

Issues

- 1: Which party is entitled to costs?
- 2: What is the appropriate scale of costs?
- 3: What is the reasonable quantum of costs?

Issue 1: Which party is entitled to costs?

[3] The successful party is presumptively entitled to costs: *Sims-Howarth v. Bilcliffe*, 2000 ONSC 22584 at paragraphs 13.

[4] In the present case, the Defendant was entirely successful and is entitled to an award of costs.

What is the Appropriate scale of costs?

[5] The Defendants seek their costs on a substantial indemnity basis, arguing that they were entirely successful, and that the Plaintiff did not accept two offers which were made more than a year prior to trial, and prior to most of the trial preparation.

[6] The Defendants' bill of costs is \$166,208.21, on a partial indemnity basis, and \$219,589.41 on a substantial indemnity basis.

[7] In *Falsetto v. Falsetto*, 2022 ONSC 5089, the court held that where the plaintiff recovers no damages the Court may fix costs on a substantial indemnity scale from the date of the defendant's first offer: para 37.

[8] In *Lalani Properties et al v. Intact Insurance/2160943 Ontario v. Intact Insurance et al*, 2024 ONSC 892 Vella J. also awarded substantial indemnity costs after the date of the defendant's first offer indicating that this was based on the court's discretion without reference to r. 49.10.

[9] She indicated that this approach promotes the "policy objective underlying offers to settle generally; namely, to encourage settlement with the risk that if the offer is better than the result, the recipient has an enhanced cost consequence."

[10] As well, I take into account direction from appellate courts that although the court has the discretion to award substantial indemnity costs, such costs are “rare and exceptional” and only warranted where there has been reprehensible, scandalous or outrageous conduct on the part of a party: see *DUCA Financial Services Credit Union Ltd. v. Bozzo*, 2010 ONSC 4601, at para. 5; *Foulis v. Robinson* (1978), 21 O.R. (2d) 769 (C.A.); and most recently *Mars Canada Inc. v. Bemco Cash & Carry Inc.*, 2018 ONCA 239, 140 O.R. (3d) 81, at para. 43.

What is the reasonable quantum of costs?

[11] Pursuant to s. 131(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, costs are in the discretion of the court. Rule 57 of the *Rules* sets out the factors which courts should have regard to when awarding costs. I have reviewed those factors here.

[12] The overall objective is “to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding, rather than an amount fixed by the actual costs incurred by the successful litigant”: *Zesta Engineering Ltd. v. Cloutier* (2002), 21 C.C.E.L. (3d) 161 (Ont. C.A.), at para. 4; *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.), at para. 26; *Clarington (Municipality) v. Blue Circle Canada Inc.*, 2009 ONCA 722, 100 O.R. (3d) 66, at para. 52; and *G.C. v. Ontario (Attorney General)*, 2014 ONSC 1191, at para. 5.

Offers to Settle

[13] On July 12, 2023 the Defendants offered to settle the civil case by paying \$50,000 to the Plaintiff from the proceeds of 227 Rymal Road, with the balance to the Defendants, and each party bearing their own legal fees.

[14] The Defendants later made another offer to settle this matter in conjunction with the family litigation, for a payment of \$100,000 to the Plaintiff on account of both matters. When this second offer was made, the initial July 12, 2023 offer was not revoked. I agree with the Defendants that there is no reason to conclude that subsequent offer either cancelled or changed the effect of the July 12, 2023 offer.

Analysis

[15] After receiving the Defendants' reply submissions, I was in receipt of a note from Plaintiff's counsel, sent by email and copied to counsel for the Defendants, advising that he finds paragraph 2 of the Defendants' cost submissions may "impugn his integrity", and he requested an opportunity to make submissions in that regard. I decline his request. Paragraph 2 of the Defendants' reply submissions read:

The plaintiff's current bill of costs is proportionately lower than the \$20,958 claimed for a short, 1.5-hour procedural motion to consolidate the two cases, where the plaintiff was successful. This suggests that the plaintiff is now deflating her costs to minimize her liability for the defendants' costs.

[16] I do not accept that this impugns the integrity of counsel, as it is virtually the exact terminology that Plaintiff's counsel used in his submissions about the Defendants' costs, wherein he made the following statements: "their bill appears inflated"; "the bill overstates the fees charged" "the dockets appear inflated because many entries are recorded as whole hours and all trial days are the same length".

Conduct of the Parties

[17] In my decision on the trial, I found the Plaintiff's evidence to have lacked credibility in every respect, and as a result, she was entirely unsuccessful. This was not a situation of divided success.

[18] I have balanced this in relation to the fact that the Plaintiff's case was presented in an organized fashion, and that much of the excess time spent which far extended the originally estimated length of the trial of only 5 days, was in relation to the Defendants' conduct of the case.

[19] I have considered that Counsel for the Defendants made a number of attempts at settlement, including the *Rule 49* offer of July, 2023, which I find was not nullified by the subsequent offer, though it makes little difference if it were. The Defendants were entirely successful in defending the Plaintiff's claims, faring better than the offers made to the Plaintiff.

Expectation as to costs

[20] In considering the unsuccessful Plaintiff's reasonable expectation as to costs, I have reviewed the Plaintiff's bill of costs, and her prior bills of costs, and her other conduct. The Plaintiff admits that they advised the Defendants in January 2024 that their mid trial partial indemnity costs at that time were \$100,000.

[21] The Defendants point out that the Plaintiff's costs of her successful 1.5 day motion were over \$19,000. I agree with the Defendants that the Plaintiff's bill of costs on a 1.5 day motion were proportionately higher than any of the bills of cost before me on the trial.

[22] The Offers to settle were in July and November 2023, well ahead of the time when trial preparation would have begun.

[23] I also agree the submission of Plaintiff's counsel as they related to the Defendants' conduct of the trial being inefficient and having resulted in the trial running longer than necessary. In my view, the trial ought to have been significantly more efficient from the Defendants' perspective. Where there were delays in starting on time, or failure to ensure prompt availability of witnesses, and failure to make use of full court days, those delays lay disproportionately at the feet of the Defendants.

[24] I have considered also that the Defendants brought an entirely unsuccessful motion regarding hearsay evidence during the trial, for which they appear to have included well over 20 hours of preparation in their docket. Their unpreparedness to address the motion required that the matter be addressed over several days. The motion was unsuccessful, and I found that the evidence did not approach the standard which would have been required in arguing an exception to the hearsay rule. In total the motion easily accounted for more than one full day of court time, in addition to significant related preparation. The costs of this motion should not be recovered. I balance this against the Plaintiff's unsuccessful motion brought at the beginning of trial, which took up the better part of a half day.

[25] The Defendants concede that the Plaintiff is impecunious which "may be one of the factors the court could consider in the exercise of the courts discretion under S. 131 of the Courts of Justice

Act in determining a reasonable amount of costs”: *Agius v Home Depot*, 2011 ONSC 5272 at para 17.

Importance of the Issues:

[26] The dispute at trial was over a 55% interest in real property, or \$416,900, although I note that the Plaintiff claimed 100% interest in the property during her testimony at trial. In the circumstances known to me, I find that the case was significant to the parties.

Complexity

[27] The factual matrix was complex, but the legal issues in the case were of moderate complexity.

Conclusion

[28] Although I did not accept the Plaintiff’s evidence, I do not find that her conduct rises to the point of being scandalous and outrageous, and, in consideration of everything presented, including, inter alia, the length and complexity of the trial, the Offers to Settle, the Defendants’ complete success in defending against the Plaintiff’s claims, balanced against the inefficient conduct of the case, in my view, I decline to exercise my discretion to order costs on an increased scale, and find that the proper scale of costs is on a partial indemnity basis.

[29] I find that a reasonable and proportionate award of costs in all of the circumstances here, is a cost award in favour of the defendants on a partial indemnity scale, somewhat reduced to reflect the concerns indicated above. I award the Defendants their costs in the amount of \$155,000.00 inclusive, less an \$8,500 costs award made in favour of the Plaintiff on September 8, 2023, if it has not been paid at the time of the release of these reasons.

[30] The Defendants urge me to order that those costs may be recovered against the proceeds of a property held in trust in relation to the family proceedings, given their belief that the Plaintiff is impecunious. I decline to make an order to impact property held in trust in relation to another proceeding.

Order

[31] The Plaintiff shall pay \$155,000 to the Defendants, inclusive of all costs, including disbursements and HST, less the \$8,500.00 costs set-off from Justice Broad's outstanding September 8, 2023 endorsement (if it has not been paid), within 30 days of the date herein.

S. Antoniani, J.

Released: February 18, 2025

CITATION: Alsous v. Hadweh et al., 2025 ONSC 1052
COURT FILE NO.: CV-20-74557
DATE: 2025-02-18

2025 ONSC 1052 (CanLII)

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

RANA ALSOUS

Plaintiff

- and -

BISHARA HADWEH and DUAA HADWEH

Defendants

DECISION RE COSTS

S. Antoniani, J.

Released: February 18, 2025