CITATION: Sir Corp. v. Aviva Insurance Company, 2023 ONSC 3506
COURT FILE NO.: CV-20-653557-0000
DATE: 20230613

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
SIR CORP., US S.I.R., LLC AND/OR SUBSIDIARIES AND/OR FRANCISHES AND/OR AFFILIATED AND/OR ASSOCIATED FIRMS AND/OR OTHER INTERESTS AS DIRECTED BY SIR CORP.	)	Mirilyn Sharp and Rory Barnable and Zac Cooper, for the Applicants
Applicants	)	Ellen Snow, John Nicholl and Emma Nicholl for the Respondent
– and –	)	
AVIVA INSURANCE COMPANY OF CANADA	)	
Respondent	)	
	)	**HEARD:** In Writing

A.P. RAMSAY J.

A. **Overview**

[1] This matter involved a coverage dispute between the parties under an all-risk manuscript insurance policy. In Reasons dated December 20, 2022, reported at *Sir Corp. v. Aviva*, 2022 ONSC 6929, I dismissed the application. The parties were unable to resolve the issue of costs and delivered costs submissions.

[2] The Respondent, Aviva Insurance Company of Canada, seeks its costs of the application in accordance with an agreement entered into between the parties, before the proceedings, to resolve costs. In the alternative, the Respondent seeks partial indemnity costs in the amount of $254,566.28, inclusive of fees, taxes and disbursements plus costs in the amount of $8,136.00 for preparation of these costs submissions. The Respondent maintains that under the agreement, the

parties agreed that the successful party on the application would be entitled to costs of $100,000.00, all inclusive.

[3] The application occupied five days of hearing time. The materials before the court were extensive and included hundreds of pages of Application Records, 11 Factums, 8 Compendiums and 8 Books of Authorities.

[4] For the reasons below, the Respondent is entitled to its costs in the amount of $100,000.00 all-inclusive for the application, and $8,136.00 all-inclusive for the preparation of the costs submissions.

B. **Parties' Positions**

[5] The Respondent submits that there were a number of improper or unnecessary steps taken by the Applicants which unnecessarily increased the length and complexity of this proceeding.

[6] The Applicants submit that the cost agreement should not be enforced and ask that there be no costs awarded since the Applicants incurred significant additional costs to respond to the Respondent's constantly changing position regarding the basis for its coverage denial, after its initial coverage. The Applicants refer to the Respondent's email on November 18, 2021, indicating that it intended to rely on the Australia lower Court decision in *LCA Marrickville v. Swiss*, and the Respondent's March 11, 2022 email regarding the Australian Court of Appeal decisions of *LCA Marrickville Pty Limited v. Swiss Re International SE*, [2022] FCAFC 17 and *Star Entertainment Group v. Chubb*, [2022] FCAFC 16, which resulted in further submissions.

[7] The Applicants submit that the Respondent had an obligation of utmost good faith to set out its full position on coverage at the outset, and the insurer's evolving position on coverage resulted in the submissions above, affected the length of the proceedings and resulted in costs to SIR Corp. of $604,552.50.

C. **Analysis**

[8] An award of costs is a matter in the discretion of the judge by virtue of s. 131(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, which reads as follows:

> Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent costs shall be paid.

[9] To understand my reasons, some brief background facts are required. On May 18, 2021, the parties entered into an agreement whereby the successful party could be entitled to $100,000.00, all-inclusive in costs. The Applicants agree that they entered into the agreement. Counsel for the Applicants urges the court to ignore the agreement on the basis of the significant costs incurred by the Applicants after the agreement was entered into. In my view, the agreement is a contract and absent a breach or anything that would otherwise vitiate agreement, it should be

enforced. The Applicants understood that the losing party would potentially pay $100,000.00 in costs – that was the agreement. The Applicants do not dispute that the parties agreed to cap costs in the amount of $100,000.00, leaving entitlement to be determined by the court. In an affidavit of a law clerk sworn in support of the Applicants' Costs Submissions, the law clerk acknowledges that "the parties had agreed on the 'quantum' of costs but not the 'entitlement' to costs, such that we did not need to prepare or serve a Costs Outline". The Applicants state in their Costs' Submission:

> *18. SIR was content with Aviva's change to SIR's proposed costs agreement, as it meant there was no need to prepare a Costs Outline in advance of the May 19, 2021 hearing.*
>
> *19. SIR understood that while it had incurred costs of approximately $300k as at May 18, 2021, it was willing to forgo the potential to recover its full costs in exchange for the certainty that at maximum it would be responsible to pay $100k to Aviva, if the Court* found *that Aviva was entitled to costs, and that it would recover a maximum of $100k from Aviva, if the Court found that SIR was entitled to costs.*

[10] The Applicants have not provided the court with any basis to indicate that the agreement was breached by the Respondent or is not enforceable, but rather ask that the court ignore the agreement because of additional costs incurred by the Applicants beyond the date the agreement was entered into. The Applicants have also not provided the court with any authority to support their position that the agreement should be ignored or set aside.

[11] In the absence of any vitiation of the agreement or supporting authority, the agreement should be enforced.

[12] In the alternative, if I am wrong, I would award the Respondent its costs in the amount of $150,000.00 in the absence of the costs agreement and based on their Costs Outline and alternative arguments. I would reduce the alternative figure to reflect the number of lawyers involved in the matter; those costs should not be visited upon the unsuccessful party. However, I have reduced this amount to $100,000.00 to take into account the fact that the Respondent's primary position is that it is entitled to costs on the quantum agreed to in the agreement.

[13] The Respondent is entitled to its costs as the insurer was successful on the application. In the absence of misconduct, a successful litigant has a reasonable expectation that the unsuccessful party will indemnify them for costs: *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, at p. 404; *Bell Canada v. Olympia & York Developments Ltd.* (1994), 17 O.R. (3d) 135 (C.A.). The general principle that a successful party is entitled to his or her costs is long standing and should not be departed from except for very good reasons: *Macfie v. Cater* (1920), 57 D.L.R. 736 (Ont. S.C.), aff'd (1921), 64 D.L.R. (Ont. C.A.). I find that there was no misconduct on the part of the successful Respondent worthy of chastisement by depriving the Respondent of its costs.

[14] None of the cases relied upon by the Applicants dealt with a situation where there was an agreement between the parties.

[15] The hearing took place over multiple days. The record and written material exceed 8,000 pages. Oral submissions required a total of five days. However, I disagree with the Respondent that the Applicants ought to be blamed for taking more time to argue the matter than estimated, for three reasons. First, the record on this application is extensive. Second, the bar and litigants alike were newly acquainted with CaseLines and how to use it, which slowed the process down. It was not until August 2022 that the Consolidated Practice Direction was updated to notify the profession and litigants that in estimating the time for a hearing, one ought to consider the time that it will take to navigate CaseLines. And third, the Applicants' resistance to have oral submissions on the Australian caselaw was not improper – one party wished to make oral submissions, the other did not. On the other hand, the Applicants' argument that the Respondent raising every possible argument, including arguments that had no bearing on the subject Policy, should be viewed in the context of the Applicants also raising every possible argument. In my view, both sides advanced arguments which lengthened the proceedings, but in the circumstances, for good reason. The matter was of vital importance to both evidenced by the quantum involved, over $26 million dollars. As noted by the Applicants in their Costs Outline: "The application involves the interpretation of a custom "manuscript" policy of insurance against the backdrop of a global catastrophe (the Covid-19 pandemic)." The Applicants submit "that the matter is of significant complexity".

[16] Both sides were always well prepared for the hearings. In my view, in the circumstances of this case, I find that no conduct by the Applicants nor the Respondent resulted in litigation costs being incurred or increased unnecessarily, and as such, the court may deprive all the parties of their costs.

[17] In determining costs, one of the overarching considerations is whether the costs award is reasonable, fair, and proportionate in the circumstances of the case, having regard to the factors set out in r. 57.01(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the "*Rules*") and the reasonable expectations of the party: *Boucher v. Public Accountants Council for the Province of Ontario*, (2004), 71 O.R. (3d) 291 (C.A.), at para. 26. The principle of proportionality is enshrined in r. 1.04(1.1) of the *Rules*, which make it clear that the court must "give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding". When assessing proportionality, the court may consider the factors enumerated in r. 57 of the *Rules*, the principle of indemnity, the hourly rates claimed, time spent, and the amount the unsuccessful party reasonably expected to pay: *Chandran v. National Bank of Canada*, 2011 ONSC 4369, 95 C.C.E.L. (3d) 322, at para. 24, aff'd 2012 ONCA 205, 99 C.C.E.L. (3d) 277.

[18] The fundamental purposes which modern costs rules are designed to foster, are articulated by the Court of Appeal as follows:

i. to partially indemnify successful litigants for the costs of litigation;

ii. to encourage settlement; and

iii. to discourage and sanction inappropriate behaviour: *Fong* v. *Chan* (1999), 46 O.R. (3d) 330 (C.A.), at para. 22; *Serra v. Serra*, 2009 ONCA 395, 66 R.F.L. (6th) 40 (Ont. C.A.), at p. 42:

[19] I agree though with the Respondent that the quantum of costs awarded in a proceeding should mirror, to the extent possible, awards that have been made in closely analogous proceedings. However, the authorities relied upon by the Respondent, being *Harris v. Bayerische Motoren Werke Aktiengesellschaft*, 2020 ONSC 4220 and *Centerra Gold Inc. v. Bolturuk*, 2022 ONSC 1040, 161 O.R. (3d) 294, are not at all similar or analogous to the application before me. Both *Harris* and *Centerra* involve matters proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6., and *Centerra* is a proceeding involving an injunction, and in that case, Gilmore J. determined that the case should attract a higher scale of costs given the losing party's conduct. The costs awards ranged between $225,000.00 to $300,000.00 in these cases.

[20] In *Zesta Engineering Ltd. v. Cloutier*, (2001), 21 C.C.E.L. (3d) 161 (Ont. C.A.), at para. 4, the Court of Appeal did not make any finding with respect to the amount of time spent expended or the rates charged, but rather stated:

> In our view, the costs award should reflect more what the court views as a fair and reasonable amount that should be paid by the unsuccessful party rather than any exact measure of the actual costs of the successful litigant.

[21] The Respondent's Bill of Costs indicates fees and disbursements on a partial indemnity scale of $223,267.80, plus disbursements of $2,274.67, plus HST for a total of $254,568.28.

[22] There are multiple lawyers, seven, on this file and a law clerk. Ellen Snow was lead counsel on the application. Ms. Snow's time, exclusive of the preparation time for the cost's submissions, totals $121,368,00. Ms. Snow is a 2006 call and her hourly rate is $400.00. Her substantial indemnity rate is $320.00, and her partial indemnity rate is $240.00.

[23] Emma Nicholl is a 2016 call. Ms. Nicholl's hourly rate is $300.00 an hour. Her substantial indemnity rate is $240.00 an hour and her partial indemnity rate is $180.00 an hour. Ms. Nicholl's total time, exclusive of the preparation time for the costs submissions is approximately $47,000.00

[24] The Applicants' Costs Outline indicates partial indemnity costs in the amount of $456,814, plus disbursements and HST for a total of $519,283.83 as compared to the Respondent's costs of $254,566.28 on the same scale. It is not clear why the Applicants' costs are almost twice the amount of the Respondent's costs. By the time of the initial hearing, the Applicants' actual costs incurred was $304,459.38, which probably amounts to around $182,675 (60% of actual) on a partial indemnity basis. Therefore, in my view, the amount being claimed by the Respondent was in the reasonable expectation of the Applicants. Since the Respondent's primary position on this hearing is that it is seeking costs of $100,000.00 contemplated by the agreement, I would not

increase the amount for that reason alone. In the result, both sides are still bearing some of their own costs.

[25] As for costs of preparation of their submissions, the amount claimed by the Respondent is fair and reasonable. First, the submissions would not have been necessary in light of the costs agreement. Second, the Applicants' Costs Outline indicates $12,252 claimed for partial indemnity costs for the same step and, therefore, the amount claimed by the Respondent of $8,136.00 for the same step in the proceeding is reasonable, proportionate and in the reasonable expectation of the parties.

D. Disposition

[26] I therefore make the following order:

i. Costs of the application to the Respondent payable by the Applicants, fixed in the amount of $100,000.00 all-inclusive.

ii. The Respondent is entitled to its costs for preparation of the costs submissions, fixed in the amount of $8,136.00 all-inclusive, and payable by the Applicants.

A.P. Ramsay J.

Released: June 13, 2023

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SIR CORP., US S.I.R., LLC AND/OR SUBSIDIARIES AND/OR FRANCISHES AND/OR AFFILIATED AND/OR ASSOCIATED FIRMS AND/OR OTHER INTERESTS AS DIRECTED BY SIR CORP.

Applicants

– and –

AVIVA INSURANCE COMPANY OF CANADA

Respondent

COSTS ENDORSEMENT

A.P. Ramsay J.

Released: June 13, 2023