CITATION: Bellsam Contracting Limited v. Torgerson, 2023 ONSC 5652
COURT FILE NO.: CV-19-628829
DATE: 2023 10 06

ONTARIO
SUPERIOR COURT OF JUSTICE

IN THE MATTER OF the *Construction Act*, RSO 1990, c. C.30, as amended

B E T W E E N:	)	
	)	
BELLSAM CONTRACTING LIMITED	)	M. Simaan, *for the plaintiff / defendant by counterclaim*
	)	
Plaintiff / Defendant by counterclaim	)	
	)	
- and -	)	
	)	
2567714 ONTARIO INC., CORY TORGERSON, NADINE TORGERSON and CAISSE POPULAIRE VOYAGEURS INC.	)	J. Rankin and C. Campbell, *for the defendants / plaintiff by counterclaim, 2567714 Ontario Inc., Cory Torgerson, and Nadine Torgerson*
Defendants / Plaintiff by counterclaim	)	
	)	
	)	**HEARD:** In writing

REASONS FOR COSTS DECISION
(Trial of an Issue)

Robinson A.J.

[1] The parties were unable to resolve costs of the trial of an issue in this action. During the period for exchanging costs submissions, Bellsam Contracting Limited ("Bellsam") retained new counsel. That led to a consent extension to the deadlines for exchanging responding and reply costs submissions. Following that exchange, this costs decision has been unfortunately delayed through no fault of the parties.

[2] 2567714 Ontario Inc., Dr. Cory Torgerson and Nadine Torgerson (collectively, the "Torgerson Defendants") seek their costs of the trial in the total amount of $501,941.27, including HST and disbursements. That costs claim includes partial indemnity costs to the date of an offer to settle served in February 2022 and substantial indemnity costs after that date. The Torgerson

Defendants further seek their partial indemnity costs of their costs submissions of $13,261.26, including HST. Bellsam takes the position that the Torgerson Defendants' overall costs claim is excessive, unreasonable, and disproportionate to the impact of a decision on the issue in dispute at the trial. Bellsam submits that the $174,000 in costs that it incurred is more proportionate and in line with the expectations of a reasonable party in the circumstances of this case.

[3] For the reasons that follow, I fix costs of the trial of an issue and the costs submissions in the amount of $287,500.00, inclusive of HST and disbursements, payable by Bellsam to the Torgerson Defendants within sixty (60) days of confirmation of my interim report.

Relevant costs principles

[4] Costs in a lien action are governed by s. 86 of the *Construction Act*, RSO 1990, c C.30. It provides me with broad discretion to award costs, including on a substantial indemnity basis. Pursuant to s. 86(2), where the least expensive course is not taken by a party, the costs awarded to that party shall not exceed what would have been incurred had the least expensive course been taken. It is also relevant in assessing costs that procedure in a lien action is to be as far as possible of a summary character, having regard to the amount and nature of the liens in question: *Construction Act*, s. 50(3) (formerly *Construction Lien Act*, s. 67(1)).

[5] By operation of s. 50(2) of the *Construction Act* (formerly s. 67(3) of the *Construction Lien Act*), the *Rules of Civil Procedure*, RRO 1990, Reg 194 (the "*Rules*") apply in a lien action except to the extent of any inconsistency with the *Construction Act*. Subrule 57.01(1) of the *Rules* outlines non-mandatory and non-exhaustive considerations for the court in assessing costs. The court has repeatedly held that subrule 57.01(1) is not inconsistent with the *Construction Act* and is applicable in the court's exercise of its discretion under s. 86.

[6] The same is not true of rules that provide a mandatory framework for costs or presumptive costs. Although not cited by either side, there is case law holding that the mandatory nature of such rules is inconsistent with the broad discretion afforded by s. 86: see, for example, *Allcon Concrete & Haulage Ltd. v. Klein-Rose Homes Inc.*, 2016 ONSC 2572 at paras. 7 and 12; *Dean Construction Company Limited v. M.J. Dixon Construction Limited*, 2011 ONSC 5125 at paras. 17 and 25.

[7] Ultimately, costs awards in lien actions are discretionary. As with non-lien civil actions, costs awards should reflect what the court views as a fair and reasonable amount that should be paid by the unsuccessful party, having regard to the expectations of the parties concerning the quantum of costs, rather than any exact measure of the actual costs of the successful litigant: *Davies v. Clarington (Municipality)*, 2009 ONCA 722 at para. 52; *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 OR (3d) 291 (CA) at paras. 26 and 38.

Proportionality

[8] At the outset of my analysis, it is important to note that this trial was not a trial of all issues in the claim and counterclaim. It was limited to determining whether there was a contract between the parties and, if so, the parties to the contract and the terms of the contract. This trial of an issue

was proposed by the Torgerson Defendants with Bellsam's agreement. It was expected to have a significant impact on whether and what experts would be required in the action, other procedural matters, and the scope of evidence required at the ultimate trial of all issues. The proposal was made to me after ordered documentary discovery and examinations for discovery had been predominantly completed. As set out in Trial Directions #3 in this reference, I was convinced by the parties' submissions that there would likely be a narrowing of issues or the required evidence, which would likely assist in a more overall summary disposition of the disputed issues.

[9] Proportionality is a serious concern here. Bellsam correctly points out that the difference between the parties' positions on the applicable contract and contract price is less than $400,000. Bellsam's original quote, relied on by the Torgerson Defendants, was for $2,300,000, plus HST. Bellsam's revised quote, relied on by Bellsam, was for $2,599,340, plus HST. I found that the contract was formed based on the original quote and that the revised quote was not accepted. It follows from that finding that the base contract price is $337,870 ($299,000, plus HST) less than what Bellsam argued at the trial.

[10] Actual legal fees are not totalled in the Torgerson Defendants' bill of costs, but substantial indemnity fees are calculated at $610,831.67, including HST. Actual fees must thereby be somewhere in the vicinity of $750,000, including HST, if not higher. Adding the legal fees for the Torgerson Defendants' costs submissions, the actual costs incurred for this trial of an issue are at least $778,000, including HST. That is juxtaposed with Bellsam's actual fees per its bill of costs in the amount of $165,680.60, including HST.

[11] The Torgerson Defendants argue that proportionality should not focus solely on the parties positions on the base contract price. They argue that the trial result has much broader implications. In particular, they submit that:

> (a) the base contract scope of work has been determined, which will bear directly on adjudication of the 192 disputed items of work in the parties' Scott Schedules (notably those where inclusion in the base contract scope of work is disputed);
>
> (b) Dr. Cory Torgerson and Nadine Torgerson have been relieved of potential liability under the contract;
>
> (c) a completion deadline of May 31, 2019 was determined, which is significant both because Bellsam admits in its statement of claim that work was not completed by that date and because that finding will have "significant impacts on issues of delay and breach of contract";
>
> (d) knowing the terms of the contract will be critical in deciding who breached the contract; and
>
> (e) the trial significantly narrowed issues and evidence required for the ultimate trial, since alternative contracts and *quantum meruit* need no longer be argued, which will significantly reduce the parties' costs to take this action through to the ultimate trial.

[12] In my view, the Torgerson Defendants are overstating the results and implications of this trial. I agree with the point outlined in (a) and, to an extent, (e) above, but am unconvinced that the balance are fair characterizations of what clearly flows from my decision.

[13] With respect to (b) above, I did find that Dr. Torgerson and Ms. Torgerson were not parties to the contract. I did not find that they were relieved from any liability. Notably, at para. 126, I specifically held that my finding does not preclude Bellsam from pursing Dr. Torgerson and Ms. Torgerson in their personal capacities to the extent such a claim is permitted by the *Construction Act*. It remains an open question if Bellsam will maintain claims against the individual defendants and, if so, on what basis and in what amounts.

[14] With respect to (c) and (d), I have determined only what the base contract contemplated and have found that Bellsam's revised quote was not accepted. I have made no findings on whether there were any changes to the contract, including extensions in contract time. I agree that my decision will focus next steps in the litigation and the ultimate trial of the remaining issues. However, in my view, the significance and criticality of my decision on the issues of delay and who breached the contract will not be readily apparent until that trial.

[15] Bellsam also correctly points out that, at para. 149 of my reasons, I held that Bellsam is not precluded from pursuing claims for extras arising from changes to the drawings that I have now held provided the base contract scope of work. It accordingly remains open to Bellsam to pursue its claim for more than the $2,300,000 base contract price, despite not being successful at the trial of an issue. There has been a narrowing of issues and evidence, but I am not convinced that it is clearly as significant as the Torgerson Defendants submit.

[16] The Torgerson Defendants further argue that proportionality must take into consideration the total quantum in dispute between the parties, including the counterclaim. They argue that they have "expended considerable resources *now* to ensure success on these key issues and significantly reduce the issues, evidence and costs *later*." The Torgerson Defendants' submit that the role of the court on a costs disposition is not to second-guess successful counsel on the amount of time spent on the case or the allocation of counsel to the tasks at hand, since it is all too easy after the fact to be critical of time spent by successful parties: *Ed Mirvish Enterprises Limited v. Stinson Hospitality Inc.*, 2010 ONSC 847 at para. 4.

[17] Although I agree the court should not second-guess the time spent on a case, none of the case law before me supports that litigants are exempted from having the court scrutinize a substantial costs claim in ensuring that a costs award is fair, reasonable, in within the reasonable expectations of the parties. Here, the Torgerson Defendants' actual fees are more than quadruple those incurred by Bellsam and greatly outstrip the immediate financial implications of the decision to the base contract price. Bellsam has specifically challenged both the reasonableness and proportionality of the costs claim. In these circumstances, it is properly the subject of scrutiny.

[18] I do not accept the Torgerson Defendants' submission that time spent by their counsel was "reasonable and proportionate to this proceeding." There is no clear correlation between the costs expended on this trial and litigating the remaining issues driving a decision on what is owing and to whom, namely what work was actually performed by Bellsam, the recoverable value of that

work, whether work was deficient or incomplete, and costs of rectification and completion. At best, this trial will assist in disputes over whether any work performed by Bellsam beyond the now-determined base scope of work was properly chargeable as extras and whether items claimed as deficient or incomplete were (or were not) within Bellsam's base scope of work.

[19] Simply put, I do not agree that incurring actual legal fees of $778,000 (or more) to obtain a ruling on what constituted the contract, the terms of the contract, and the parties to the contract was proportionate in all the circumstances. Costs of that magnitude are more commensurate with a longer, final trial dealing with all of the disputed issues. This was a short trial focused on only one of the many issues in dispute between the parties.

[20] I am frankly disappointed that I was convinced to permit this trial of an issue to proceed. I now question whether the parties' aggregate legal fees spent on this trial would have been better spent on retaining experts and taking steps to advance this action to a final trial of all issues, including the alternative claim in *quantum meruit*. Obtaining some narrowing of the issues and evidence required for the final trial has come at a significant price to both sides. An aggregate of nearly $1 million has been spent by the parties on this trial. The premise that this trial would result in overall costs savings in the litigation has, it seems, proven to be a fallacy.

[21] As expressly set out in s. 86(2) of the *Construction Act*, where the least expensive course is not taken by a party, the costs allowed to the party shall not exceed what would have been incurred had the least expensive course been taken. In my view, the Torgerson Defendants have not taken the least expensive course of action in preparing their case for this trial of an issue. They opted to use a team of four lawyers, three clerks, five students-at-law, and an eDiscovery specialist, all of whom expended significant time preparing for and conducting this trial.

[22] In saying the above, I do not intend to diminish the outcome of the trial of an issue. Deciding what (if anything) constitutes the contract between the parties is important in this litigation. My decision does resolve that key dispute, which will hopefully focus the remainder of the reference and may facilitate settlement discussions. Legal costs, though, may now be an impediment to out-of-court settlement. The Torgerson Defendants may well feel that their investment was worthwhile given the result achieved at the trial. They were certainly entitled to prepare their case how they felt necessary at the cost they were prepared to pay. However, their success at the trial does not mean that Bellsam is liable to pay those costs.

Scope of claimed costs

[23] Since Bellsam has challenged the Torgerson Defendants' costs claim as excessive, unreasonable, and disproportionate, I have reviewed it in some detail to decide a fair and just result on costs. The Torgerson Defendants' costs claim as presented in their costs submissions is overly complex, to say the least. The bill of costs submitted after the trial was broken into ten legal fee categories, including subdivisions of time for drafting the affidavits of each of the Torgerson Defendants' witnesses. It is easy to follow. It includes a summary of total legal fees disclosing $360,430 in partial indemnity fees and $540,559 in substantial indemnity fees, excluding HST.

[24] In their costs submissions, the Torgerson Defendants have revised certain claimed rates and, seemingly, the hours claimed. The costs claim is summarized in a chart appended as Schedule "A" to the costs submissions. Since the Torgerson Defendants rely on their offers to settle served on February 23, 2022, their costs claim is divided into partial indemnity costs for the pre-offer period and substantial indemnity costs for the post-offer period. Schedule "A" outlines the total hours and rates claimed for each lawyer/professional in those two periods. However, it is organized by lawyer/professional without correlating them to the legal fee categories from the bill of costs. As a result, I had no way of readily determining which fee categories, or portions of fee categories, fall within the pre-offer and post-offer periods.

[25] In my view, the scope of the Torgerson Defendants' bill of costs includes two categories of fees that go beyond the trial of an issue, namely discovery and hearing fees. In my view, with a minor exception, they are both more properly claimable as costs of the action.

[26] With respect to the discovery-related fees, 81.3 hours are claimed for preparation for and attendance at the continued examination for discovery of Nadine Torgerson in December 2021, preparing answers to undertakings, preparing a supplementary affidavit of documents, and corresponding with Bellsam's counsel on late delivery of answers to undertakings. The continued examination, together with any undertakings or productions arising from it, was part of overall discoveries in this action. Nothing in the Torgerson Defendants' submissions or from the trial support that the discovery evidence obtained on or arising from that final date of discovery was exclusively relevant to the trial of an issue. No argument has been made for why it should be treated separately from the balance of examinations. Costs of documentary and oral discoveries are properly costs of the action.

[27] With respect to hearing-related fees, 36.7 hours are claimed for preparing for and attending five of the eight hearings for trial directions before me and a case conference on April 14, 2022. However, other than the hearing for trial directions on March 21, 2022 and the case conference, each of the hearings dealt with matters in the reference before me beyond the trial of an issue, notably positions on subcontractor liens and the process for dealing with them. Although this trial of an issue was discussed at them, other matters were addressed. Costs of those hearings are also properly costs of the action.

[28] The March 21 and April 14, 2022 hearings were exclusively in respect of this trial of an issue. They are properly claimable as costs of this trial. Fortunately, the appended docket summaries permit an accurate calculation of the time associated with those two hearings. I have disregarded the fees claimed for other hearings. Those may be raised again in costs of the action after a final disposition of this proceeding.

[29] With respect to the time claimed, I have some concerns with the extent of research time and duplication between lawyers and clerks attending the same meetings. There is also a claim for time spent by an eDiscovery Specialist at a partial indemnity rate of $90 per hour. Per the dockets filed, that individual downloaded Bellsam's productions, managed production load files, added documents to the eDiscovery database, and performed quality control checks. Separate from whether a law firm is entitled to bill this kind of work to its clients, it is not clear to me why this work, which on its face appears to be administrative in nature, should be viewed as recoverable

litigation costs. Administrative work is not typically recoverable separate from the legal fees charged for lawyers, law clerks, and students-at-law. No case law has been tendered and no argument advanced for recovery of time spent by an eDiscovery Specialist.

[30] In the current age of eDiscovery, I am aware that many law firms have hired specialists who are neither lawyer nor law clerk to manage production databases and support legal teams. I do not find that such time is never recoverable as litigation costs. However, Part 1 of Tariff A in the *Rules* refers to recovery of the counsel fee for motions, applications, trials, references, and appeals. It also expressly contemplates allowing fees for students-at-law and law clerks who have "provided services of a nature that the Law Society of Ontario authorizes them to provide". No other professionals or services are mentioned.

[31] Costs awards indemnify the cost of legal services. What constitutes legal services and the services that may be provided by law clerks and students-at-law are set out in the *Law Society Act*, RSO 1990, c L.8, its regulations, and the by-laws of the Law Society of Ontario. In my view, since eDiscovery specialists (or other non-legal individuals) are not contemplated by the *Rules* as persons whose services may be considered in awarding costs, parties wishing to claim recoverable time for them must make submissions on the nature of their services and the appropriateness of awarding costs for their time in the circumstances of the case before the court. That has not been done here, so I am not allowing the time as recoverable costs for this trial.

Scale of costs

[32] The Torgerson Defendants seek substantial indemnity costs on two bases: (i) Bellsam's conduct in breaching trial-related orders, and (ii) the Torgerson Defendants beating their offers to settle dated February 23, 2022. I am convinced that substantial indemnity costs are warranted.

[33] As set out above, I have discretion in s. 86 of the *Construction Act* to award substantial indemnity costs in an appropriate case. The Court of Appeal has set out that, in civil litigation, an award of costs on an elevated scale is justified in only very narrow circumstances, namely where an offer to settle is engaged or where the losing party has engaged in behaviour worthy of sanction. Substantial indemnity costs is the elevated scale of costs normally resorted to when the court wishes to express its disapproval of the conduct of a party to the litigation: *Net Connect Installation Inc. v. Mobile Zone Inc.*, 2017 ONCA 766 at para. 8.

[34] Although the Court of Appeal's decision was not made in the context of a lien action or s. 86 of the *Construction Act*, it remains instructive in lien proceedings. I have considered both bases for substantial indemnity costs with the Court of Appeal's comments in mind.

[35] Dealing first with Bellsam's conduct, the Torgerson Defendants point to Bellsam's refusal to admit facts that were found at the trial of an issue. In particular, Bellsam provided a blanket denial of all of the requested admissions in the Torgerson Defendants' request to admit. On review of the request to admit, I did ultimately find as fact several of the requested admissions.

[36] Refusing to admit facts that should have been admitted is conduct that may support substantial indemnity costs: see, for example, *Jassal v. Kaith*, 2016 ONSC 3650 at para. 11. The

Torgerson Defendants' request to admit comprises 87 requested admissions. It is drafted largely as a narrative and included matters that the Torgerson Defendants knew were disputed issues and ought reasonably to have known would not be admitted. Failing to admit something that should have been admitted is not the same as being unsuccessful in proving a disputed fact. I do not agree that Bellsam's blanket refusal should attract heightened costs. Although I did not accept Bellsam's position on what transpired between the parties, this is not a case where key facts as I found them at trial clearly ought to have been admitted.

[37] The Torgerson Defendants also point to Bellsam's trial conduct: (i) failing to agree with the Torgerson Defendants' challenges to Teresa Zumpano's affidavit, but ultimately conceding that paragraphs and exhibits should be struck, and (ii) failing to comply with the deadline for serving its document book, which was not served until the day before trial after the peremptory filing deadline for all materials. I agree that unnecessary costs were incurred as a result of both instances, but substantial indemnity costs requires conduct worthy of sanction. I am not convinced that the former rises to that level. However, the latter is different.

[38] After hearing submissions, I ultimately allowed the late-served document book to be relied upon at trial, despite Bellsam's breaching both the order to serve its separate document book and the peremptory filing deadline for all materials. In the context of this reference, where Bellsam had already breached ordered timetables, it was a significant indulgence. Ultimately, despite the time and cost associated with that dispute, Bellsam only tendered a handful of the 94 documents in its document book. In my view, the Torgerson Defendants are entitled to their substantial indemnity costs arising from the late-served document book and the pre-trial motion on admissibility of the documents. It does not, however, support substantial indemnity costs of the entire trial.

[39] I deal next with the Torgerson Defendants' offers to settle. They served three. One was served by each of the individual defendants offering to agree that they were not parties to the contract. The third primary offer was served by all of the Torgerson Defendants. It included two options for Bellsam, which were characterized as "Offer A" and "Offer B". The first offer was for Bellsam to accept that Bellsam and 2567714 Ontario Inc. entered into a contract in or around December 17, 2018, that the agreed base contract price was $2,400,000, that Bellsam was to complete the build-out in a reasonable time, and that the scope of work was defined by the drawings submitted to Bellsam prior to December 16, 2018. The second offer was for Bellsam to agree that there was no enforceable contract and that Bellsam's claim would proceed in *quantum meruit*. Both options were provided with a 7-day no costs acceptance window, after which the offer provided for partial indemnity costs from the date of the offer to the date of acceptance.

[40] The Torgerson Defendants' submit that the result of the trial was such that they met or beat the terms of Offer A. Bellsam disagrees, arguing that if the offer had been accepted, it would have precluded Bellsam's ability to pursue the Torgerson Defendants for changes made to the contract, which I have permitted Bellsam to pursue at para. 149 of my reasons.

[41] I do not agree with Bellsam's submission. Offer A clearly contemplates a "base contract price", not a total contract price. Accepting it would not have precluded any claim for changes or extras. The trial result was substantively the same as Offer A, albeit with additional findings that

the base contract price was $2,300,000, plus HST, and that the parties had agreed to a specific completion date of May 31, 2019. I agree with the Torgerson Defendants that they have "beat" their offer. Had Bellsam accepted it, the base contract price would have been admitted at an agreed higher amount and the admitted and agreed completion deadline would have provided Bellsam with flexibility to argue what constituted a "reasonable" period of time to complete the work. More pertinent to costs, this entire trial and all of the associated costs would have been avoided.

[42] Offer B is also notable here. The Torgerson Defendants were not only offering what ultimately ended up being the substantive the trial result. They were also offering an alternative that would permit Bellsam to pursue its claim on a *quantum meruit* basis. Prior to trial, the parties were in agreement that there were three potential outcomes at trial: that Bellsam's original quote governed, that Bellsam's revised quote governed, or that there was no contract at all.

[43] In their offer, the Torgerson Defendants were rejecting Bellsam's position, but still giving Bellsam the choice of which other avenue would proceed in the litigation: the parties would agree to the Torgerson Defendants' position on the contract or that there was no contract at all. Bellsam opted to maintain its position that its revised quote formed the contract. It was unsuccessful in that position. The Torgerson Defendants were completely successful in obtaining a result that was better than the terms of their offer. My findings are more favourable to them than what Bellsam had been offered, particularly considering that Offer B was also an option available to Bellsam.

[44] The Torgerson Defendants' offer was creative. Although not strictly compliant with rule 49 of the *Rules*, in my view, that does not matter. Rule 49.13 permits the court to consider any offer. Moreover, this is a lien action and the breadth of s. 86 of the *Construction Act* affords me with discretion to consider it in any event. Lien actions are statutorily prescribed to be summary in nature. In my view, practicality and creativity in resolving disputes should be encouraged. Although there is no guarantee that an offer to settle will attract heightened costs, since costs are always in the discretion of the court, parties receiving an offer in a lien action must take stock of their own case and consider whether judicial intervention is genuinely required to resolve the dispute.

[45] In deciding to pursue its position that the revised quote was the basis for the contract, Bellsam had the benefit of documentary and oral discovery evidence. Prior to the trial of an issue, it also had the benefit of all of the trial affidavit evidence. Bellsam opted to call only one witness and, after receiving the Torgerson Defendants' detailed affidavit evidence, still maintained its position that the revised quote formed the contract between the parties and that the contract was with all three of the Torgerson Defendants. I found otherwise. In my view, substantial indemnity costs from the date of the offers is warranted in the circumstances.

Other rule 57.01 factors

[46] There are numerous factors in subrule 57.01(1) of the *Rules* that courts consider in awarding costs. Some of those factors have already been addressed above. Given my concerns about proportionality and the Torgerson Defendants' failure to take the least expensive course of action in how it proceeded with the trial of an issue, I will deal with the reasonable expectations of the parties and quantum of costs separately.

[47] Although the issue for trial was narrow, the trial itself was complex. It involved pre-trial admissibility disputes, disputes over absent witnesses and adverse inferences, and a very detailed fact-driven chronology of events that bore directly on whether and when a contract was formed. The legal requirements for forming a contract were also strongly disputed and required focused submissions on relevant case law.

[48] The core dispute over contract formation was important to both sides. The parties could not agree on which quote governed or even who were the parties to the contract. What constituted the contract between the parties, or if there as no contract, drives many other issues and positions in the overall litigation, including the amounts that Bellsam was entitled to charge and the required scope of work it was to have performed. As a result, both sides had a vested interest in the outcome of this trial of an issue.

[49] The Torgerson Defendants submit that their efforts shortened the proceeding and Bellsam's conduct unnecessarily lengthened it. I do not agree. Both parties' lawyers worked well together to ensure that the trial was run smoothly and efficiently, despite opposed positions, challenges, and objections. The parties' conduct is generally a neutral factor in costs, other than to the extent of my earlier comments.

Quantum of costs award

[50] The Torgerson Defendants submit that the fact that they incurred more costs and time than Bellsam is not an indication that their costs are unreasonable or disproportionate. Rather, they submit it is a reflection of the amount of time and effort that was necessary to present, analyze and synthesize the facts and legal issues into quality and comprehensive submissions.

[51] I generally agree with that submission. Higher costs is not itself indicative of unreasonable or disproportionate costs. Bellsam's bill of costs shows actual legal costs, totalling $173,949.18, including HST and disbursements. That correlates to a partial indemnity claim of approx. $100,000 and a substantial indemnity claim of approx. $145,000. The fact that the Torgerson Defendants' costs are higher than those claimed by Bellsam is understandable. It is consistent with a greater number of witness affidavits, well-prepared materials, evident preparation, and a comprehensive approach to the trial. I accordingly agree with the Torgerson Defendants that Bellsam's bill of costs is not an accurate measure of the reasonable expectations of an unsuccessful party in this case.

[52] That said, as already discussed, the Torgerson Defendants' costs claim is, in my view, disproportionate to the issue in dispute and reflects a failure to take the least expensive course of action. I do not accept that costs in the range sought by the Torgerson Defendants are within reasonable expectations given the nature, complexity, and scope of the trial of an issue, even accounting for the reduction in the rates claimed by the three senior lawyers to match the amount claimed for Bellsam's now-former lawyers. That, though, must be balanced with the fact that I have found that substantial indemnity costs from the date of the Torgerson Defendants' offers to settle is warranted and, further, that they would be entitled to substantial indemnity costs of the document admissibility dispute in any event.

[53] As noted at the outset of these reasons, Bellsam concedes that an award of $174,000 "is proportionate to the amount in dispute and is in line with what a reasonable party would expect to incur". Bellsam's subjective view of what is reasonable and proportionate is not determinative. I agree that Bellsam cannot complain about such an award, but it would not reflect the greater work performed by the Torgerson Defendants and the large period of substantial indemnity costs following the offers to settle.

[54] I also note that, other than challenging the overall costs claim as being excessive and disproportionate, Bellsam has not specifically challenged any of the hourly rates claimed. I find them to be reasonable, particularly given the reduction in the claimed rate for the three senior lawyers. The claimed disbursements also appear reasonable and are unchallenged by Bellsam.

[55] Fixing costs is not a mathematical exercise, although it is not entirely divorced from it. The court must have regard to the actual hours claimed and time spent when fixing cots. However, I am not bound by the *Rules* stipulating that substantial indemnity costs are 1.5 times the partial indemnity costs. That calculated approach to substantial indemnity costs is inconsistent with the discretionary nature of s. 86 of the *Construction Act*.

[56] Considering the foregoing, and weighing the factors in subrule 57.01(1) of the *Rules*, the result of the trial, the impact of the Torgerson Defendants' offers to settle, and the broad discretion afforded to me by s. 86 of the *Construction Act*, I fix costs of the trial of an issue in the total amount of $285,000, inclusive of HST and disbursements, which is a rounded sum comprised of: (i) $32,500, plus HST, in partial indemnity costs to the date of the offers, including costs for the March 21 and April 14, 2022 hearings, but excluding discovery and other hearing costs in categories 1 and 3 of the bill of costs (which shall be claimable as costs of the action); (ii) $140,000, plus HST, in substantial indemnity costs from the date of the offers to the conclusion of trial; and (iii) $10,974.91 in disbursements.

Costs of costs submissions

[57] In addition to costs of the trial of an issue, the Torgerson Defendants seek their partial indemnity costs of preparing their costs submissions. A costs outline has been submitted showing actual legal fees of $24,934, plus HST, which does not include preparing their reply submissions. The partial indemnity claim is for $13,261.26, including HST.

[58] In my reasons for judgment, I did not specifically address the parties' entitlement to costs of the costs submissions. No case law has been provided addressing the Torgerson's entitlement to such costs, but there is no principled reason why I should not consider the claim. It was a required step following the trial decision.

[59] I have difficulty with the hours spent and the amount claimed by the Torgerson Defendants on their costs submissions. Those submissions consist of five pages of written submissions, an additional one-page costs claim summary, and a short brief comprised of the offers to settle and affidavit of service for them. The submissions do cite numerous cases, but I am frankly at a loss for why the five-page submission required the involvement of three lawyers and a student-at-law with an aggregate time investment of 46.2 claimed hours. The Torgerson Defendants submit that

it was important to them to seek indemnification for the significant legal costs they incurred preparing for and attending the trial of an issue. I accept that. However, I have found that their incurred legal costs are beyond reasonable expectations. The time expended on costs submissions is, in my view, excessive and also well beyond the reasonable expectations of any party in the circumstances of this trial of an issue.

[60] Costs of the costs submissions is appropriate in the circumstances of this case, but the Torgerson Defendants' costs claim is unjustified on the materials before me. I am awarding partial indemnity costs of $2,500, including HST, for the costs submissions.

Disposition on costs

[61] For the above reasons, Bellsam shall pay to the Torgerson Defendants their costs of the trial of an issue and trial costs submissions fixed in the amount of $287,500.00, inclusive of HST and disbursements, which shall be payable within sixty (60) days of my interim report being confirmed. Order accordingly.

ASSOCIATE JUSTICE TODD ROBINSON

DATE: October 6, 2023