an overarching consideration: *CNH Canada Ltd. v. Chesterman Farm Equipment Ltd*., 2018 ONCA 637, at para. 89.

[46] In *A & A Steelseal Waterproofing Inc. v. Kalovski*, 2010 ONSC 2652, at para. 21, the court did award costs that exceeded the damage award. However, this case is not comparable. The plaintiff in that case only sought and recovered $10,000, but it had to defend a $150,000 counterclaim which was outstanding at the commencement of trial. The downside risk was enormous. And so, the plaintiff was awarded both the costs of her claim and the dismissed counterclaim. Here, there is no possibility of awarding Heywood anything in respect of the counterclaim because State Group succeeded.

[47] Absent unique circumstances, which do not exist here, cost awards "rarely exceed the amount recovered": *Bentley*, at para. 33.

[48] I disagree with Heywood's argument that State Group is using concerns about proportionality as a sword to undercompensate Heywood for costs legitimately incurred.

[49] I add here that the parties' bills of costs uploaded immediately prior to trial were both approximately $141,000. The fact that State Group also spent a great deal on this matter does not undermine the arguments about Heywood's waste which drove up costs, and the divided success.

[50] Since State Group did not provide another Bill of Costs to supplement the first one, Heywood says I should draw an adverse inference that State Group spent as much time as Heywood after this and that this supports the argument that its total claimed costs are within State Group's reasonable contemplation. Even if I drew an adverse inference that State Group spent as much time as Heywood, it would not impact my conclusion that there was divided success and that Heywood's conduct caused wasted expenses for both sides. Its costs are so high because the level of costs includes the pursuit of matters that drove up costs but were not of assistance to the outcome in the case and were disproportionate.

[51] Even if both parties unreasonably spent more than half a million dollars each on this matter, I would not make that kind of award. It would only encourage parties to unreasonably drive up the costs in matters like this one that certainly could have been dealt with more efficiently and with significantly fewer costs.

[52] In my view, the reasonable costs that a party could have incurred on both the trial and the counterclaim, to be proportionate, would be $120,000. This would have to be reduced to take into account State Group's success on the counterclaim as well as the concerns about wasted time.

[53] Therefore, in the exercise of my discretion, taking into account the divided success as well as Heywood's conduct in driving up the costs, and concerns about proportionality, I award Heywood $60,000 in costs on a partial indemnity basis plus its disbursements fixed in the amount of $12,902.74 plus HST on both.

[54] I also award pre-judgment interest of $18,288.39 which both parties agree to.

Issue 3: Taking into account the costs I would have awarded, did Heywood beat its offer?

[55] Now I turn to whether or not the costs award would entitle Heywood to substantial indemnity costs pursuant to rule 49.10 if *Rooney* is applicable.

[56] And I conduct this analysis with respect to all of Heywood's offers for the sake of completeness.

[57] Even taking the cost award into account and approaching the evaluation of the offers as Heywood asserts, by reflecting costs, pre-judgment interest, and interest at the time of the judgment, none of Heywood's offers beat the outcome.

	Recovery at trial	July 25, 2019	September 14, 2022	November 23, 2023
Claim	$164,577.54	$226,000	$210,000	$210,000
Pre-judgment Interest	$18,288.39	$18,288.39	$18,288.39	$18,288.39
Costs (partial indemnity)	$60,000 $12,902.74 + $1,677.36 in HST + $7,800.	$60,000 $12,902.74 + $1,677.36 in HST + $7,800.	$60,000 $12,902.74 + $1,677.36 in HST + $7,800.	$60,000 $12,902.74 + $1,677.36 in HST + $7,800.
Total	$265,246.03	$326,668.49	$310,668.49	$310,668.49

[58] Therefore, I award Heywood costs in the amount of $60,000 plus HST in the amount of $7,800, plus disbursements in the amount of $12,902.74 + HST in the amount of $1,677.36, plus prejudgment in the amount of $18,288.39.

Papageorgiou J.

Released: May 28, 2025

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COURT FILE NO.: CV-18-00607867
DATE: 20250527

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

HEYWOOD INNOVATIVE SOLUTIONS INC.

Plaintiff

– and –

THE STATE GROUP INC.

Defendant

COSTS ENDORSEMENT

Papageorgiou J.

Released: May 28, 2025