CITATION: Prasher Steel Ltd v. BWK Construction Company Limited and Peel District School Board, 2023 ONSC 3494
COURT FILE NO.: CV-12-4521-00
DATE: 2023 06 09

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
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PRASHER STEEL LTD.	)	A. Assuras, for the Plaintiff
	)	
	)	
	)	
- and -	)	
	)	
B.W.K. CONSTRUCTION COMPANY LIMITED AND PEEL DISTRICT SCHOOL BOARD	)	S. Fairley, for the Defendant
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COSTS ENDORSEMENT

McGee J.

BWK is Entitled to Their Costs Against Prasher

[1] The defendant, B.W.K. Construction Company Limited ("BWK"), was the successful party in this lengthy contract dispute than spanned the period from August 2012 to the release of my reasons on February 22, 2023.

[2] In 2012, BWK was required to pay $186,393.50 to the Accountant of the Superior Court of Justice based on a lien claim registered by the plaintiff, Prasher Steel Ltd. (“Prasher”) in the amount of $149,114.80. Those monies remained unavailable to BWK for a decade and at trial, the lien claim proved to have been inflated. I found the actual amount of the lien, inclusive of HST to be $83,079.86.

[3] BWK ask for their full indemnity costs in the amount of $142,679.47 and in the alternative, costs based on their Rule 49 Offer of $113,276.42, being $37,329.27 in partial indemnity costs up to the date of their Offer and substantial indemnity costs thereafter of $75,949.15.

[4] In submissions that well exceed the permitted length, Prasher asks that no costs be payable because there was divided success. Prasher calculates the result as a 68% success in their claim, and a 48% success in the Defendant’s counterclaim. I reject this assessment of success. It is not supported by my reasons for decision, the result at trial; or the fact that the trial and counterclaim were heard together. In no manner was success divided. BWK was wholly successful, and they are entitled to their costs against Prasher.

[5] BWK further asks that Manoj Prasher personally be held jointly and severable liable for costs with Prasher (his company.) BWK asserts that after Manoj started this dispute, be began operating through a different company, knowing his claim was excessive, while committing acts of spoilation. They fear

that monies owing to them will be uncollectable given the manner in which Prasher operates. Manoj asks that he not be personally liable for any costs principally, because he did not engage in fraud or gross misconduct by lying or creating false documents.

[6] I cannot consider awarding costs against Manoj Prasher personally because no claim is made against him in these proceedings, and I did not make any findings, nor was evidence adduced with respect to his business practises after the period in which the lien claim arose. Neither did I make a finding that Prasher had acted fraudulently and deceitfully as was the case in *Marcos v. Lad*, 2021 ONSC 4900 Div. Ct. at para 10 and 11.

The Scale of Costs Payable

[7] Generally speaking, costs are awarded to a successful party and are measured on a partial indemnity basis, see *Bell Canada v. Olympia & York Developments Limited et. al.* (1994), 1994 CanLII 239 (ON CA), 17 O.R. (3d) 135 (C.A.). In special circumstances, costs may be awarded on a higher scale, but those cases are exceptional. They are reserved for cases where there has been "reprehensible, scandalous or outrageous conduct on the part of one of the parties." See *Young v. Young*, 1993 CanLII 34 (SCC), [1993] 4 S.C.R. 3, at para. 241. See also *Mars Canada Inc. v. Bemco Cash & Carry Inc.,* 2018 ONCA 239 at para. 43.

[8] A higher scale of costs may also be applicable where triggered by the Rules. In particular, R. 49.10 provides that where a plaintiff makes an offer to settle at least seven days before the commencement of the hearing, which is not withdrawn or accepted by the defendant and where the plaintiff obtains a judgment as or more favourable than the terms of the offer, the plaintiff is entitled to partial indemnity costs to the date the offer was served and substantial indemnity costs thereafter, unless the court orders otherwise.

[9] The purpose of R. 49 is to foster settlement, and costs awards overall have a number of purposes, including to indemnify (fully or partly) successful litigants, to encourage settlement, to sanction unreasonable litigation conduct, and to discourage frivolous or ill-founded litigation, see *394 Lakeshore Oakville Holdings Inc. v. Misek*, 2010 ONSC 7238, at para. On the latter purpose, *394 Lakeshore* supra includes a caution that one party playing “hardball” is a relevant factor to consider when awarded costs.

[10] BWK were exemplary in their efforts to resolve this dispute. They made multiple offers to settle before and during trial. For example, BWK made an offer on September 27, 2022, to pay $45,000.00 all inclusive to Prasher. During the Plaintiff’s case at trial, BWK offered to settle on the basis that the claim and counterclaim be dismissed without costs, but the trial proceeded.

[11] BWK made a Rule 49 offer to settle on October 16, 2018. Rule 49.10 provides

> **49.10 (**1) Where an offer to settle,
>
> (a) is made by a plaintiff at least seven days before the commencement of the hearing;
>
> (b) is not withdrawn and does not expire before the commencement of the hearing; and
>
> (c) is not accepted by the defendant,
>
> and the plaintiff obtains a judgment as favourable as or more favourable than the terms of the offer to settle, the plaintiff is entitled to partial indemnity costs to the date the offer to settle was served and substantial indemnity costs from that date, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 49.10 (1); O. Reg. 284/01, s. 11 (1).

[12] BWK's Rule 49 offer provided that Prasher would be paid $35,000 from the funds currently paid into court, with the balance being released to BWK; and that counsel for BWK would bear the costs of discharging the lien and dismissing the claim and counterclaim without costs. The offer was open for acceptance until one minute following the commencement of trial, and it was not accepted.

[13] The result at trial, the exact amount corrected within my reasons released March 29, 2023, was that no monies were payable to Prasher, the whole of the moneys paid into court in 2012 are to be released to BWK and a further amount of $60,902.86 is owing from Prasher to BWK.

[14] Prasher has never made an offer to settle. A failure to make an offer to settle is unreasonable litigation conduct.

[15] In addition to making a number of offers to settle, BWK served an extensive Request to Admit in September 2018 to narrow the issues for determination. A Request to Admit is a factor in determining costs under the Rule 51.04.

> **51.04** Where a party denies or refuses to admit the truth of a fact or the authenticity of a document after receiving a request to admit, and the fact or document is subsequently proved at the hearing, the court may take the denial or refusal into account in exercising its discretion respecting costs.

[16] Prasher's Response to Request to Admit did not admit any facts and refused to admit facts that necessitated proof at trial. All material facts set out in BWK's Request to Admit were found at trial.

[17] BMW also argues that the *Construction Lien Act* includes provisions relating to costs in this decision at section 86:

> ***Section 86 of the Construction Lien Act*, R.S.O. 1990 c. 30**
>
> 1) Subject to subsection (2), any order as to the costs in an action, application, motion or settlement meeting is in the discretion of the court, and an order as to costs may be made against,
>
> a) a party to the action or motion; or
>
> (b) a person who represented a party to the action, application or motion, where the person,
>
> (i) knowingly participated in the preservation or perfection of a lien, or represented a party at the trial of an action, where it is clear that the claim for a lien is without foundation or is for a grossly excessive amount, or that the lien has expired, or
>
> (ii) prejudiced or delayed the conduct of the action,
>
> and the order may be made on a substantial indemnity basis, including where the motion is heard by, or the action has been referred under section 58 to, a master, case management master or commissioner. 2006, c. 21, Sched. C, s. 102 (3).

[18] Section 86 provides cost consequences to parties who pursue excessive liens. In the present case, the lien amount exceeded the maximum adjusted contract value, the Plaintiff proceeded through to trial in the absence of documentary evidence, and a portion of the lien amount was abandoned during closing arguments.

[19] Finally, BWK asserts that Prasher committed spoliation of evidence. Manoj's evidence was that he didn't retain key documents because he "thought Bruce would settle." BWK submits that this evidence supports that the Plaintiff knowingly pursued an excessive lien. On the basis of section 86, BWK requests full indemnity costs throughout, or alternatively, substantial indemnity costs throughout. Otherwise, the Plaintiff will have been permitted to advance a claim through trial in these circumstances, with BWK's funds being tied up in court for ten years, with the intent of leveraging a settlement.

[20] I find that there is a sufficient basis for BWK to receive a substantial indemnity of their costs throughout this proceeding.

The Amount of Costs Payable

[21] The amount of an award of costs is in the court's discretion. That discretion is grounded in section 131 of the *Courts of Justice Act*, R.S.O. 1990 c. C.43. Its application is guided by the factors enumerated in r. 57.01 of the *Rules of Civil Procedure.*

[22] The law is now well-settled that the overarching principles to be applied to the assessment of costs are fairness, proportionality, and reasonableness: see *Beaver v. Hill*, 2018 ONCA 840; *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 2004 CanLII 14579 (ON CA), 71 O.R. (3d) 291 (C.A.); and *Moon v. Sher* (2004), 2004 CanLII 39005 (ON CA), 246 D.L.R. (4th) 440 (C.A.). In the context of determining what is fair, reasonable, and proportionate, due consideration must be given to the reasonable expectations of the parties. See *Neubuerger v. York,* 2016 ONCA 303 at para. 17.

[23] Armstrong J.A. explained in *Boucher v. Public Accountants Council for the Province of Ontario*, [2004] O.J. No. 2634 (Ont. C.A.) that when a judge fixing costs, his or her task involves more than a mere calculation using the hours docketed and the costs grid. “[I]t is also necessary to step back and consider the result produced and question whether, in all the circumstances, the result is fair and reasonable.” (para. 24).

[24] Here, the actual amount of costs incurred by BWK is not in dispute. Within his own Bill of Costs, Prasher reports having incurred $154,583.11 in fees, disbursements and HST. Prasher could have reasonably expected that BWK would have incurred a similar amount of fees, and that were he unsuccessful, he would pay costs within that range.

[25] When fixing the amount of costs, a Judge does not engage in an arithmetical exercise. Rather, she fixes an amount that is reasonable for the unsuccessful party to pay rather than determining the exact costs of the successful litigant (*Boucher, supra*, at para. 26). Costs, generally, should be proportional to the issues in the action and amount awarded. Proportionality, however, should not override other considerations, and determining proportionality should not be a purely retrospective inquiry based on the award. It should not be used to undercompensate a litigant for costs legitimately incurred (*Aacurate v. Tarasco*, 2015 ONSC 5980 (S.C.J.) at para. 13 to 17). In *Aacurate,* McCarthy, J. said:

> I am mindful that the principle of proportionality calls upon the court to consider the amount claimed for costs in relation to the amount recovered in the judgment, as well as the reasonable expectation of the parties. In my view, however, proportionality cannot and should not be routinely invoked to save litigants from the actual costs of proceedings in circumstances where those litigants have put forth a wholly unmeritorious defence to a legitimate claim or have caused the proceeding to become unduly prolonged or complicated. The principle should be applied thoughtfully and in a balanced fashion along with the other factors set out in rule 57.01.

[26] I have reviewed BWK's detailed Bill of Costs. It reflects a reasonable and proportionate account given that this proceeding was ongoing for ten years, and

that it was called to trial and rescheduled multiple times. Their full indemnity costs throughout were $142,679.47: an amount less than what was incurred by Prasher.

[27] I grant BWK their substantial indemnity costs in the amount of $135,000, inclusive of fees, disbursements and HST. In my view, this rounded amount of $135,000 is a fair, reasonable and proportionate award of costs given my findings as to the appropriate scale of costs and the principles of a costs award.

[28] Order to issue that Prasher shall forthwith pay costs to BWK of $135,000.

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McGee J.

Released: June 9, 2023

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COSTS ENDORSEMENT

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Released: June 9, 2023