CITATION: *Innocon v. Daro Industries Inc.*, 2025 ONSC 6582
COURT FILE NO.: CV-12-00461795-0000
DATE: 20251125

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: INNOCON and LAFARGE CANADA INC., Plaintiffs/Defendants by Counterclaim

and

DARO INDUSTRIES INC. and ROBERT DANNINGER, Defendants/Plaintiffs by Counterclaim

BEFORE: Schabas J.

COUNSEL: *Gregory W. Banks*, for the Plaintiffs/Defendants by Counterclaim

Angela Assuras, for the Defendants/Plaintiffs by Counterclaim

HEARD: In writing

COSTS ENDORSEMENT

Background

[1] This endorsement addresses costs of this action following the release of my Reasons for Judgment on December 19, 2024: *Innocon v. Daro Industries Inc.*, 2024 ONSC 7140. Those reasons set out the background and some of the history of the litigation.

[2] Twelve years after the plaintiffs, Innocon and Lafarge (whom I will refer to simply as "Innocon"), commenced this action, the matter came to trial. However, only the Counterclaim was left. At the outset of the trial, I was advised that Innocon had, one day prior to trial, discontinued its action and the only issues to be tried arose from the defendants', Daro"s and Danninger's, Counterclaim (I will refer to the defendants simply as "Daro"). Following 21 days of testimony and after receiving detailed written and oral submissions, I dismissed Daro's Counterclaim in my Reasons for Judgment released on December 19, 2024.

[3] Innocon now seeks costs on a substantial indemnity basis or, alternatively, partial indemnity costs to the date of its Offer to Settle made on March 18, 2024, and substantial indemnity costs thereafter. On either approach, the costs sought are substantial, over $1 million including HST and disbursements.

[4] Daro, on the other hand, submits that it offered to settle Innocon's claims by consenting to dismiss them as early as 2015, and therefore it ought to receive costs of that action on a

partial indemnity scale to the date of those offers and substantial indemnity thereafter, in the total amount of $319,630.15. Daro submits that Innocon's costs for defending the Counterclaim are excessive and that there is no justification for awarding costs on a substantial indemnity scale. Daro also takes issue with some of Innocon's disbursements for experts. Daro submits that a costs award of $200,000 in faovur of Innocon for the Counterclaim would be fair and reasonable.

The Bills of Costs

[5] Innocon's Bill of Costs discloses a full indemnity claim of $1,191,471 for fees, not including HST. The substantial and partial indemnity numbers are set at 90% and 66% of the actual fees – or $1,072,32.35 and $786,371.19, respectively. Innocon's disbursements are $243,310.86, not including HST.

[6] Daro's Bill of Costs shows full indemnity fees of $912,060.50, not including HST. The substantial and partial indemnity amounts are $774,574,20 and $602,337.40. Daro's disbursements are $196,654.03, not including HST.

Applicable legal priniciples

[7] The Court has a broad discretion in determining costs. Rule 57.01(1) sets out factors to be considered to achieve a result that is fair and reasonable for the unsuccessful party to pay. Costs should be fair and proportionate to the issues, complexity, conduct of the parties, and result achieved: *Boucher v. Public Accountants Counsel for Ontario*, 2004 CanLII 14579 (ON CA), 2004 CanLII 14579 (Ont. C.A.).

[8] The awarding of costs is not an exact science. The court need not engage in an exact measure or detailed analysis of the dockets: *Harley v. Harley*, 2023 ONSC 4611, at paras. 34-35; *Bender v. Dulovic*, 2023 ONSC 4753, at paras. 24-25; *Persampieri v. Hobbs*, 2018 ONSC 368, at para. 33, citing *Zesta Engineering Ltd. v. Cloutier* (2002), 2002 CanLII 25577 (ON CA), at para. 4; *Brophy v. Harrison*, 2019 ONSC 4377, at para. 15, citing *Apotex Inc. v. Egis Pharmaceuticals* (1991), 1991 CanLII 2729 (ON SC), 4 O.R. (3d) 321.

[9] In *Davies v. Clarington (Municipality)* (2009), 2009 ONCA 722, 100 O.R. (3d) 66, Epstein J.A. stated at paras. 51-52:

> As can be seen, the overriding principle is reasonableness. If the judge fails to consider the reasonableness of the costs award, then the result can be contrary to the fundamental objective of access to justice. Rather than engage in a purely mathematical exercise, the judge awarding costs should reflect on what the court views as a reasonable amount that should be paid by the unsuccessful party rather than any exact measure of the actual costs of the successful litigant. In *Boucher*, this court emphasized the importance of fixing costs in an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding at para. 37, where Armstrong J.A. said "[t]he failure to refer, in assessing costs, to the

> overriding principle of reasonableness, can produce a result that is contrary to the fundamental objective of access to justice."

[10] An award of costs on a substantial indemnity basis is exceptional. It can arise from the conduct of the unsuccessful party where it rises to a level that is considered reprehensible, egregious and worthy of sanction. As the Court of Appeal stated in *Davies v. Clarington*, at para. 40:

> [W]hile fixing costs is a discretionary exercise, attracting a high level of deference, it must be on a principled basis. The judicial discretion under rules 49.13 and 57.01 is not so broad as to permit a fundamental change to the law that governs the award of an elevated level of costs. Apart from the operation of rule 49.10, elevated costs should only be awarded on a clear finding of reprehensible conduct on the part of the party against which the cost award is being made.

[11] An elevated award of costs is usually based on conduct during the litigation. The mere fact that the unsuccessful party committed misconduct giving rise to the proceeding is generally not a sufficient basis for substantial indemnity, as the successful party can be compensated through an award of damages: *Hunt v. TD Securities Inc.*, (2003) 2003 CanLII 3649 (ON CA), 66 O.R. (3d) 481 (C.A.). Examples of misconduct giving rise to elevated awards includes evidence tampering (see, e.g., *Turtle Creek Landscape Inc. v. Summit Auto Brokers Inc*., 2018 ONSC 512 (CanLII), at para. 6), and "conduct reflecting a patent and persistent disregard for the court's processes": *Tridelta Investment Counsel Inc. v. GTA Mixed-Use Developments GP Inc.*, 2024 ONSC 3543 (CanLII) at para. 27.

[12] My role, therefore, is to award an amount that is fair and reasonable for the unsuccessful party to pay in the particular circumstances of this case. I am not to be guided by the actual costs incurred by the successful litigant, although I should not disregard it either: *Boucher v. Public Accountants Counsel for Ontario*, 2004 CanLII 14579 (ON CA), 2004 CanLII 14579 (Ont. C.A.). In addition, I must have regard to the factors set out in Rule 57.01(1) of the *Rules of Civil Procedure*. the principle of proportionality (R. 1.01(1.1)), and the need to balance the indemnity principle with the fundamental objective of access to justice.

Daro's claim for costs of Innocon's claim

[13] Daro seeks to recover about one-third of its costs based on the dismissal of Innocon's action. Daro points out that it was entirely successful on that action as Innocon agreed to its dismissal before the commencement of the trial. Daro also relies on offers to settle that action made in 2015, which would have allowed Innocon out without costs, Daro submits that its offers presumptively entitle it to costs on a substantial indemnity scale from 2015. This would include all discovery and trial preparation attributable to Innocon's action.

[14] Daro's position is correct. However, the real issue is how much of Daro's costs are attributable to Innocon's claim. Daro has not attempted to parse out what time was spent on Innocon's action, and in my view it is very little.

[15] Innocon's claim was, primarily, a simple debt action for a modest sum. Invoices were sent and were not paid. Daro defended not by saying that it had paid the invoices, but by counterclaiming, asserting that the screed was defective – all of it, and not just the screed related to the unpaid invoices.

[16] Innocon defended the Counterclaim by taking on the issues of whether the screed was defective, and whether the limited failure of the screed was the fault of Daro's installation. The action was all about these issues, not the small number of unpaid invoices. As stated by counsel for Innocon, "likely less than 1% of all documents produced" related to the claim for unpaid invoices.

[17] Although Innocon also pleaded a defamation claim in an amended pleading, that arose from one incident, and there is no evidence that it was given any attention in the pre-trial proceedings. Indeed, Daro described Innocon's defamation claim as a "tit-for-tat" after Daro had amended its defence and counterclaim to assert a defamation claim against Innocon. Daro's defamation claim did not take up much time at trial and the facts regarding what was said for both defamation claims would have taken up very little time in discovery and pre-trial preparation. Again, the main issues in dispute at the trial were whether the screed was defective and/or whether Daro had failed to install it properly – which are issues that arose from Daro's Counterclaim.

[18] Similarly, the experts were retained to address the issues on the Counterclaim, not the claim for unpaid invoices. There is no basis to attribute expert fees to the action brought by Innocon, as Daro seeks to do.

[19] Daro's complaint that Innocon waited until April 1, 2024, the day before the trial started, to disclose that it would not be pursuing its claim at trial is not borne out by the facts. Innocon advised Daro of this in its pre-trial memorandum on January 31, 2024. In any event, little, if any, time would have been spent on the disputed invoices in preparing for trial.

[20] Innocon suggests, if costs should be awarded to Daro, that the costs should be limited to the cost of Daro's pleading in response to its action, and be no more that $5,000, on a partial indemnity scale.

[21] In my view Daro is entitled to something for the Innocon action, some of which should be on a substantial indemnity basis in light of its offers to settle. Daro has not provided a breakdown on which to fix those costs, so I must do my best to award an amount that is fair and reasonable and which Innocon ought reasonably to have expected to pay. While my information is imperfect, I at least have the experience gleaned from the trial and my knowledge of how the case unfolded, on which to fix these costs.

[22] Taking into account the amount of work that was required of Daro in responding to the Innocon claim, but also having regard to Daro's offers, I fix costs of the Innocon action at $25,000, including disbursements (if any) and HST.

Innocon's claim for costs of the Counterclaim

[23] Innocon seeks costs of the entire action on a substantial indemnity scale, or alternatively on a partial indemnity basis to March 18, 2024, and substantial indemnity costs thereafter.

[24] In my view, costs on a substantial indemnity basis for the action are not warranted. Innocon complains that Daro made serious and baseless allegations, including that Innocon knew the screed was defective, that it deliberately and knowingly misrepresented the quality of the screed, and that Innocon and Lafarge and its employees set out to harm Daro, and did so by making false statements, among other things.

[25] While serious allegations of wrongdoing which turn out to be unfounded can support substantial indemnity costs, this is not automatic. As the Court of Appeal has recently stated, "[c]osts on a substantial indemnity basis "are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties": *T.A.W. v. J.C.L.*, 2021 ONCA 270 at para. 4, citing *Young v. Young*, 1993 CanLII 34 (SCC), [1993] 4 S.C.R. 3, at p. 134; *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303, at para. 26.

[26] Here, again, it is relevant that a major focus of the trial was on the quality of the screed. While Daro pleaded aggressively, including claiming punitive damages, there was no misconduct by it in how the action was pleaded or conducted. In my view, Daro did not unduly attack the character or reputation of Innocon's witnesses, nor was there any evidence that any of them, or Innocon or Lafarge, were affected or harmed by Daro's Counterclaim.

[27] Innocon's complaints about Daro's conduct of the trial included lack of cooperation over preparation of a joint document brief, unnecessarily long cross-examinations, calling unnecessary witnesses, not calling others and, according to Innocon, requiring Innocon to prepare witnesses that Innocon ended up not needing to call. However, these complaints do not give rise to elevated costs. Nor do my adverse findings respecting some of Daro's witnesses. This is all part of the trial process, especially a long and complex trial.

[28] Innocon's Offer was to settle the entirety of the action by paying Daro $1.1 million for damages and $122,000 for costs, interest and disbursements. Clearly, Innocon achieved a far better result at trial.

[29] However, Rule 49.10 does not create an entitlement to higher costs by a defendant where it does better than its offer, as the presumptive impact of the Rule on a defendant's offer only applies where the plaintiff is in some way successful. That is not this case.

[30] But this does not make the Offer irrelevant, as offers to settle are always a consideration in determining the scale and quantum of costs.

[31] In my view, the offer should have some impact on the amount of costs awarded for the period following the making of the offer.

[32] Innocon seeks almost $500,000 on a partial indemnity basis for fees incurred prior to the date of the offer, March 18, 2024. Having reviewed Innocon's Bill of Costs, and compared it to Daro's, I find the amounts claimed to be excessive.

[33] Large amounts of time were attributed to pleadings and to working with experts, although the allocation is somewhat unclear. The amount of time associated with these steps struck me as excessive. Further, about two-thirds of the fees claimed were incurred well before trial or even immediate trial preparation. Daro's Bill of Costs, on the other hand, seems more reasonable in attributing a larger proportion of its fees to trial preparation and attendance at the trial.

[34] Recognizing that I am not required to engage in a line-by-line examination of fees and that fixing costs is not an exact science, I fix the costs for fees claimed for the period prior to the March 18, 2024 offer at $300,000, not including HST.

[35] As for costs following the Offer, as I read the Bill of Costs, Innocon seeks about $565,000 on a substantial indemnity basis or about $294,000 on a partial indemnity scale. These figures, while larger than Daro's, are not unreasonable given the length and complexity of the trial. Taking into account the factors in the Rules, including the Offer to Settle and the reasonable expectations of the parties, I find that the costs awarded for the period after the Offer to Settle should be higher than partial indemnity but not so high as claimed by Innocon. I fix costs for fees post-Offer at $400,000, plus HST.

[36] Innocon's costs should be reduced to ensure it is not reimbursed for time spent pursuing its own claim. As I fixed costs, Innocon should pay Daro at $25,000 inclusive of HST, I also reduce Innocon's costs by that amount, such that the total payable for costs by Daro is $675,000 plus HST.

[37] Innocon claims disbursements of $243,310.86, not including HST. Most of this relates to expert reports, and almost half is for Dr. Thomas ($114,100), who died before the trial, causing Innocon to retain Dr. Carballosa. This, in turn, led to more expense by Daro which had to respond to Dr. Carballosa. All of this was unfortunate and could not have been prevented, but I do not find it fair that Daro should have to pay for Dr. Thomas; it is enough that it bears its own additional costs responding to Dr. Carballosa.

[38] There are also a few minor objections related to Dr Thomas which I find valid and should lower the amount by another $1,500.

[39] Daro also takes issue with Innocon's disbursement for its accounting expert who was never called as a witness, totaling $19,423.59. However, the report was prepared to respond to Daro's damage claim and was a reasonable expense in the circumstances. The fact that, in the end, Innocon did not need to present that evidence does not mean it was unreasonable to have it ready for trial.

[40] I fix the disbursements owing by Daro to Innocon in the amount of $125,000 plus HST.

Conclusion

[41] In summary:

(a) Innocon shall pay Daro costs of $25,000, including disbursements and HST, for Innocon's claim against Daro;

(b) Daro shall pay Innocon costs of the Counterclaim in the amount of $675,000, plus HST; and

(c) Daro shall reimburse Innocon for disbursements in the amount of $125,000 plus HST.

Paul B. Schabas J

Date: November 25, 2025