

CIVIL FILE ENDORSEMENT SHEET

MOTION/DIRECTION/ORDER

Judge: JUSTICE M. FRASER

Court File No.: CV-19-00000096-0000

Short Case Name: John JORDAN and William NEILSON v. Commonwell Mutual Insurance and Finnegan Insurance Brokers.

for Plaintiff(s) - Michael Raymond Switzer

for Defendant (s)– Commonwell – Kadey B.J. Schultz
Finnegan Insurance – Pasquale Santini

ENDORSEMENT RE: COSTS:

1. This is my order with respect to the parties' costs arising from the motions which were before me relating to my endorsement dated October 6, 2022. On the issue of costs, I ordered that the Defendants provide their written submissions within 30 days and that the Plaintiffs would then have 15 days from receipt of those submissions to respond. No submissions were submitted by the Plaintiffs. The Plaintiffs' counsel requested that a conference be scheduled prior to my disposing of the issue of costs on the basis that he took issue with an "offer" included in the Defendant Commonwell's submissions respecting costs. I do not see the need to hold a conference in the circumstances. In my view, my cost ruling can be made without regard to any offer appended to the Defendant Commonwell's submissions and without the parties having to incur further costs by attending a conference.
2. In my view, the Defendants are entitled to recover their costs for the motions on a substantial indemnity basis. My reasons for this conclusion are as follows:
 - A. The Plaintiffs' motion was wholly unsuccessful;
 - B. The Defendant Commonwell's motion was successful;
 - C. In my reasons I found that the conduct of Plaintiffs' counsel at the examinations for discovery was disruptive and in my view fueled the parties' inability to address the substantive issues in a reasonably cooperative manner. I found his conduct at the examinations to be intemperate and rude and it departed, in my view, from the standard of conduct one would expect from counsel for a party.
 - D. The Plaintiffs' motion simply continued to be a further advancement of this aggressive and uncooperative approach. It was found to be without merit. The motion was

advanced without proper compliance to the procedural requirements set out in Rule 37 of the *Rules of Civil Procedure*. While the Notice of Motion was served on a number of occasions, in each instance it was served without the evidence relied upon in support of same. That evidence was served at the last minute. No motion record was ever served or filed. No factum was filed. Authorities were relied upon without advance notice to the Defendants and were provided to the court following the hearing. This all led to confusion and delay at the hearing and made it unnecessarily difficult for the Defendants to understand the Plaintiffs position and to respond.

3. Section 131(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43, provides that the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court.

4. Although discretionary, and therefore owed a high degree of deference, a court must fix costs on a principled basis. (*Davies v. Clarington*, 2009 ONCA 722, at para. 40.)

5. Further, the court's discretion under s. 131(1) is "[s]ubject to the provisions of an Act or rules of court."

6. Rule 57.01(4) of the *Rules of Civil Procedure* states that when the court awards costs, it shall fix them in accordance with Rule 57.01(1) and the Tariffs.

7. Rule 57.01 (1) provides as follows:

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.

8. The general rule is that costs will be awarded on a partial indemnity basis. (*Akagi v. Synergy Group (2000) Inc.*, 2015 ONCA 771 at para. 31.)

9. Substantial indemnity costs awards are intended to be rare and are warranted in only two circumstances:

1. through the effect of Rule 49.10 of the Rules of Civil Procedure on an unaccepted offer to settle; or

2. where there has been "a clear finding of reprehensible conduct on the part of the party against which the cost award is being made." (Davies, at para. 40.)

10. Reprehensible conduct "represents a marked and unacceptable departure from the standard of reasonable conduct expected of a player in the judicial system" (See: *Québec (Directeur des poursuites criminelles et pénales) c. Jodoin* 2017 SCC 26, 2017 CSC 26, 2017 CarswellQue 3092).

11. I accept the submissions of the Defendants that the costs in this instance should be awarded on a substantial indemnity scale. The Plaintiffs' conduct in this instance was a marked and unacceptable departure from the standard of reasonable conduct which is expected of a player in the judicial system.

12. Therefore, the costs of this motion shall be payable by the Plaintiffs to the Defendants on a substantial indemnity basis as follows:

A. The Plaintiffs shall pay the Defendant, Finnegan Insurance Brokers Ltd its costs fixed

in the amount of \$10,287.97 inclusive of disbursements and HST plus \$500.00 for its costs of making submissions on this issue.

- B. The Plaintiffs shall pay the Defendant, Commonwell Mutual Insurance Group its costs fixed in the amount of \$13,996.40 inclusive of disbursements and HST plus \$500.00 for its costs of making submissions on this issue.

Date: 2 February 2023

A handwritten signature in black ink, appearing to read "W. Fran", written over a horizontal line.

Judge's Signature