

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Louise Lewis, Dominic Vitale and Eugene Lewis, Plaintiffs

**AND:**

Marcel Rene Joseph Jones, Anthony Forgione, Shawn Jones, Leah Marie Jones, also known as Leah Marie Eward, Blake Jones, Megan Jones and Kristina Lebovic, Defendants

**BEFORE:** THE HON. MADAM JUSTICE E.A. QUINLAN

**COUNSEL:** P.J. Daffern, Counsel for the Plaintiffs

**HEARD:** By written submissions of the Plaintiffs

**COSTS ENDORSEMENT**

**Overview**

[1] On November 10, 2015, I granted judgment in favour of the plaintiffs against Leah Marie Jones, aka Leah Marie Eward, in the sum of \$660,484.94, after having earlier struck her Statement of Defence in this claim of misappropriation of funds. I fixed costs of the motion in the amount of \$5,000. The plaintiffs sought costs of the action against Ms. Eward on a substantial indemnity scale, and a joint and several basis of over \$130,000. In view of the quantum of costs sought, I ordered that the costs of the action be determined after the plaintiffs provided written submissions as to costs, detailing, among other things, the previous costs awards. I have now received the written submissions.

**The Legal Principles**

[2] The award of costs is governed by s. 131 of the *Courts of Justice Act*, R.S.O. 1990 c. C. 43 and by Rule 57.01 of the *Rules of Civil Procedure*. Section 131 clothes the court with its general discretion to fix costs. Rule 57.01 provides a measure of guidance in the exercise of that discretion by enumerating certain factors that the court may consider when assessing costs: *Zandersod Company Limited v. Solmar Development Corp.*, 2011 ONSC 3874 at para. 11.

[3] In particular, the court may consider any of the following factors:

(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. R.R.O.1990, Reg. 194, r. 57.01 (1); O. Reg. 627/98, s. 6; O. Reg. 42/05, s. 4 (1); O. Reg. 575/07, s. 1.

- [4] Ultimately, in fixing an amount for costs, the overriding principles are fairness and reasonableness: *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3<sup>d</sup>) 291 (C.A.); *Moon v. Sher* (2004), 246 D.L.R. (4<sup>th</sup>) 440 (Ont. C.A.)
- [5] It is important to recognize that the assessment process is ultimately not a mechanical exercise: *Gratton-Masuy Environmental Technologies Inc.(c.o.b. Ecoflow Ontario) v. Building Materials Evaluation Commission*, [2003] O.J. No. 1658 at para. 17. Instead, the court must take a contextual approach applying the principles and factors enumerated above, to determine a figure that is fair and reasonable in all the circumstances.
- [6] Substantial indemnity costs are an exceptional scale of costs. They are awarded on very rare occasions, such as when a party has displayed outrageous conduct during the proceedings. They are generally reserved for conduct warranting the court's disapproval: *Prinzo v. Baycrest Centre for Geriatric Care*, 2002 CanLII 45005 (ON CA) at para. 76. The court should not make an award of costs on a substantial indemnity scale unless there has been a determination on the merits, as well as an evaluation of the conduct of the parties in the litigation: Mark M. Orkin, *The Law of Costs*, Looseleaf, (2015 – Rel. No. 55 Oct.) Vol. 1, 2d ed., (Aurora: Canada Law Book 1993, pages 215-221).

### Analysis

- [7] At the hearing of the motion the plaintiffs sought costs on a substantial indemnity scale in the amount of \$136,120.97 or alternatively on a partial indemnity scale in the amount of \$77,350.82. The fees sought were roughly \$121,000 or \$62,000, depending on the scale. In the Bill of Costs that accompanied the written submissions, the plaintiffs claim costs in the amount of \$96,833.89 on a substantial indemnity basis or \$60,052.39 on a partial indemnity basis. Fees sought are approximately \$73,000 or \$40,000, depending on the scale. The significant reduction in the Bill of Costs was as a result of the removal of the costs of other motions for which costs had been granted.
- [8] In this case, there has not been a determination on the merits. Ms. Eward's Statement of Defence was struck because of her failure to answer her undertakings, under advisements, and refusals given at her examination for discovery. There has been no evaluation of Ms. Eward's conduct in the litigation, save and except for an earlier finding that her defence had questionable merit. There are no special grounds to justify a departure from the usual scale. The plaintiffs shall have their costs on a partial indemnity scale.
- [9] I now turn to a consideration of the quantum of those costs.
- [10] The overarching principles of fairness and reasonableness are at the core of the exercise of the court's discretion in assessing costs: *Grammatico v. Chambers*, 2012 ONSC 5640 at para. 30. The court should consider what it views as a reasonable amount for the unsuccessful party to pay rather than any exact measure of the actual costs of the successful litigant: *Davies v. Clarington (Municipality)*, 2009 ONCA 722 at para. 52.
- [11] Having regard to the broad range of factors set out in Rule 57.01, I consider that the proceeding was somewhat complex and the issues were important to the parties. The

plaintiffs have obtained judgment against another of the defendants with costs to be assessed. The actions of Ms. Eward have contributed to an unduly lengthening of the proceedings and, as noted, her defence had questionable merit.

- [12] I turn now to a consideration of the time spent, the principle of proportionality and the amount that a losing party would reasonably expect to pay.
- [13] In reviewing the Bill of Costs, I note that there are fees charged for attending at a motion, drafting motion materials, and research into and the drafting of a claim against another party. Costs have been awarded thus far in this litigation for motions totalling \$32,750. There has been no justification provided for claiming costs for attending at a motion, drafting motion materials or drafting a claim against another party. These amounts are disallowed. The time spent of 144 hours by counsel and 74 hours by the clerk are excessive given the steps taken and will be discounted somewhat, as will be the hourly rate: although the hourly rate of \$400 charged in 2011 was reasonable, the hourly rate since of \$450 and then in September 2014 of \$500 is high. Fees for the junior lawyer are charged at the senior lawyer's rate. These amounts should be discounted to reflect an hourly rate of \$150. The travel fees charged at counsel's full rate are excessive and should be reduced to reflect one-third of counsel's hourly rate. At paragraph 311.5, Orkin in *The Law of Costs* states:

Where a solicitor's retainer requires him to travel on behalf of the client, he is not entitled to be paid at the same rate for travelling time as he is for solicitor's work... Full rates charged for travelling time have been reduced on assessment, either by a reduction in the amount of time to be allowed, or by allowing the full amount of time recorded but reducing the rate substantially below the solicitor's normal billing rates...

- [14] Having considered the above and the factors set out in Rule 57.01, including the principle of proportionality and the amount that a losing party would reasonably expect to pay, I find that an award of costs of \$45,000 is a fair and reasonable amount.
- [15] Accordingly, this court orders that Leah Marie Jones, aka Leah Marie Eward, shall forthwith pay to the plaintiffs on a joint and several basis their costs of this action fixed in the amount of \$45,000 inclusive of disbursements and HST.

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QUINLAN J.

**Date:** December 16, 2015

