

CITATION: CLEAResult Canada Inc. v. Santomero, 2025 ONSC 573
COURT FILE NO.: CV-24-00719420-00CL
DATE: 20250128

ONTARIO

SUPERIOR COURT OF JUSTICE (COMMERCIAL LIST)

BETWEEN:)	
)	
CLEAResult CANADA INC. and)	<i>Sarah Whitmore and Kylie de Chastelain, for</i>
CLEAResult CONSULTING INC.)	CLEAResult Canada Inc. and CLEAResult
Applicants (Defendants)	Consulting Inc.
in CV-24-00718895-00CL))	
)	
– and –)	
)	
JASON SANTOMERO, KATHY)	<i>Aaron Kreaden, for Jason Santomero,</i>
SANTOMERO and 11168843 CANADA)	Kathy Santoro, and 11168843 Canada Ltd.
LTD.)	
Respondents (Plaintiffs)	
in CV-24-00718895-00CL))	
)	
)	

KIMMEL J.

COSTS ENDORSEMENT

Summary of the Decision on the Application and Directions Regarding Costs

[1] The court's decision in this application was rendered on November 4, 2024: see *CLEAResult Canada Inc. v. Santomero*, 2024 ONSC 6054 (the "Application Decision"). Capitalized terms not otherwise defined in this endorsement shall have the meanings ascribed to them in the Application Decision.

[2] The Applicants sought to enforce the agreed upon procedure in section 2.9 of the parties' Share Purchase Agreement dated June 27, 2022 (the "SPA" or the "Agreement"). That procedure would allow the appointed Independent Auditor, BDO Canada LLP ("BDO"), to proceed with the expert adjudication of the Reverse Earn-Out Calculation as prescribed under ss. 2.8 and 2.9 of the Agreement that was precipitated by the delivery of Reverse Earn-Out Calculations by the Purchaser (CLEAResult Canada Inc.) and Reverse Earn-Out Objection Notices delivered by the Vendors (Respondents).

[3] The Respondents argued that before the Independent Auditor could adjudicate the Reverse Earn-Out Calculation, there are other disputes under the SPA that first need to be adjudicated by the court (the "Other Disputes") in another proceeding pending on the regular civil list in this court (the "Action").

[4] The court agreed with the Applicants' position that the Reverse Earn-Out Calculation that BDO was engaged as the Independent Auditor to undertake should not be held up by the Other Disputes raised in the Action. The court ruled that the Independent Auditor must determine what information is needed for it to properly determine the Reverse Earn-Out Calculations and Payment amounts, if any. The Application was granted.

[5] The parties advised during oral submissions that they agreed that if one side was wholly successful, that party would be paid the all-inclusive amount of \$60,000 in costs for this application.

[6] The court observed in the Application Decision that the Applicants were successful, but that not all of the relief in their Notice of Application was granted, and not all of the specific relief sought in their factum and original draft order (for an order directing BDO to take specific steps and actions) was granted.

[7] It was noted in the Application Decision that the Respondents had raised concerns about the lack of clarity around the Applicants' position regarding the scope of what BDO can look at in carrying out its mandate, particularly with respect to the ability of BDO to look at past practices. The Applicants confirmed in the course of the application that BDO could do that as part of the determination of EBITDA. The Respondents raised further concerns about the Applicants' agreement in the BDO Engagement Letter to explore a broader investigative mandate for BDO that was almost immediately shut down without any real attempt to negotiate that broader mandate.

[8] The court directed in the Application Decision that, if the Respondents are seeking to reduce the agreed upon quantum of costs to be awarded to the Applicants on this application, for any of the above, or other, reasons, the Respondents could deliver a brief cost submission within two weeks of the release of that decision with a proposed reduced costs amount. If, after that, the parties were still unable to reach an agreement on costs, the Applicants could deliver a responding cost submission and the Respondents could deliver a reply cost submission within a week thereafter.

The Parties' Positions on Costs

[9] The Respondents delivered a cost submission dated November 15, 2024 seeking a 75% reduction of the \$60,000 in costs that the parties had agreed would be paid to the successful party on the application, and asking that the court fix the partial indemnity costs to be awarded to the Application in the amount of \$15,000. The proposed reduction was on account of the grounds noted in the Application Decision and other grounds.

[10] The parties exchanged without prejudice offers regarding the amount of costs thereafter, with the Respondents offering to pay \$30,000 in costs and the Applicants countering at \$45,000. No agreement was reached.

[11] In their responding cost submissions dated November 29, 2024, the Applicants asserted their entitlement to the agreed amount of \$60,000 in costs but re-affirmed their offer to accept the reduced amount of \$45,000 on a without prejudice basis.

[12] The Respondents' reply cost submissions dated December 6, 2024 reaffirmed their earlier position that they should pay \$15,000 or, in the alternative, \$30,000 in costs to the Applicants, based on the offer that they had made.

Analysis and Costs Decision

[13] The only issue to be decided regarding costs is whether the agreed amount of partial indemnity costs should be reduced on account of the conduct of the Applicants or positions taken by them leading up to or in the course of this Application, upon consideration of the applicable factors under Rule 57.01(1).

[14] The discretion of the court must be exercised in light of the specific facts and circumstances of the case having regard to the factors enumerated in that Rule, which include in the context of this costs decision: i) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of any proceeding; ii) whether any step in the proceeding was improper, unnecessary or taken through mistake; iii) a party's denial of or refusal to admit anything that should have been admitted; and iv) any other matter relevant to the question of costs.

[15] The positions of the Applicants that the Respondents say warrant a reduction in the agreed amount of costs to be paid to the Applicants for their success in having prevailed on the contract interpretation issue are to account for: (i) the Applicants' refusal to provide the requested information, (ii) their "agreement" to consider an investigation mandate and then shut it down entirely, (iii) their refusal to engage with the questions posed by the Respondents' expert; and (iv) their incorrect attempts to prevent BDO from reviewing matters (e.g. past conduct and practices) that everyone now acknowledges falls within EBITDA.

[16] The Applicants say that none of these positions were relevant to the determination of the issues on the application and many are the subject of the Action. Ultimately, the Applicants say that the Respondents were the ones who took unreasonable positions regarding the scope and timing of BDO's mandate. The Applicants contend that, by disregarding the terms of the SPA and maintaining unreasonable positions on sequencing, the investigative mandate, and the supposed inextricability of the financial accounting and covenant breach issues, the Respondents' conduct necessitated this Application and unnecessarily protracted the parties' global dispute.

[17] The Applicants say that by proposing that parties jointly instruct BDO to adjudicate the Applicants' calculations of EBITDA and the Reverse Earn-Out Payments, it was implicit that they were agreeing that BDO could look at and consider past practices. On this point, but for the history of

dealings between counsel for the parties (including prior counsel for the Applicants), the Applicants' position might be more compelling. However, there was clearly a disconnect on the question of what BDO could look at and whether it could consider past practices, even when determining EBITDA, that was only clarified in the course of the submissions on the application.

[18] Having further reflected on the issues and positions of the parties, I have determined that the lack of clarity in the Applicants' position regarding the ability of BDO to consider past practices is the only one that reflects conduct on the part of the Applicants that is relevant to the court's exercise of discretion in the determination of a fair and reasonable amount of costs to award the Applicants, who were (as noted in the Application Decision) the successful parties on this application and entitled to an award of costs. I find that the reduced amount offered by the Applicants, of \$45,000, fairly accounts for this in the costs award.

[19] In the exercise of my discretion under s. 131 of the *Courts of Justice Act*, and having regard to the relevant factors under Rule 57.03 and the quantum of partial indemnity costs that the parties agreed would be appropriate to award to any party that was wholly successful on this application, I fix the partial indemnity costs of the Applicants in the all-inclusive amount of \$45,000 and order the Respondents to pay those costs to the Applicants forthwith.

KIMMEL J.

Released: January 28, 2025