Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

THE CATALYST CAPITAL GROUP INC.

Plaintiff

- and –

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants

COSTS SUBMISSIONS OF THE DEFENDANT, BRANDON MOYSE

July 20, 2015

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TAB A

A. Overview

1. The Catalyst Capital Group Inc. ("Catalyst") brought a contempt motion against one of its former junior employees, Brandon Moyse. On July 7, 2015, Justice Glustein dismissed the motion in its entirety.

2. Mr. Moyse now seeks his costs against Catalyst on a partial indemnity scale in the amount of $110,000.00, inclusive of HST, plus disbursements. Though this amount is on the high end of costs awards on unsuccessful contempt motions, it is not unprecedented.[1] The amount is fair and reasonable given the seriousness of the allegations Catalyst made against Mr. Moyse, the technical nature of the forensic computer evidence marshalled, and the manner in which Catalyst pursued this motion. Catalyst could have reasonably expected that Mr. Moyse would defend himself vigorously against a motion seeking, among other things, his imprisonment.

3. As reflected in the attached costs outline, the amount Mr. Moyse seeks is significantly less than his actual costs, and less than he would normally be expected to seek in partial indemnity costs. This reduced amount reflects that in light of the seriousness of Catalyst's allegations, he retained new counsel for the contempt motion who were required to familiarize themselves with the case. It also reflects Mr. Moyse's recognition that he could have protected his legitimate privacy concerns in ways that would have reduced the likelihood of Catalyst responding in the way that it did.[2]

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[1] See e.g. *SeaWorld Parks & Entertainment LLC v Marineland of Canada Inc.*, 2013 ONSC 1930, where the court awarded the alleged comtemnor $100,000 in costs on a partial indemnity scale, inclusive of tax and disbursements.

[2] Cross-Examination of Brandon Moyse, May 11, 2015, 2nd Supplementary Motion Record, Tab 13, p. 313, Q. 521.

B. General principles in fixing costs on contempt motions

4. The court's power to award costs on a contempt motion is discretionary and decided in accordance with the factors in rule 57.01 of the *Rules of Civil Procedure*.[3] A successful party on a contempt motion is presumptively entitled to his or her costs.[4]

5. In fixing costs on civil contempt motions, the court should give particular significance to the quasi-criminal nature of the proceedings:

> A contempt proceeding is punitive in nature with broad powers given to the court, including the power to order imprisonment. ... When successful, a party should not have to bear the costs of defending against the serious allegation that he or she had acted in a way that exhibited contempt for the court. In my view, together with the judgment of this court, an appropriate award of costs constitutes public rehabilitation of the [alleged contemnor's] reputation.[5]

C. Mr. Moyse is entitled to his costs in the amount sought

6. The importance of the issues to Mr. Moyse on this motion cannot be understated. Catalyst sought an order:

(a) declaring that he was in contempt of court,
(b) committing him to jail for a period to be determined by the court, and
(c) in addition or in the alternative, that he be fined in an amount to be determined by the court.[6]

7. Catalyst put Mr. Moyse's liberty, reputation, and integrity at stake. He had no choice but to respond vigorously to the contempt motion.[7]

8. In fixing Mr. Moyse's costs, the court should consider the increasingly desperate manner in which Catalyst pursued this motion even when its contempt allegations became unsupportable on the evidence. Catalyst moved to have Mr. Moyse found in contempt of

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[3] *Rules of Civil Procedure,* R.R.O. 1990, Reg 194, rule 57.01.
[4] *Bell Canada v Olympia & York Developments Ltd.* (1994), 17 OR (3d) 135 (ONCA) at p 14; *SeaWorld Parks & Entertainment LLC v Marineland of Canada Inc. supra*, at para 6.
[5] *Rogacki v Belz*, [2004] OJ No 719 (ONCA), per Borins J.A., dissenting, at para 7.
[6] Catalyst Amended Notice of Motion, Catalyst Motion Record, p. 3, para (c.1)-(c.2).
[7] See *Azzopardi v Potomski*, 2008 CanLII 54962 (ONSC) at para 33.

court on the basis of his use of the "Secure Delete" program on his computer and relied entirely on the evidence of its forensic expert, Martin Musters, on this point. Mr. Musters filed three affidavits, and Mr. Moyse's forensic expert, Kevin Lo, filed two affidavits, on which both were cross-examined. Mr. Musters conceded on cross-examination that his conclusion that Mr. Moyse had run the "Secure Delete" program on his computer was incorrect, and that Mr. Moyse's forensic expert was correct: there was in fact no evidence that Mr. Moyse had run the "Secure Delete" program, or used it to delete any files.[8]

9. Catalyst nevertheless doggedly pursued the motion even in the face of its expert's critical concession. Catalyst then advanced a new theory, arguing that Mr. Moyse was nevertheless in contempt based on his evidence that he had deleted his personal web browsing history prior to turning over his personal devices for imaging. Catalyst argued, without any basis in the record, that Mr. Moyse had deleted relevant information when deleting his web browsing history, without leading expert or other evidence on this point. The court rightly rejected this speculation and dismissed Catalyst's motion.

D. Relief sought

10. Mr. Moyse requests an order awarding him his costs against Catalyst on a partial indemnity scale in the amount of $110,000.00, inclusive of HST, plus disbursements.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of July, 2015

Robert A. Centa / Kristian Borg-Olivier / Denise Cooney

Paliare Roland Rosenberg Rothstein LLP
Lawyers for the Defendant Brandon Moyse

[8] Endorsement of Glustein J., July 7, 2015, at para. 79.

Schedule "A"

1. *SeaWorld Parks & Entertainment LLC v Marineland of Canada Inc.*, 2013 ONSC 1930
2. *Bell Canada v Olympia & York Developments Ltd.* (1994), 17 OR (3d) 135 (ONCA)
3. *Rogacki v Belz*, [2004] OJ No 719 (ONCA)
4. *Azzopardi v Potomski*, 2008 CanLII 54962 (ONSC)

Schedule "B"

Rules of Civil Procedure, R.R.O. 1990, Reg 194

GENERAL PRINCIPLES

Factors in Discretion

57.01 (1) In exercising its discretion under section 131 of the Courts of Justice Act to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,

(0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;

(0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;

(a) the amount claimed and the amount recovered in the proceeding;

(b) the apportionment of liability;

(c) the complexity of the proceeding;

(d) the importance of the issues;

(e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;

(f) whether any step in the proceeding was,

(i) improper, vexatious or unnecessary, or

(ii) taken through negligence, mistake or excessive caution;

(g) a party's denial of or refusal to admit anything that should have been admitted;

(h) whether it is appropriate to award any costs or more than one set of costs where a party,

(i) commenced separate proceedings for claims that should have been made in one proceeding, or

(ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer; and

(i) any other matter relevant to the question of costs.

TAB B

Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

THE CATALYST CAPITAL GROUP INC.

Plaintiff (Moving Party)

- and -

BRANDON MOYSE and **WEST FACE CAPITAL INC.**

Defendants (Responding Parties)

COSTS OUTLINE OF THE DEFENDANT BRANDON MOYSE

(Motion heard July 2, 2015)

The defendant and responding party Brandon Moyse provides the following outline of the submissions in support of the costs he is seeking further to the order of Glustein, J.:

	Partial Indemnity	Actual
Fees (as detailed below)	$ 115,817.50	$212,687.50
HST on Fees	$ 15,026.28	$ 27,649.38
Total Fees and HST	$130,873.78	$240,336.88
Disbursements (as detailed in the attached appendix)	$21,602.32	$21,602.32
Total Fees, HST and Disbursements	$152,476.10	$261,939.20

Fee Items	Name	Hours	Partial Indemnity Rate / Fee	Actual Rate(s) / Fee
Inter-office communications; communications with counsel; Reviewing moving party's motion materials; Attendances at Civil Practice Court; Legal research; Preparing Responding Motion Records, Factum and Brief of Authorities; Preparing for and conducting cross-examinations; Preparing for motion; Attending at court on June 11, 2015 and July 2, 2015; Reviewing endorsement of Glustein, J.	Chris Paliare	1.0	$350.00 ($350.00)	$900.00 ($900.00)
	Robert Centa	149.3	$300.00 ($44,790.00)	$600.00 ($89,580.00)
	Kris Borg-Oliver	142.8	$300.00 ($42,840.00)	$525.00 ($74,970.00)
	Denise Cooney	121.1	$225.00 ($27,247.50)	$375.00 ($45,412.50)
	Student	6.5	$60.00 ($390.00)	$200.00 ($1,300.00)
	Law Clerk	2.5	$80.00 ($200.00)	$210.00 ($525.00)
	Total this section: Partial Indemnity fees: $115,817.50 Actual fees: $212,687.50			

LAWYER'S CERTIFICATE

I CERTIFY that the hours claimed have been spent, that the rates shown are correct and that each disbursement has been incurred as claimed.

Date: July 20, 2015

Robert A. Centa

APPENDIX

Disbursement	Amount
Taxable Disbursements	
Photocopies & Binding[1]	$ 4,081.50
Froese Forensic Partners	12,921.34
Transcripts	1,988.00
Couriers and taxis	197.77
Telephone and Miscellaneous	93.49
Process server fees	335.00
Total	$19,117.10
HST	2,485.21
Total Disbursements and HST	**$21,602.32**
TOTAL Disbursements and HST	**$21,602.32**

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[1] The amount sought for disbursements reflects that Mr. Moyse produced the Joint Book of Authorities and the other parties contributed to that cost.

TAB 1

Para 6

CITATION: SeaWorld Parks & Entertainment LLC v. Marineland of Canada Inc., 2013 ONSC 1930
COURT FILE NO.: 52783/11 (St. Catharines)
DATE: 2013/04/02

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: SeaWorld Parks & Entertainment LLC (Applicant) v. Marineland of Canada Inc. (Respondent)

BEFORE: The Honourable Mr. Justice R.A. Lococo

COUNSEL: Peter R. Jervis and P. John Landry, for the Applicant

Doug Hunt, Q,C. and Andrew Burns, for the Respondent

HEARD: By written submissions

ENDORSEMENT – COSTS

[1] In an oral decision on December 7, 2011 after a hearing lasting two full days, I dismissed SeaWorld Parks & Entertainment LLC's motion that Marineland of Canada Inc. be found in contempt of an order of this court dated July 5, 2011.[1] That order granted SeaWorld possession of a killer whale located at Marineland's facilities in Niagara Falls and directed Marineland's co-operation in the whale's transport to the United States. The question of costs was left to be determined in a manner to be arranged by the parties through the trial co-ordinator.

[2] Nothing more was heard from the parties until almost a year later, when the trial co-ordinator was advised in November 2012 that the parties had not agreed on costs, and that a determination by the court would be required. Both parties suggested written submissions. As well, SeaWorld requested (opposed by Marineland) that a hearing also be convened to allow oral submissions once written submissions had been exchanged. The parties were directed to exchange written submissions consisting of a costs outline plus additional written submissions not to exceed five pages. A decision on whether oral submissions would also be required was deferred until after the written submissions were received.

[3] Written submissions were subsequently received from Marineland's counsel on January 30. 2013 and SeaWorld's counsel on March 12, 2013. Counsel complied with at least the letter of the court's directions as to the length of the written submissions, although given the size of the type font in places I was fortunate to have a magnifying glass on hand. The submissions for both parties also included a number of attachments, which in the case of SeaWorld ran to some seven substantial volumes.

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[1] See *SeaWorld Parks & Entertainment LLC v. Marineland of Canada Inc.*, 2011 ONSC 4084; aff'd 2011 ONCA 616.

[4] Subrule 57.01(7) of the *Rules of Civil Procedure*[2] directs the court to devise the simplest, least expensive and most expeditious process for fixing costs, and provides the court with specific authority to fix costs after receiving written submissions, without the attendance of the parties. Having reviewed the written costs submissions and supporting material, I am satisfied that both parties have had an ample opportunity to put their positions before the court, and that additional oral submissions are not required.

[5] In their written submissions, each party have requested costs from the other party. Marineland is requesting full indemnity costs of over $252,000. SeaWorld is requesting substantial indemnity costs of over $269,000. SeaWorld's costs claim included disbursements for U.S. legal fees of over $120,000 incurred to defend actions brought by Marineland in U.S. courts which, if successful, would have impeded the transport of the killer whale to the United States.

[6] The successful party on the contempt motion is presumptively entitled to its costs.[3] However, the court has the authority to deny the successful party its costs, as well as the power to award costs against the successful party in a proper case.[4] SeaWorld argued that I should exercise that authority and order Marineland to pay Seaworld costs in this case. SeaWorld relied in particular on Marineland's conduct in attempting to impede compliance with this court's July 2011 order, including the legal actions brought by Marineland in the United States.

[7] Having considered SeaWorld's submissions, I am not satisfied that I should depart from the presumptive result that SeaWorld should be ordered to pay Marineland's costs. In order to succeed on a contempt motion, the moving party must meet the high onus of establishing contempt beyond a reasonable doubt. I dismissed SeaWorld's motion because I found that SeaWorld had not met that onus. In particular, I found that I was left in reasonable doubt in this case as to whether Marineland's attempts to pursue what it perceived to be its legal rights in a foreign jurisdiction constituted contempt of the order of this court. While I stated elsewhere in my oral reasons that Marineland had skated close to the line, I am not satisfied that Marineland's conduct was so egregious as to justify ordering them to pay the costs of the unsuccessful moving party on the contempt motion, nor does it justify denying Marineland its costs.

[8] Marineland requested that SeaWorld be ordered to pay its costs on a full indemnity basis or at least a substantial indemnity basis. In particular, Marineland argued that given the nature of contempt proceedings, the paramount considerations were the principle of indemnity, reasonable expectations of the party and the importance of the issues,[5] which should ordinarily attract an award of at least substantial indemnity costs to the successful defending party. Marineland also

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[2] R.R.O. 1990, Reg. 194.
[3] See *Bell Canada v. Olympia & York Developments Ltd.*, [1994] O.J. No. 343, 17 O.R. (3d) 135 (C.A.) at para. 21.
[4] *Rules of Civil Procedure*, *supra*, subrule 57.01(2).
[5] *Rules of Civil Procedure*, *supra*, subrules 57.01(0.a), 57.01(0.b), and 57.01(d).

relied on SeaWorld's alleged failure to comply with all necessary procedural requirements for the granting of a contempt order as justifying at least a substantial indemnity costs order.

[9] After considering Marineland's submissions, I have concluded that the costs award in favour of Marineland should be on a partial indemnity basis. Substantial indemnity costs are intended to be awarded on an exceptional basis, saved for extenuating circumstances such as situations where there has been egregious conduct or where the motion was brought unreasonably. [6] I do not consider that SeaWorld's conduct rose to the level of justifying an award of substantial indemnity costs. In making this determination, I have also taken into account Marineland's conduct, including its unsuccessful attempts to avoid compliance with the July 2011 order of this court once that order was upheld by the Court of Appeal in September 2011. While Marineland's conduct did not merit a finding of contempt or denial of its costs, I find it somewhat disingenuous in all the circumstances for Marineland to suggest that SeaWorld's conduct merits a substantial indemnity costs award against it. In my view, the contempt motion although unsuccessful was reasonably brought by SeaWorld, and I have no criticism to offer for the way SeaWorld conducted the motion.

[10] After reviewing the costs outlines filed by the parties, I have concluded that in all the circumstances, a partial indemnity costs award to Marineland of $100,000 would be appropriate in this case. I have no reason to question the quantum of the legal costs incurred by Marineland given the potentially serious consequences of an adverse finding. However, I consider that the amount I am awarding to more appropriately reflect the amount that SeaWorld should reasonably expect to pay in all the circumstances, including the respective conduct of the parties.

[11] Accordingly, an order will issue requiring SeaWorld to pay Marineland's costs of the contempt motion on partial indemnity basis, fixed at $100,000 inclusive of disbursements and tax, payable within 30 days.

The Honourable Mr. Justice R.A. Lococo

Released: April 2, 2013

[6] *Empire Life Insurance Co. v. Krystal Holdings Inc.*, [2009] O.J. No. 1095 (S.C.) at para 19.

CITATION: SeaWorld Parks & Entertainment LLC v. Marineland of Canada Inc., 2013 ONSC 1930
COURT FILE NO.: 52783/11 (St. Catharines)
DATE: 2013/04/02

SUPERIOR COURT OF JUSTICE - ONTARIO

B E T W E E N:

SeaWorld Parks & Entertainment LLC

Applicant

- and -

Marineland of Canada Inc.

Respondent

BEFORE: The Honourable Mr. Justice R.A. Lococo

COUNSEL: Peter R. Jervis and P. John Landry, for the Applicant

Doug Hunt, Q.C. and Andrew Burns, for the Respondent

ENDORSEMENT – COSTS

Lococo J.

Released: April 2, 2013

TAB 2

File No. C15202

COURT OF APPEAL FOR ONTARIO

BLAIR, McKINLAY AND CARTHY JJ.A.

B E T W E E N:	
BELL CANADA	
Plaintiff (Respondent)	*Robert M. Loudon, Q.C.* and *Paul A. Ivanoff* for the appellant Olympia & York Developments Limited
- and -	
OLYMPIA & YORK DEVELOPMENTS LIMITED AND JERRY JABLONSKY LIMITED	*Warren H.O. Mueller, Q.C.* and *Elizabeth A. Ellis* for the plaintiff (respondent) Bell Canada
Defendant (Appellant)	
- and -	
THE CORPORATION OF THE CITY OF OTTAWA, THE REGIONAL MUNICIPALITY OF OTTAWA-CARLETON, PRESCON OF CANADA LIMITED AND RACEY MCCALLUM & BLUTEAU INC.	
Third Parties	Heard: December 15 and 16, 1993

CARTHY J.A.:

Olympia & York Developments Limited (O&Y) was granted leave by this court to appeal from the refusal of the trial judge to award costs to O&Y despite its very substantial success in defending the action.

The action involved a claim for damages totalling over $19 million for breach of a covenant to repair a parking structure and negligence in the construction of an office tower. There were 316 days of trial spread over a period of 3½ years and on January 22, 1993, Eberle J. delivered judgment. The claims of Bell Canada were dismissed, except for what were described to us as incidental repair claims which were not at the centre of the dispute, and for which Bell was awarded $25,000. After receiving written submissions as to costs, the trial judge decided not to award costs of the action to either party. The essence of the position of O&Y is that, as a successful litigant, it was entitled to expect that costs would follow the event, and that it was an error in principle to deny that expectancy solely because it had not made an offer of settlement until mid-way through the trial.

Bell is also an appellant against the finding on liability and, because of the unique circumstances, this appeal as to costs is being heard ahead of, and independently of, the appeal on the merits. Bell has apparently satisfied itself that O&Y is no longer able to pay a judgment against it. Thus, if Bell has no obligation to pay costs it will discontinue the appeal on the merits. If the costs award is made in favour of O&Y the amount will be so substantial that

Bell would continue with the appeal on liability in the hope of shielding itself against that award, or having it reversed if Bell is ultimately successful on the merits. This is obviously a contortion of normal appeal procedures, producing the result that if this panel decides to allow the appeal as to costs, the decision may later become redundant should the judgment on the merits be disturbed. However, the potential efficiency of this approach was understandably appealing to the parties, and this panel has heard the argument on the understanding that if it is our conclusion that the appeal as to costs should be allowed, the operation of our order will be suspended pending disposition of the appeal on the merits.

Turning to the merits of this appeal, I note at the outset, without immediate reference to authorities, that a trial judge's wide discretion as to costs must always be respected, and never more so than when the trial judge has been involved with the parties for 3½ years and a further year preparing reasons. The reasons relating to the costs of Bell and O&Y read as follows:

> I have now carefully reviewed the written submissions about costs and pre-judgment interest, and I turn first to the main action. In it, the plaintiff seeks costs of $30,000.00; and the defendant seeks "full party-and-party costs and disbursements of the proceedings on a solicitor-and-client

scale". The Writ was issued in November 1984. The trial began September 26, 1988, and the evidence was completed on May 21, 1991. The arguments, written and oral, concluded on January 31, 1992.

The plaintiff made three Offers in the main action, ranging from $9,000,000.00 to $11,000,000.00. Two of these were before trial and one during it. Obviously none were accepted. The defendant made one Offer of $2,000,000.00, on May 28, 1990, nearly two years into the trial.

Costs are essentially a discretionary matter, requiring consideration of all of the relevant circumstances. These include such matters as the amounts claimed, the length of the trial, the multiplicity of issues (most of which are not reflected in my formal Reasons), the complexity of the case as presented, the offers and their timing, the rules respecting costs, and the outcome, representing as it does a relative lack of success by the plaintiff.

Considering all of these factors, in my best judgment, no award of costs should be made to the plaintiff. In addition, and in relation to the general factors I have enumerated, I particularly note that the plaintiff gains no help from any of its Offers to Settle, nor from Rule 49.10(1). I note as well that, although the plaintiff recovered a modest sum, this case should not be likened to other cases where a plaintiff recovers less than the amount claimed. One example is where a Court assesses damages in a personal injury case at less than, let us say, the $1,000,000.00 or $2,000,000.00 so routinely claimed in such actions these days. Another example is where liability is apportioned between the parties. In these examples, a trial is necessary in order to determine the

issues of liability and of assessment of damages. In the present situation, if this plaintiff had made a claim in contract for only $25,000.00 against this defendant, I am confident that there would have been no lawsuit and no trial whatsoever; and no costs would have been incurred. For all of these reasons, the Court's discretion ought not to be exercised in favour of granting the plaintiff any costs.

Turning to the defendant's claim for costs, again in all the circumstances, and in the exercise of the best discretion of which I am capable, I do not think that the defendant should be awarded any costs, in spite of its offer which exceeded the plaintiff's recovery. Among all of the circumstances of the case, two important factors have particularly influenced me. First, Rule 49.10(2) does not apply because the defendant's offer was not made at least 7 days before trial, and because it did not remain open until the commencement of the trial. The matter of costs thus falls within the broad general discretion of the Court. The second important factor is that I am frankly appalled to learn that the defendant, a major figure at the time in the business life of Canada, when faced with a claim for a substantial sum of money (approximately $20,000,000), and faced with a very long trial (the estimate given to me before commencement of the trial was eight months), did not see fit to make any offer whatever until after the trial had dragged on for nearly two years. The inordinate length of the trial was not the responsibility of only one party, but was a joint responsibility. I recognize that a party has no obligation to settle a case, and no obligation even to make an Offer to Settle; but a defendant who does not make an offer in accordance with the requirements of Rule 49.10(2), not only loses the comfort and support

> of that Rule, but significantly weakens its claim on the overall discretion of the Court. In all the circumstances of the case, I am not persuaded that the Court's discretion ought to be exercised in favour of granting costs to the defendant against the plaintiff.

It is clear from these reasons that the trial judge treated the $25,000 recovered by Bell as a non-recovery in any meaningful sense. No argument was made before us to suggest otherwise. Counsel for Bell, in supporting the refusal to award costs to O&Y, put considerable emphasis on the general expressions in the reasons, such as "in all the circumstances", as indicating that the trial judge considered a variety of factors and that this court should not isolate for critical analysis one factor that he happened to emphasize. I shall return to that argument after considering what appears to be the predominant factor.

The trial judge refers to two important factors which influenced him concerning O&Y's claim to costs, but in reality there is only one. The fact that the offer of O&Y was not made before trial simply makes rule 49.10(2) inapplicable. The only truly "important" factor referred to is the failure of O&Y to make an offer until mid-trial.

The offers came in this sequence:

July 2, 1988

Bell offered to accept $9 million all inclusive, offer open until August 1, 1988;

August 2, 1988

Bell offered to accept $10 million, inclusive of pre-judgment interest, with costs to be assessed, open until trial in September 1988;

May 28, 1990

O & Y offered to pay Bell $2 million, all inclusive.

Only Bell's offer of August 2, 1988, triggered potential direct cost consequences under rule 49.10 and, of course, it was too high an offer to accomplish a result. The other offers could be taken into consideration by the trial judge in exercising his discretion with respect to costs pursuant to either rule 49.13 or rule 57.01(1), both of which refer to offers to settle made in writing. However, nowhere in the rules is there a provision which provides explicitly for the consideration of a failure to make an offer.

Our current rules place great emphasis, and I think effectively, upon offers to settle made in writing. The

recipient knows the risk of refusal and all parties know the benefits that can flow from a well-calculated offer that is turned down. In this case, the potential value of a pre-trial offer was immense. In argument before us the parties agreed that the $2 million mid-trial offer by O&Y would have met only part of Bell's costs. There is no sign of an abatement in the trend of costs inflating from year to year and offers to settle will consequently have a growing influence upon the conduct of litigation. The danger in attaching cost consequences to a failure to make an offer is that litigants may be distracted from the focus of the rules regarding offers to settle in writing, which encourage offers related to the anticipated outcome. The expectation would be introduced that a defendant should offer payment above the anticipated result. In the case of an offer from the plaintiff, it would follow that a defendant should accept a modest offer even though the expectation, and eventual result, is that the claim is dismissed. In both these cases the litigants would then have to ponder how much excess over expectation would suffice to find favour with the court.

I do not back away from my comment in *Armak Chemicals Ltd. v. Canadian National Railway Co.* (1991), 5 O.R. (3d) 1 (C.A.) at p.9:

> At the same time, every litigant should be encouraged to be single-minded in attention to the need to make and consider reasonable offers which may dispose of the litigation.

The question is, what is reasonable when the claim is dismissed? The defendant's position has been vindicated, and to deprive that party of the normal fruits of success is to say to all defendants that an offer to settle must be made simply because the lawsuit was launched. To put it another way, the trial judge cannot dispute the reasonableness of his own decision and, thus, cannot be critical of a party who anticipated it.

The courts must also be careful not to become too paternalistic with litigants or to unnecessarily discourage recourse to the trial as a forum for the resolution of disputes. Concern is properly directed to unreasonable conduct in the course of litigation which leads to unnecessary or prolonged trials. However, the judicial system is here to serve the public and no barriers to access should be imposed by warnings as to cost consequences arising from the court's assessment of how litigants should conduct their business.

There are many reasons not to offer settlement, and they should remain the private preserve of the litigants. In a libel suit, for example, vindication may be a legitimate consideration for either party, standing above recovery or payment of money. We have no evidence of why O&Y made no offer in this case but it may have been to protect its reputation as a builder or operator of buildings, or to protect against other lawsuits that might be commenced when word of a settlement reached the business community. Malpractice actions are often tried through to judgment in an attempt to protect reputations. A defendant may not be in a position to pay a settlement and, even if wealthy, may have a better business use for the money pending trial. None of these litigants should fall from grace in the eyes of the trial judge if they succeed on the merits.

Reference was made by counsel for Bell to the reasons of this court in *Berdette v. Berdette* (1991), 3 O.R. (3d) 513 (C.A.). In that matrimonial case the wife made no offer and recovered less than the defendant husband's offer. This court upheld the trial judge's award of costs in favour of the husband, which exceeded those to which he was entitled under rule 49.10, in recognition of the wife's failure to make an offer.

Galligan J.A. referred at pp.528-29 to the ruinous cost of litigation in family law matters and the necessity for parties to approach their problems reasonably and realistically so that the family assets are not dissipated in litigation. He then continued:

> Broadly speaking, the view expressed by Granger J. at p. 44 O.R., p.366 R.F.L. of his reasons is well taken:
>
> > Given the enormous cost of litigation, a spouse who allows the litigation to continue without making a reasonable settlement offer, or fails to accept a reasonable offer should bear the costs of the trial. This approach should be followed regardless of the assets of the spouses. The application of this approach is valid in actions involving modest assets, as these disputes can result in hard-earned assets being consumed by the costs of the litigation.
>
> My view, however, is somewhat more restrictive. It seems to me that before a party will be entitled to recover costs, he or she must have made a realistic and reasonable offer of settlement to the other spouse. I do not think that failure to make such an offer, however, should necessarily make him or her liable for costs. It is in this respect only that I do not share the views of Granger J. quoted above.

The first distinction to be noted is that the wife was successful in *Berdette* in obtaining only half the assets.

She was termed unreasonable in not recognizing that she might not be entitled to all the assets. Nothing in these reasons touches a party who is wholly successful and makes no offer. Secondly, the courts can justifiably be more paternalistic in family litigation over modest assets where it is well recognized that the heart and emotions often rule the head.

That is a sufficient explanation of my disagreement with the trial judge's reliance on the failure by O&Y to make a pre-trial offer. However, it does not dispose of the appeal. Consideration must be given to whether, in all the circumstances, the discretion was exercised judicially, even if erroneously on one factor.

The applicable principles of law are well summarized in *Henderson v. Laframboise* (1930), 65 O.L.R. 610 (C.A.) a case in which this court refused to interfere with the exercise of discretion even though no reasons were given by the trial judge.

Masten J.A., after reciting a number of features of the facts at trial which might have influenced the result stated at pp.612-13:

> Whether this is so or not, the plaintiffs have in my opinion failed to

satisfy the onus that rested on them of establishing in this Court that the trial Judge proceeded erroneously in law and failed to exercise his discretion, or that he exercised his discretion against the plaintiffs on grounds wholly unconnected with the cause of action. These appear to be the only grounds on which this Court is permitted to interfere with the disposition of costs by the trial Judge.

...

There is no doubt that the trial Judge in the exercise of his discretion must act judicially; no doubt he must bear in mind that in the absence of special circumstances the successful party is entitled to a reasonable expectation of obtaining an order for the payment of his costs by the unsuccessful party; but, if the trial Judge, upon facts connected with or leading up to the litigation, exercises his discretion to withhold those costs from him, the discretion of the trial Judge is unfettered, and a court of appeal is not entitled to substitute its discretion for his.

Even if the trial Judge has given leave to appeal as to costs within his discretion, "it is not the duty of the Court of Appeal to rehear the case, and that court will not interfere with his discretion unless he has proceeded in his judgment on some erroneous principle of law and has not in fact exercised his discretion on the facts of the case. The Court of Appeal has no right to substitute its discretion for the discretion of the Judge in the Court below," *per* Lindley, L.J., in *Young v. Thomas*, [1892] 2 Ch. 134, at p. 136.

> Thus, while it is well established that a successful party has no entitlement to costs, that party is entitled to a reasonable expectation in the absence of special circumstances. However, it is only where it can be demonstrated that the trial judge proceeded on an erroneous principle of law that the discretion can be overruled. I have concluded that it was an error of law to act on the basis of a failure to make an offer of settlement, but it remains to be determined if there is an independent basis for the exercise of the discretion.

The first segment of the reasons of the trial judge, quoted above, demonstrates clearly that all of the appropriate considerations were brought to bear upon Bell's claim for costs. When the trial judge then turns to consider O&Y's claim to costs he uses the expression "again in all the circumstances", and after the discussion be concludes, "[i]n all the circumstances of the case" -- each suggesting that other factors, and in particular the facts listed when discussing Bell's claim to costs, played a part in the decision.

One way of testing to see whether there were other factors to support a denial of costs to O&Y is to review the written argument submitted to the trial judge on behalf of

Bell. The opening points of that memorandum concern the failure of O&Y to make a reasonable offer before trial, and emphasize that even the offer during trial was less than Bell's costs to that date and, therefore, unreasonable. The same theme is continued as Bell argued that its own offers were reasonable in light of the guidance given on the pre-trial conference and the prospects and predictability of the potential result, without the benefit of hindsight. Further, it was submitted that without the benefit of knowing the result, Bell was reasonable in the position it took on issues at trial. I will have more to say on the subject of the pre-trial conference, but at this point merely observe that all of these arguments are directed to the lack of a reasonable offer and Bell's reasonable conduct, testing reasonableness without regard to the result. The trial judge appears to have refined these arguments into the principle which, as discussed earlier, should in my view be rejected.

Bell's submissions to the trial judge continued to emphasize the lack of co-operation by O&Y in admitting facts and in calling duplicate experts, arguing for a time-related penalty of 50%. Further, Bell submitted that the comparative lack of success in reducing the damage claim could justify a refusal of any costs.

This latter argument seems to have been picked up by the trial judge in his observation that "[t]he inordinate length of the trial was not the responsibility of only one party, but was a joint responsibility." Counsel for Bell now argues that this comment can be taken as an independent basis for the exercise of discretion, and that if this court does not favour one expressed reason (the failure to make an offer) it should not interfere simply because it was termed the "important factor". In other words, this court should not become involved in assigning weight to factors behind the exercise of discretion.

I would agree with that submission if I could read the sentence concerning the length of trial as a factor leading to the decision. Counsel for Bell urges it be read with the meaning "neither of you deserve the favour of my discretionary award". I cannot adopt that interpretation. First, it was not mentioned as a factor in the first segment of the reasons for denying Bell's costs. Second, only two factors are identified by the language of the reasons concerning O&Y's costs, and this would be a third. The sentence appears in the middle of a discussion of offers to settle and elaborates on the comment in the previous sentence that "the trial had dragged on for two years." If anything, I read the sentence as dismissing Bell's argument that costs

should be reduced or denied on account of O&Y's conduct. If applied sensibly to the result, if both parties contributed equally and the trial took double its appropriate time, the thought expressed in the sentence would lead to a 25% reduction in costs.

It is therefore my conclusion that prolongation of trial was not a factor in the trial judge's exercise of discretion. Having said that, I note in passing that if this court decides to set aside the order under appeal, recognition should be given to the fact that the trial judge might well have reduced the recovery on this account if costs had been awarded.

As noted above, Bell's memorandum on costs urged the trial judge to consider the offers to settle which were made in the context of the pre-trial hearing. The same issue was strenuously pursued before this court and, in my opinion, was not a proper subject for discussion at either level. My earlier finding concerning the effect of failure to make an offer makes it unnecessary to deal with this subject, but I am drawn to do so because there is judicial authority which appears contrary to my opinion.

In early 1988 a pre-trial conference extending over 8 days was conducted before Rosenberg J. At the conclusion he wrote the parties a lengthy letter dated June 2, 1988, expressing his views and, essentially, suggesting a settlement of $12 million. In that letter he stated:

> In the event that this case is not settled during the pretrial process, this letter is not under any circumstances to be referred to by any of the parties to the action for any purpose whatsoever.

On July 21, 1988, Bell made its first offer in a letter written by a Bell officer to an O&Y officer. It stated in part:

> In our initial discussions, Bell stated its willingness to accept a figure of approximately $10,000,000, about a 17% reduction from the pretrial judge's suggested figure of $12,000,000. Bell is now prepared to settle for an all inclusive amount of $9,000,000, but this offer is open for acceptance only until August 1.

That letter came before the trial judge at the time of the argument on costs and was the basis for Bell's counsel to argue the question of reasonable offers as related to the pre-trial conference. No specific reference to the pre-trial proceedings appears in the trial judge's reasons and I take

the language of the reasons to indicate a far more general assessment of the attempts to settle than those which arose specifically from the pre-trial conference.

After the appeal was launched, counsel appeared before Rosenberg J. and, together, asked him to release them from the obligation of secrecy so that his letter could be placed before this court. The release was granted with the reservation expressed by Rosenberg J. that he had no jurisdiction to determine what could be put before the Court of Appeal.

The pertinent rules read:

> **50.03** No communication shall be made to the judge or officer presiding at the hearing of the proceeding or a motion or reference in the proceeding with respect to any statement made at a pre-trial conference, except as disclosed in the memorandum or order under rule 50.02.
>
> **50.04** A judge who conducts a pre-trial conference shall not preside at the trial of the action or the hearing of the application.

There was no necessity for the condition of secrecy in Justice Rosenberg's letter of June 2, 1988; it was secured by the rules. If consent of the parties can override the

rules to condone presentation of evidence from a pre-trial conference, it cannot justify a court acting upon such information. Pre-trials were designed to provide the court with an opportunity to intervene with the experience and influence of its judges to persuade litigants to reach reasonable settlements or refine the issues. None of that would be possible without assurance to the litigants that they can speak freely, negotiate openly, and consider recommendations from a judge, all without concern that their positions in the litigation will be affected.

Even if the parties consent to the admission of evidence of what occurred at a pre-trial conference, that evidence and what flowed from it remain irrelevant to trial considerations. The events were without prejudice when they occurred and should not be used as a basis for a subsequent assessment of the parties' comparative reasonableness. The pre-trial judge was seeking to persuade the parties to a settlement on a basis that appeared reasonable to him at the time. His opinions should not be taken as depriving the parties of the right to make their own assessments as to their best interests and to form their own opinions as to the likely outcome, all as discussed earlier in these reasons.

In *V. Kelner Airways Ltd. v. Standard Aero Ltd.* (1991), 2 C.P.C. (3d) 140 (Ont. Gen. Div.), O'Brien J. in the course of giving reasons concerning costs, stated at p.142:

> There were two long pre-trial conferences conducted by Rutherford J. He urged settlement on a 50 per cent basis, having considered the significant problems on liability. The plaintiff immediately rejected such settlement. The defendant formally made an offer to settle for $125,000 all inclusive. It was immediately rejected.

It is not clear from the reasons whether the trial judge gave any effect to what occurred at the pre-trial, but, in my view, the evidence should not have been before him and, if admitted on consent, should not have been a factor in the reasons.

Bell also argued before this court its relative success on the issues at trial, particularly in maintaining a substantial portion of its damage assessment. To the extent that this is a relevant consideration under rule 57.01(4)(a), and subject to the observations of this court in *Armak* at p.8 as to distributive orders for costs, the trial judge effectively commented on this submission in his reference to prolonging the trial. That was the context in which the

argument was put to him and my conclusion, as previously stated, is that he was dismissive of it.

Finally, Bell argues the novelty of the principal issue at trial concerning knowledge as a pre-condition for liability to repair. This was not argued in the submissions to the trial judge and I find it difficult to give serious consideration to denying costs to a successful defendant who was brought to a 3½-year trial by a plaintiff who wished to litigate a novel issue.

I end where I began -- reluctant to interfere with the exercise of discretion by a trial judge who had a much better opportunity to acquaint himself with, and have a feeling for, all of the factors that formed the basis for the award of costs. Yet I can find no proper legal principles or considerations favouring a denial of costs, and two factors stand prominently in favour of an award. O&Y was successful in the action and, if only during trial, made an offer of $2 million which far exceeded its ultimate liability. Bell would have been better off accepting the offer at that time than pursuing the trial to final judgment, with or without a costs order against it.

Thus, having determined that the trial judge's fundamental reason for disallowing costs to the successful defendant was wrong in principle, I can find nothing in the factual circumstances or argument to support the order. In my view the normal expectation of the successful litigant should prevail and O&Y should have its costs of the action through trial on a party-and-party basis. This court is obviously not equipped to make a fine judgment as to a limitation on those costs based upon the unnecessary length of the trial, but in my view we should not ignore the observation of the trial judge that its inordinate length was a joint responsibility. The trial was estimated to be one which would take seven months and, allowing for the usual error in such estimates, it would not be unfair to make that 10 months with expedition on both sides. That equates to approximately 200 days and the trial took 316 days. It is a rough estimate, but not, I think, an unfair one, to conclude that the parties unnecessarily and jointly extended the trial by one-third. This justifies a reduction in the trial counsel fees allowed to O&Y by one-sixth, and I would so order.

There should be a reference back to the trial judge to either fix costs or give directions to the Assessment Officer concerning costs.

No order shall issue pursuant to these reasons until disposition by the Court of Appeal of the appeal on the liability issues, or until the discontinuance or dismissal of that appeal. In the event that the disposition of the liability issues renders this disposition of costs inappropriate, the panel dealing with liability will make the appropriate order as to costs below and no order will issue pursuant to these reasons.

Costs of this portion of the appeal will be payable by Bell to O&Y if Bell fails in its appeal on the substantive issues. If Bell succeeds, costs will be dealt with by that panel.

J.A.

Jagger J.

Jagger J.A.

File No. C15202

COURT OF APPEAL FOR ONTARIO

BLAIR, McKINLAY AND CARTHY JJ.A.

B E T W E E N:

BELL CANADA

Plaintiff (Respondent)

- and -

OLYMPIA & YORK DEVELOPMENTS LIMITED AND JERRY JABLONSKY LIMITED

Defendant (Appellant)

- and -

THE CORPORATION OF THE CITY OF OTTAWA, THE REGIONAL MUNICIPALITY OF OTTAWA-CARLETON, PRESCON OF CANADA LIMITED AND RACEY MCCALLUM & BLUTEAU INC.

Third Parties

J U D G M E N T

Released: FEB 24 1994
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TAB 3

Para 7

DATE: 20040226
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COURT OF APPEAL FOR ONTARIO

ABELLA, BORINS and ARMSTRONG JJ.A.

B E T W E E N :	)	
	)	
ELIZABETH ROGACKI	)	**Robert B. Bell**
	)	**for the respondent**
	)	
Plaintiff (Respondent)	)	
	)	
- and -	)	
	)	
ZBIGNIEW BELZ, GAZETA INC., GAZETA MAGAZINE and ALICJA GETTLICH	)	**Peter I. Waldmann for the appellant**
	)	
Defendants (Appellant)	)	
	)	
	)	**Heard: May 15, 2003**

On appeal from the order of Justice W. J. Lloyd Brennan of the Superior Court of Justice dated June 12, 2002.

ADDENDUM ON COSTS

[1] The appellant, while not found to be guilty of contempt, deliberately violated the Confidentiality Agreement he signed at the mediation. This conduct is relevant to whether he is entitled to his costs.

[2] Moreover, this appeal raises legal issues affecting mediation which have not previously been considered. Given their significance and novelty, we are of the view that there should be no costs awarded in this appeal.

RELEASED:

"FEB 26 2004" "R.S. Abella J.A."

"RSA" "Robert P. Armstrong J.A."

BORINS J.A. (Dissenting):

[3] In my view, the successful appellant is entitled to his costs of the motion and the appeal. As this is not the occasion for a discursive review of circumstances which may result in the court exercising its discretion to deprive a successful litigant of costs, I will be brief in discussing the two reasons why I believe the appellant should have his costs.

I

[4] The starting point is the principle of long standing that a successful party is entitled to his or her costs. This is a principle from which the court should not depart except for very good reasons. As this court stated in *Bell Canada v. Olympia & York Development Ltd.* (1994), 17 O.R. (3d) 135 at 142: "While it is well-established that a successful party has no entitlement to costs, that party is entitled to a reasonable expectation [of costs] in the absence of special circumstances". In my view, there is neither a good reason nor any special circumstance that would justify depriving the appellant of his costs.

[5] It is suggested that this case is an exception because the issue was novel. In M. M. Orkin, *The Law of Costs*, 2nd ed (Aurora, Ontario: Canada Law Book, looseleaf) at pp. 2-38 to 2-58, the author summarizes numerous decisions disposing of appeals without costs where, *inter alia*, the question involved was new or not previously decided by the courts, or the court determined an uncertain or unsettled point of practice or law. In my view, the issue on this appeal was not of sufficient novelty to constitute an exception to the general principle on costs. As stated in our reasons for allowing the appeal, (now reported: (2003), 232 D.L.R. (4th) 523) Rule 24.1 does not support a finding that the appellant was in contempt of court as nothing in the rule precluded the appellant from publishing the first article, and rule 24.14 does not address confidentiality of the mediation process. As this conclusion followed a plain reading of Rule 24.1, I have difficulty in appreciating that the issue raised in the appeal was in any way novel. Nor was there any novelty in our further holdings that the confidentially agreement was not capable of enforcement under Rule 60 and that nothing in the article published in purported breach of the confidentiality agreement was capable of compromising a fair trial.

[6] I would add that an appellate judgment that considers an issue or question for the first time, or determines an uncertain point of practice or law, is not uncommon. From the perspective of the range of appeals considered by this court, this common situation does not constitute "special circumstances" or an exceptional case. It is expected that an appellate court will clarify the law when it is unclear. Something more is required to justify departing from the long-standing general rule on costs, otherwise successful

litigants will be penalized by the court's refusal to award costs in their favour. See *Blue Range Resource Corp. (Re)* (2001), 202 D.L.R. (4th) 523 (Alta. C.A.).

II

[7] The other reason why the appellant should not be deprived of his costs is based on the remedy sought by the respondent. As pointed out in our reasons for judgment at p. 537, it is a serious matter for a person to be found in contempt of court. A contempt proceeding is punitive in nature with broad powers given to the court, including the power to order imprisonment. A person found in contempt of court is entitled to bring proceedings before this court to clear his or her name. When successful, a party should not have to bear the costs of defending against the serious allegation that he or she had acted in a way that exhibited contempt for the court. In my view, together with the judgment of this court, an appropriate award of costs constitutes public rehabilitation of the appellant's reputation.

[8] In *Canada Metal Co. Ltd. v. Canadian Broadcasting Corp. (No. 2)* (1975), 8 O.R. (2d) 375, this court was asked to determine whether the trial judge had exercised his discretion judicially in depriving the appellant of the costs of his successful defence of a motion to commit him to jail for contempt of court by violating an injunction in the alleged production by him of a news bulletin. Although the trial judge found that there was insufficient evidence to prove this allegation, he had a strong suspicion that the appellant was involved in some way in the bulletin's production. When the appellant declined the trial judge's invitation to remove his suspicion by filing an affidavit stating that he had nothing to do with the production of the news bulletin, the trial judge deprived him of his costs of the motion.

[9] In allowing the appellant's appeal and awarding him costs of the motion, at p. 376 Jessup J.A. held:

> The proceeding before the learned trial Judge was a quasi-criminal proceeding, and the learned trial Judge found a reasonable doubt as to the guilt of the appellant. Having so found, in my opinion, he proceeded in error of principle in denying the appellant his costs, simply because of a suspicion which existed in the learned trial Judge's mind. Different considerations might apply if this were not a quasi-criminal proceeding.

III

[10] I would note that in response to our reasons for judgment, the Civil Rules Committee is to consider an amendment to rule 24.1.14 that will add to the existing rule a

provision that all communications at a mediation session and the mediator's notes and records shall "be subject to the deemed undertaking as provided in rule 30.1.01". If the amendment is passed, it seems that its effect will be to preclude one party to a mediation session from using information provided by the other party for purposes other than those of the proceeding in which the information was provided.

IV

[11] For the foregoing reasons, I would award the appellant his costs of the motion and the appeal on a partial indemnity basis. The costs of the motion and the appeal are fixed at $6,350 and $10,600, respectively, each inclusive of disbursements and G.S.T.

"S. Borins J.A."

TAB 4

COURT FILE NO.: 07-CV-8912
DATE: 20080930

SUPERIOR COURT OF JUSTICE - *ONTARIO*

RE: CATHERINE ELIZABETH AZZOPARDI and EDWARD ANDREW POTOMSKI

Applicants

EUFROSINA POTOMSKI (also known as Florence Potomski), STANLEY MICHAEL POTOMSKI, ROBERT JOSEPH POTOMSKI, TERRANCE FRANK POTOMSKI and THE PUBLIC GUARDIAN AND TRUSTEE

Respondents

COUNSEL: Alicia T. Stein, Counsel for the Applicants (Responding party)

Charles W. Walters, Counsel for the Public Guardian and Trustee

Robert Potomski (Moving Party) – Self-represented

HEARD: By Written Submissions

DECISION ON COSTS

INTRODUCTION AND BACKGROUND

[1] This decision on costs is the final chapter in the sad saga of a family whose memories of the last days of their beloved mother, Eufrosina Potomski, will be forever marred by the bitter and wholly unnecessary litigation that took place at the instigation and dogged persistence of one of Mrs. Potomski's five children, Robert Potomski ("Robert").

[2] Less than a month after this court made a final order appointing Catherine Azzopardi ("Catherine") and Edward Potomski ("Edward"), Robert's sister and brother, as guardians of the person of their mother, Robert launched a motion seeking a finding of contempt against them with penalties up to and including their imprisonment. In addition to seeking a finding of contempt against them, Robert also sought an order for their removal as guardians of the person of their mother and the appointment of the Office of the Public Guardian and Trustee ("PGT") in their stead. Such an order requires the consent of the PGT and consent was refused. Robert proceeded with the motion nonetheless. Robert also sought a Certificate of Pending Litigation and damages.

[3] For reasons set out in my decision of September 4, 2007, all the claims but one were found to be wholly without merit and were dismissed. Robert's request for a geriatric assessment of his mother was adjourned pending a report from Mrs. Potomski's physician. Nevertheless, his allegations about the inadequacy of Mrs. Potomski's care under Catherine's and Edward's direction, which were ultimately found to be unfounded, caused the PGT to direct an investigation into her care. As part of that investigation, the Geriatric Assessment/Consultation Unit ("GAP") at Windsor Regional Hospital, which arranges for and administers geriatric assessments, was contacted by the PGT for information about any assessment that might have been arranged or attempted to be arranged for Mrs. Potomski by anyone other than the guardians, contrary to an order granted August 8, 2007. That order directed that no one other than the court appointed guardians could make any arrangements for care or treatment of Mrs. Potomski.

[4] Within hours of the PGT's phone call to GAP, Robert was advised about the call by a staff member at GAP, with whom he had testified he had previously had a relationship. Robert then contacted GAP demanding information about any assessment that had been arranged and about the phone call. In addition, he issued directives to GAP that the staff was not to provide any information to the PGT about his phone call. This action on Robert's part led the PGT to request a court order for the records relating to any calls between any GAP staff member and Robert about the PGT's phone call as well as any action taken or not taken by GAP in relation to those phone calls. GAP did not oppose the release of the records but required a court order.

[5] Robert, on the other hand, vigourously opposed the granting of the order and proceeded to conduct examinations under oath of every person who had filed an affidavit on the motion as well as of counsel of record for the PGT. Robert also attempted to examine counsel for Catherine and Edward but the summons to witness was set aside on motion and costs were ordered against Robert.

[6] As a result of both Robert's unsuccessful motion for contempt and other relief, and the PGT's motion for the release of GAP records, costs were awarded to Catherine and Edward as well as the PGT. Because there was no agreement by the parties on the amount or scale of costs to be paid by Robert, written submissions were made. Catherine and Edward seek costs against Robert on account of his unsuccessful motion for contempt and for an order removing them as guardians of the person of Mrs. Potomski as well as for their involvement in the motion brought by the PGT to obtain written records from the GAP. They seek costs in the total amount of $13,693.75 on a substantial indemnity scale.

[7] The PGT seeks costs in the total amount of $14,030, $4,760 for fees attributable to the work of counsel for the PGT in relation to the motion to have the PGT replace Catherine and Edward as guardian of the person and a further $9,270 on account of the motion to obtain the GAP records.

SUMMARY OF THE POSITION OF THE APPLICANTS CATHERINE AZZOPARDI AND EDWARD POTOMSKI

[8] Catherine and Edward seek substantial indemnity costs on the grounds that the motion for contempt brought by Robert was without merit as demonstrated by the outcome. The reasons for the dismissal of all but one of Robert's 23 claims made it clear that there was no basis in law and on the evidence by which Robert Potomski could have been successful in making the claims he did. Also, Catherine and Edward assert that Robert's tactics throughout the litigation unnecessarily complicated and lengthened the litigation and the response they were required to make. These tactics included filing material that was irrelevant but which required lengthy review and response, cross-examinations which were unnecessarily lengthy and dealt with irrelevant issues, causing service of legal documents on Edward while he was hospitalized for a serious health condition and Robert's failure to accept the offer to settle which was made in accordance with rule 49.10.

SUMMARY OF THE POSITION OF THE PUBLIC GUARDIAN AND TRUSTEE

[9] The PGT asserts that she should be awarded costs on a substantial indemnity basis for the motion which sought to have the PGT replace Edward and Catherine as guardians of the person. This claim was made by Robert as part of his contempt motion without obtaining the prior approval of the PGT as required by s. 57(2.2) of the *Substitute Decisions Act, 1992*, S.O. 1992, c. 30. In addition, because of the acrimony and the nature of the accusations made by Robert in the course of his motion for contempt, the PGT determined it was necessary to conduct an investigation into the care Mrs. Potomski was receiving pursuant to their powers and duties in the *Substitute Decisions Act, 1992*. This investigation added to the costs and necessitated the filing of a lengthy affidavit by the investigator. In addition, the PGT had offered to consent to the dismissal or withdrawal of the motion to appoint the PGT as guardians of the person of Mrs. Potomski on the condition that Robert would pay $1,500 for costs. Robert refused that offer.

[10] The PGT also seeks costs on a substantial indemnity basis for the motion for the release of GAP records. GAP did not object to releasing the records provided there was a court order. It was Robert who vigourously opposed the granting of that order. As a result of his opposition, the PGT asserts that significant and unnecessary time was spent attending cross-examinations of everyone who had sworn affidavits on the motion. The PGT argued that these cross-examinations did not result in eliciting any further useful evidence to support Robert's position, and, therefore, caused unnecessary expense in the litigation.

SUMMARY POSITION OF ROBERT POTOMSKI

[11] Robert's written submissions did not specifically address the scale of costs sought by both Catherine and Edward and the PGT. Robert's submissions on costs were divided into four sections. The first section of his submissions deals with the motion of the PGT to obtain the GAP records. Most of the submissions in that section deal with a re-arguing of the motion and in the interests of brevity, I will not repeat those submissions as they are not relevant to the issue of costs.

[12] The second section deals with the cost outline and submissions of the PGT. That section consists of only one statement: that Robert neither consents nor objects to the cost outline and submissions of the PGT.

[13] The third section of his submissions deals with the cost outline and submissions of Catherine and Edward. Robert argued that the costs claimed by them are both too high and unreasonable. It was his position that some of the costs claimed by Catherine and Edward may be duplicated because the dates that services were provided were not set out in the cost outline. Those dates were subsequently provided in the reply submissions of Catherine and Edward.

[14] Robert also asserted that Catherine was only examined by him for one hour. In comparison to the costs submitted by the PGT who had several examinations to attend and had additional travel costs, he said the costs claimed by Edward and Catherine were inflated.

[15] The fourth section of his submissions included a summary of Robert's arguments. He asserted that Catherine and Edward, either directly or through their solicitor, could have obtained the information from GAP by making a simple phone call and that it was Catherine and Edward's responsibility to contact GAP directly if action was needed to protect Mrs. Potomski. Robert also argued that it was unnecessary for the PGT to contact GAP and suggested that they did so as agents for Catherine and Edward. He further asserted that the PGT could have requested the information from Catherine and Edward without the need for a court process.

[16] Robert also attached offers to settle that he had made to both the PGT and Catherine and Edward on November 13, 2007. With respect to the offer to the PGT, it contained a provision that he would pay costs in the amount of $6,000 from his share of Mrs. Potomski's estate and that an order would issue that "All issues between Robert Joseph Potomski and the Public Guardian and Trustee are settled."

[17] On November 13, 2007 Robert also made an offer to settle with Catherine and Edward. That offer contained a provision that he would pay costs in the amount of $4,000 from his share of Mrs. Potomski's estate and that an order would issue that stated only "The motion as it relates to Robert Joseph Potomski and the guardians of Eufrosina Potomski is settled."

[18] Neither of these offers complied with all the provisions of rule 49.10.

[19] With respect to his ability to pay costs, Robert asserted that his income for the last three years has been less than $15,000 per year and that because of alleged wrongdoing on the part of Catherine and Edward in relation to the management of the estate of Mrs. Potomski, he may only receive less than $18,000 from that estate.

ANALYSIS

[20] Rule 57.01 (1) of the *Rules of Civil Procedure* provides as follows:

Factors in discretion – In exercising its discretion under section 131 of the *Courts of Justice Act* to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,

(0.a) the principle of indemnity, including, where applicable the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;

(0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;

(a) the amount claimed and the amount recovered in the proceeding;

(b) the apportionment of the liability;

(c) the complexity of the proceeding;

(d) the importance of the issues;

(e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;

(f) whether any step in the proceeding was,

(i) improper, vexatious or unnecessary, or

(ii) taken through negligence, mistake or excessive caution;

(g) a party's denial of or refusal to admit anything that should have been admitted;

(h) whether it is appropriate to award any costs or more than one set of costs where a party,

(i) commenced separate proceedings for claims that should have been made in one proceeding, or

(ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different solicitor; and

(i) any other matter relevant to the question of costs.

O. Reg. 627/98, s. 6; O. Reg. 42/05, s. 4(1).

Costs of Public Guardian and Trustee

[21] I will deal first with the cost outlines and submissions made by the PGT. The costs claimed by the PGT are for fees only and do not contain any claim for disbursements such as photocopying, service of materials or the cost of the investigators fees. The amount claimed is solely for the work completed by counsel for the PGT. Although Robert indicated in his submissions that he neither consented to nor objected to the cost outline and submissions of the PGT, it is, nevertheless, my obligation to review the outline and submissions in accordance with the factors set out in rule 57.01.

[22] With respect to the motion for the appointment of the PGT to replace Catherine and Edward as guardians of Mrs. Potomski, the PGT was required to become involved in this motion because the PGT's prior consent was not obtained before seeking the PGT's appointment as guardian of the person. This consent is required by s. 57 (2.2) of the *Substitute Decisions Act, 1992*. Counsel's appearance was necessary to protect the interest of the PGT in this matter which was not brought before the court in accordance with the requirements of the Act.

[23] With respect to Robert's conduct, I find that it unnecessarily lengthened the duration of the proceedings. It is clear from the cost outline that the PGT was required to review an unnecessary amount of materials, emails and to deal with phone calls because of Robert's approach to the litigation.

[24] Because of the allegations that Robert made about the care of Mrs. Potomski and the acrimony between the parties, I find that the PGT was required to conduct an investigation into the care that Mrs. Potomski was receiving. The allegations of misconduct made by Robert in relation to the manner in which Catherine and Edward's carried out of their duties as guardian of the person of Mrs. Potomski were unfounded and resulted in an expenditure of time and resources on the part of the PGT which was unnecessary.

[25] In addition, Robert's denial that there were difficulties contacting him led to the filing of material by the PGT which would have been unnecessary in the usual course of this kind of application. A number of orders had to be made to simplify and streamline the methods by which Robert could be served.

[26] As indicated above, Robert made an offer to settle to the PGT on November 13, 2007. While the costs he offered to pay may have approximated the costs expended by the PGT to that date, the order to which he would consent did not include a release of the information properly sought by the PGT from GAP. The release of that information was the issue before the court. The PGT did not accept that offer and at the hearing of the motion, was granted an order for the release of that information, therefore obtaining relief greater than that contained in the offer to settle. The PGT did not act unreasonably in refusing that offer.

[27] I find that the costs of the PGT should be compensated on a substantial indemnity basis. The PGT offered to permit Robert to withdraw his motion or have it dismissed with the payment of costs of $1,500. Robert refused this offer and it is appropriate, therefore, that costs on a full indemnity basis in the amount of $4,760 be payable to the PGT by Robert Potomski within 30 days of this order.

[28] With respect to the motion brought by the PGT for production of records from GAP which was successful, the PGT seeks costs in the amount of $9,270. This amount is solely for solicitors' fees. Ms. Blanchard, who was the original counsel, was examined as a witness by Robert and, as a result, another counsel had to step in to attend with her at the examination as well as at examinations of other staff members of the PGT who Robert examined. In all, 42.10 hours were spent by counsel for the PGT. Although the motion itself for release of the records

was not complicated, Robert's insistence on opposing the motion led to an over-complication of the matter.

[29] The PGT has a statutory right, and indeed an obligation, in light of the serious allegations made by Robert to conduct an investigation into the care of Mrs. Potomski. The *Substitute Decisions Act, 1992* provides the PGT with broad powers in relation to conducting that investigation. It is an issue of serious concern to the PGT, to the guardians of a person, and indeed to the court and the public that a staff person in an agency providing care to elderly incompetent persons may not respect the privacy of that person by releasing information about that person in an unauthorized manner. The PGT has broad authority in conducting investigations into the care of incompetent persons, especially those persons who have guardians of the persons against whom serious allegations of neglect of duty have been made. Those investigations cannot be interfered with by staff in care facilities by the unauthorized release of information about the investigation itself to the very person who made the allegations in the first place.

[30] The length of time that was required for counsel to prepare for and attend on the examinations was significantly impacted by the irrelevant nature of many of the questions asked by Robert. Robert's examinations did not produce any useful or relevant information that was not already before the court in affidavits and unnecessarily lengthened the duration of the proceedings. While Robert had the right to cross-examine anyone who filed an affidavit on a motion, the cross-examinations were unnecessary as no additional information was produced and the credibility of the persons examined was not successfully attacked. Most significantly, Robert could have consented to the motion. In his affidavit of November 2, 2007 at paragraph 49, he said that if GAP had notified him of the request of the PGT, he may have authorized the release and there would be no need for the motion. A review of the relief claimed in the original notice of motion makes it clear what was being requested. As he himself pointed out in his affidavit of November 2, 2007, he could have consented to that relief without the necessity for the motion to proceed to the unnecessary lengths resulting from the unreasonable position taken by Robert. (Rule 57.01 (1)(g).)

[31] In considering the factors set out in rule 57.01 (1) and Robert's unreasonable persistence, I award costs to the PGT in the amount of $9,270. This is the kind of behaviour that results in costs being awarded on a substantial indemnity basis. There was no need for this motion had Robert consented to the information being provided to the PGT by GAP. As indicated above, the right of the PGT to conduct such examinations is enshrined in the *Substitute Decisions Act, 1992*. The PGT had every right to determine whether there had been a breach of confidentiality in relation to Mrs. Potomski. In summary, therefore, Robert Potomski shall pay costs in the amount of $14,030 to the PGT within 30 days.

Costs of the Guardians of the Person of Mrs. Potomski

[32] Applying the principles of rule 57.01 (1) to the circumstances of the cost claims before me and Robert's response to those claims, I make the following findings: with respect to the

principle of indemnity, there is no indication on the costs outline of Catherine and Edward that the amount claimed for fees by counsel is anything other than the amount actually charged to Catherine and Edward for the legal services provided on both motions.

[33] With respect to the importance of the issues, Catherine and Edward had no choice but to vigourously respond to the contempt motion. A finding of contempt and the request for their imprisonment if found in contempt are criminal in nature. In addition, they were required to respond because Robert was attempting to have them removed as guardians of the person of their mother without any legal basis for doing so. These factors alone are sufficient to lead to an award of costs on a substantial indemnity basis.

[34] In response to Robert's contempt motion, Catherine and Edward made an offer to settle dated August 17, 2007. While some of the conditions of that offer were not realized in full at the end of the motion, it should have been clear to Robert when he received the offer that much of the relief sought by him in the motion, such as damages, a certificate of pending litigation and a finding of contempt leading to imprisonment, was unattainable because of a lack of necessary evidence. A serious consideration of the offer should have alerted Robert to give a second, serious thought to the merits of his litigation.

[35] Catherine and Edward were entirely successful on the motion and are entitled to their costs.

[36] Robert's behaviour in relation to his conduct of the motions before the court give rise to an award of costs on a substantial indemnity basis even if there had been no offer to settle. His decision to bring the motion for contempt within a month of the appointment of Catherine and Edward as guardians of the person of Mrs. Potomski and my findings that the basis for seeking contempt and most of the other relief was entirely without merit, attracts substantial indemnity costs.

[37] With respect to the reasonable expectations of the loser in relation to costs, this principle is thought of in the circumstances of two honest litigants with different views, who, based on the law and its application to the relevant facts, put their issues to the court for an independent determination. The motions before me can be distinguished from that kind of circumstance. Robert should have known that the contempt allegations he made were not supportable on the evidence. He should also have known that the various other relief he sought were without a basis in law. Any party who persists in acting as Robert did, both in relation to the PGT and to Catherine and Edward, must reasonably anticipate that if unsuccessful, he will have to pay all, not just some, of the costs of those with whom he has battled in court. When one chooses, as Robert has, to use the courts as a forum in which to do battle with two of his siblings and the PGT on grounds that are totally lacking in merit, he must expect that if he is unsuccessful, he will be obliged to pay all the costs of any parties who had to defend and respond to his accusations.

[38] With respect to his refusal to consent to an order allowing GAP to provide the PGT with the requested records, his refusal led to a significant expenditure of time and money for both the PGT as well as Catherine and Edward. It was clear in his submissions made on the motion that his refusal to consent to the release of the information was based, not on his concern for Mrs. Potomski, but rather on his own mistaken perceptions of his own privacy rights in relation to his phone call to GAP and what led up to the call. Even in his submissions on costs, he continued to address issues already dealt with in the motion for release of information. As one reads Robert's portion of his cost submissions entitled "Information Received from Windsor Regional Hospital" and one reads the information itself, it is hard to imagine why Robert would have objected to its release. His unreasonable positions had the effect of making a "mountain out of a mole hill" and resulted in adding significantly to the cost of this litigation.

[39] I have reviewed the cost outline in detail including the hourly rate that counsel charged for fees, the time expended and the disbursements. Earlier in this decision, I made reference to the offer to settle that Robert made to Catherine and Edward on November 13, 2007. The costs expended by Catherine and Edward as of that date far exceeded the offer in relation to costs. Catherine and Edward did not act unreasonably in refusing that offer.

[40] Accordingly, Robert shall pay costs to Catherine and Edward in the amount of $9,270 inclusive of fees, disbursements and GST, within 30 days.

SUMMARY

[41] The following order shall issue;

1) Robert Potomski shall pay the substantial indemnity costs of the PGT in the total amount of $14,030 within 30 days;

2) Robert Potomski shall pay the substantial indemnity costs of Catherine Azzopardi and Edward Potomski in the total amount of $9,270 inclusive of fees, disbursements and GST within 30 days.

"original signed by Justice Nolan"
Mary Jo M. Nolan
Justice

DATE: September 30, 2008

COURT FILE NO.: 07-CV-8912
DATE: 20080930

SUPERIOR COURT OF JUSTICE - *ONTARIO*

RE: AZZOPARDI and POTOMSKI v. POTOMSKI et al.

BEFORE: Nolan J.

COUNSEL: Alicia T. Stein, for the Applicants

Charles W. Walters, for the Public Guardian and Trustee

Robert Potomski – self-represented

DECISION ON COSTS

Nolan J.

DATE: September 30, 2008

COURT FILE NO.: 07-CV-8912
DATE: October 17, 2008

SUPERIOR COURT OF JUSTICE - *ONTARIO*

RE: CATHERINE ELIZABETH AZZOPARDI and EDWARD ANDREW POTOMSKI

Applicants

EUFROSINA POTOMSKI (also known as Florence Potomski), STANLEY MICHAEL POTOMSKI, ROBERT JOSEPH POTOMSKI, TERRANCE FRANK POTOMSKI and THE PUBLIC GUARDIAN AND TRUSTEE

Respondents

COUNSEL: Alicia T. Stein, Counsel for the Applicants (Responding party)

Charles W. Walters, Counsel for the Public Guardian and Trustee

Robert Potomski (Moving Party) – Self-represented

HEARD: By Written Submissions

***CORRIGENDUM* RE DECISION ON COSTS**

[1] After release of my Decision on Costs on September 30, 2008, I received correspondence by way of facsimile transmission on October 2, 2008 from counsel for the Applicants and from Robert Potomski. Counsel for the Applicants pointed out a discrepancy between, on the one hand, the amount of costs referred to in paragraph 6 of my decision, and, on the other hand, the amount set out in paragraphs 40 and 41(2). Counsel for the Applicants sought clarification.

[2] I have reviewed the entirety of my Decision on Costs. It is clear that the Applicants sought costs in the amount of $13,693.75, as set out in paragraph 6 of my reasons. The parties, by further correspondence, either consented to, or did not oppose an approach to, dealing with the discrepancy so as to dispense with Rule 59, of the *Rules of Civil Procedure* by virtue of Rule 2. This ensured that they would not have to come before the court, thereby engaging the cost consequences of Rule 37.

[3] The $13,693.75 sought by the Applicants represents costs on a substantial indemnity scale. In paragraphs 32 and 33 of my Decision on Costs, I review the principle of indemnity, the importance of the issues, and the necessity of the Applicants to respond vigourously to the motion for contempt and to the motion to have them removed as guardians of the person of Mrs.

Potomski. I go on to say at the end of that paragraph that "These factors alone are sufficient to lead to an award of costs on a substantial indemnity basis."

[4] At paragraph 35, 1 said, "Catherine and Edward were entirely successful on the motion and are entitled to their costs."

[5] At paragraph 39, I clearly stated that I approved the hourly rate charged by counsel for fees, the time that was expended, and the disbursements.

[6] At paragraph 7, 1 noted that one part of the costs sought by the PGT was in the amount of $9,270. 1 mistakenly carried this amount into paragraphs 40 and 41(2). It is clear, therefore, that the amount set out in paragraphs 40 and 41(2) is an error. 1 approved the Applicants' costs on a substantial indemnity basis. The amount of $13,693.75 should have been the number in paragraphs 40 and 41(2). There is no other reasonable interpretation that can be supported, given my analysis set out in the above paragraphs.

[7] Typographic errors do occur from time to time. Rule 59 permits amendments prior to the entry of an order. For the reasons above I am satisfied that this situation assuredly qualifies as an accidental slip.

"original signed by Justice Nolan"
Mary Jo M. Nolan
Justice

DATE: October 17, 2008

Court File No. CV-14-507120

THE CATALYST CAPITAL GROUP INC.
Plaintiff

-and-

BRANDON MOYSE et al
Defendants

ONTARIO
SUPERIOR COURT OF JUSTICE

COSTS SUBMISSIONS OF THE DEFENDANT, BRANDON MOYSE

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