

COSTS ENDORSEMENT

SOMJI J.

[1] People On Bikes, Gord Townley, and His Majesty the King in Right of Ontario (“HMK”) (collectively “Proposed Defendants”) seek partial indemnity costs following their successful defence to Defendant Security National’s application to add them as third party defendants to this action: *Townley v Saunders*, 2024 ONSC 2981.

[2] Security National does not deny that the Plaintiff and Proposed Defendants were successful on the motion. In fact, they have already paid the Plaintiff Erin Townley her costs on the motion. However, Security National argues that the Proposed Defendants were intervenors and therefore not entitled to costs.

[3] The issues to be decided are: one, are the Proposed Defendants entitled to costs, and two, if so, what is a fair and reasonable costs award for the motion?

Issue 1: Are the Proposed Defendants entitled to costs?

[4] Courts have broad discretion to determine to whom costs should be paid and the quantum: s. 131(1) *Ontario Courts of Justice Act*, R.S.O. 1990, c. C.43, as am.

[5] Security National argues that the Proposed Defendants had no standing on a motion brought pursuant to Rule 29.02(1.2) *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. They argue that because no relief was sought against the Proposed Defendants, they are by definition “intervenors” who are generally not entitled to costs. Additionally, Security National argues they brought this motion with the expectation that there would be only one Respondent, the Plaintiff, to whom costs might be payable.

[6] I find that the Proposed Defendants are entitled to costs for the following reasons.

[7] First, while Security National brought the motion to add the Proposed Defendants to this action under Rule 29.02(1.2), I ruled that they had erred in doing so and ought to have brought the

application pursuant to Rule 5. Security National cannot rely on its mistaken process as a basis for disentitling the Proposed Defendants to costs.

[8] Second, while it is true that the Proposed Defendants learned of the motion through other sources, and Security National provided them the motion materials as a “courtesy,” I disagree that they had no standing at the motion hearing. At the outset of the motion hearing, Security National argued that that the Proposed Defendants should only be entitled to make submissions if following the motion, they were added as parties. However, as the Proposed Defendants explained, it was highly inefficient, costly, and prejudicial to all parties to await such a situation. For example, should the court rule the Proposed Defendants were to be added as third parties, there would be significant costs for the Proposed Defendants in preparing their Statements of Defence and bringing a motion to dismiss the claims against them.

[9] Furthermore, it was clear that if the Proposed Defendants were added as third parties, there would be further delays in this action that would prejudice the Plaintiff who has been waiting six years to advance this matter. For example, the Proposed Defendants would not have been able to proceed to discoveries scheduled for the summer of 2024 and rescheduling those discoveries would have significantly delayed the action further. Finally, as the Proposed Defendants pointed out, it is common in such situations for motion materials to be served on the parties affected by the order sought pursuant to Rule 37.01 and for proposed third parties to appear and make submissions in such cases.

[10] In addition, while Security National indicated at the outset of the hearing that the Proposed Defendants had no standing, they did not maintain this position throughout the motion hearing. On the contrary, after hearing some submissions on the issue, counsel for Security National stated that while the Proposed Defendants were not parties, they were agreeable that “practically we could push forward” on the motion.

[11] If it were Security National’s position that a ruling was required on whether the Proposed Defendants could participate and the court rely on their materials, it was incumbent on Security

National to have sought such a ruling before the motion was completed. While this would have required a recess, it would have allowed all the parties to make thorough submissions on the issue of standing, including any implications for the entitlement to costs as parties or intervenors, and for the court to rule accordingly on the issue. That was not the case. While the parties requested that I adjudicate on the issue of which Rule was applicable – 29.01(1.2) or 5 – Security National did not seek a ruling on the issue of standing nor did it request the court to disregard the Proposed Defendants’ materials in arriving at my decision on all the issues before me. On the basis of Security National’s submissions, the matter proceeded with the full participation of the Proposed Defendants and the court relied on the materials they filed.

[12] Finally, Security National failed to indicate to the parties or the court at any time that if the Proposed Defendants’ participation was permitted, it was on the condition that they would not be entitled to costs if successful: *Canadian Union of Postal Workers v Her Majesty in Right of Canada* 2017 ONSC 6503 at para 87. In this respect, I find Security National accepted the possibility of a costs award in their favour or against them.

[13] Even if I am incorrect and the Proposed Defendants are “intervenors,” I find that they are entitled to costs as an exception to the general rule against costs for intervenors: *Canadian Union of Postal Workers v Her Majesty in Right of Canada*, 2017 ONSC 6503 (“CUPW”) at paras 29 to 31. In coming to this conclusion, I have relied on some of the factors for consideration listed in CUPW at paragraph 31:

- i. The Proposed Defendants interests were significant as the crux of the motion was whether they could be added as parties to the action following the expiry of the limitation period. The outcome of the motion would have significantly impacted their interests.
- ii. The Proposed Defendants were very involved in the proceeding. While they relied in part on the arguments filed by the Plaintiff to avoid duplication and minimize costs, the Proposed Defendants, particularly People on Bikes and Gord Townley, provided supplemental arguments and written materials that were critical for determining the issues raised. In particular, because Rule 5 was found to be the applicable rule, the Proposed Defendants had to address and the court had to consider the prejudice to them and not just to the

Plaintiff. This evidence of prejudice could only come from the Proposed Defendants.

- iii. The Proposed Defendants were successful on the merits on all issues.
- iv. People on Bikes is a local charity with likely limited resources. While Gord Townley's resources are not known, the costs sought are on behalf of both these parties. I would agree that HMK has sufficient resources for the motion.
- v. While the Proposed Defendants did insist on their involvement by contacting Security National upon hearing of the pending motion, as explained above their reasons for doing so were to minimize further delays and costs for all the parties involved.
- vi. My decision made clear that the Plaintiff and Proposed Defendants were presumptively entitled to costs.

[14] On balance, I find the the exception to the general rule applies and the Proposed Defendants are entitled to costs.

Issue 2: If costs are to be awarded, what is a fair and reasonable amount in this case?

[15] Rule 57.01(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg 194 (*Rules*), sets out the factors that the court may consider in exercising its discretion to award costs in addition to the result of the proceedings and any offers to settle or to contribute made in writing. These include:

- (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.

Complexity and importance of issues

[16] The matter had multiple issues: interpretation of the Rules, application of the statutory limitation period, and an assessment of the prejudice to the Plaintiff and Proposed Defendants. The interpretation of the Rules was an issue of moderate complexity.

[17] The matter was important to the Proposed Defendants because it would have exposed them to personal and financial liability for an action commenced six years ago. The motion was particularly important to Gordon Townley, who, despite being an officer and director of People on Bikes and protected by the principle of separate legal personality, was forced to respond as Security National sought to add him personally to the litigation almost six years after Defendant Saunders' vehicle collided with a group of bikers significantly injuring his daughter, the Plaintiff. The potential financial exposure of People on Bikes, if Security National had succeeded on its motion, would have been around \$200,000, plus costs. Consequently, both these parties has significant interests in defending this motion.

[18] The matter was also important to HMK due to the government's exposure to financial liability. In this regard, I note that there are disadvantages for a road authority to be brought into an action late in this game including for example, the inability to effectively gather evidence to defend the action which would have been more readily available at the time of the incident giving rise to the action.

Offer to settle

[19] The Plaintiff and the Proposed Parties clearly made it known to Security National in their correspondence that there that there was no prospect of success to their application because the statutory time period had expired. However, no formal offers were made that would trigger the operation of Rule 49.10.

Conduct of the parties

[20] As a general rule, costs on a partial indemnity scale should follow the event. Costs elevated over partial indemnity are warranted in only two circumstances. The first involves the operation of an offer to settle under Rule 49.10 of the *Rules* where substantial indemnity costs are explicitly authorized. The second involves sanction-worthy behaviour by the losing party: *Davies v Clarington (Municipality) et al.*, 2009 ONCA 722 at para 28. This can include misconduct of the party, miscarriage in procedure, or oppressive or vexatious conduct: *1318706 Ontario Ltd. v Niagara (Regional Municipality)* (2005), 75 O.R. (3d) 405 (C.A.) at para 51; *394 Lakeshore Oakville Holdings Inc. v Misek*, 2010 ONSC 7238 at paras. 10-14.

[21] In this case, the Proposed Defendants highlight that Security National engaged in unreasonable conduct by one, bringing a motion to add them as third parties which had no reasonable prospect of success, and two, failing to provide the Proposed Defendants notice of the impending motion pursuant to Rule 37.07(1) which requires service to persons affected by any potential order. However, given that the Proposed Defendants only seek partial indemnity costs, it is unnecessary to make findings on whether Security National's conduct was unreasonable and warranted an elevated costs award in this case.

Expectations of unsuccessful party

[22] Security National is a sophisticated insurance company with experience in litigation. The motion involved multiple issues. As already noted, by the end of the motion hearing Security National understood the Proposed Defendants had filed responding materials and were fully participating and consequently, would have expected to pay costs.

[23] As a sophisticated litigant, Security National could have reasonably anticipated that the costs of responding to this motion by the Proposed Third Parties would be at least \$5,000. The fact that they had entered into an agreement with the Plaintiff to fix costs at \$2500 does not undermine this estimation.

[24] Furthermore, National Security refused to concede the Rule 5.04(2) governed its request for relief which required the Proposed Defendants to incur unnecessary costs to address this question. A considerable amount of time was also spent at the outset of the motion hearing to address the issue of standing.

[25] However, I agree with Security National that there was some reliance on the Proposed Defendants with the materials and submissions of others and have considered that factor accordingly in determining the quantum of costs.

Experience of counsel and rates charged

[26] People on Bikes and Gord Townley collectively seek partial indemnity costs in the amount of \$5,328 inclusive of HST. Their counsel Ted Brooks charges a partial indemnity rate of \$444/hour which is reasonable for counsel with nine years of experience based in Toronto. Mr. Brooks performed a total of 8 hours of preparatory work (\$3552) and charged a fee of \$1,776 for the motion appearance (4 hrs). I find the rates are reasonable and the billings commensurate with the work performed. Parties are entitled to counsel of their choice. A differential in rates between cities alone is no basis for reducing the amount of costs: *Garrett v Niagara-on-the-Lake Sailing Club*, 2023 ONSC 4812 at para 28-30.

[27] HMK seeks partial indemnity costs of \$4,992.34. Their lead counsel Martin Forget is a 26-year call and charges a partial indemnity rate of \$300/hour. Junior counsel Jeremy Hanigan is a two year call and charges a partial indemnity rate of \$100/hr. Mr. Forget billed 5.6 hours and Mr. Hannigan billed 25 hours. HMK also charged 3.8 hours for the work of a law clerk.

[28] While HMK provided a Bill of Costs outlining the preparatory work conducted, I find the total billings of almost 35 hours excessive in these circumstances. Some of the billings in the Bill of Costs are attributed to preparation of responding materials. However, HMK did not file any materials in response to the motion. In fact, while HMK was granted leave to file materials following the motion hearing because of the late notice, they did not ultimately file materials. When my judicial assistant enquired with them shortly before the issuance of my decision, counsel for HMK sent a letter indicating that they would not be filing materials and were relying instead on the materials filed by the Plaintiff and People on Bikes.

[29] Furthermore, while HMK make arguments unique to their circumstances, i.e.. the existence of and discoverability of the pothole, they relied on the arguments of People on Bikes and the Plaintiff with respect to the applicable rule, delay, and expiry of the statutory timeline. In sum, while Mr. Forget appropriately delegated the bulk of the preparatory work to junior counsel at a lower rate, I find the HMK's total billings are excessive and the Bill of Costs does not adequately account for duplication of work. Consequently, I have reduced Mr. Hanigan's billings to 8 hours and Mr. Forget to 5 hours for a total of 13 hours bringing the total partial indemnity costs inclusive of HST to \$2,667.

Conclusion and Order

[30] The fixing of costs is not a mechanical exercise. The overall objective is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the circumstances of the case, rather than the fixed amount of actual costs incurred by the successful litigant: *Boucher v Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.) at para 26.

[31] Having considered that the Proposed Defendants were the successful party, the conduct of the parties, the complexity of the issues, what an unsuccessful party might expect to pay, the work

performed and rates charged, and any duplication of work, I find the following fixed costs award are fair and reasonable in this case.

- a. Partial indemnity costs of \$5,328 to People on Bikes and Gord Townley; and
- b. Partial indemnity costs of \$2,667 to HMK.

[32] There will be an Order that Security National pay the above noted costs to the Proposed Defendants in 30 days.

Somji J.

Released: August 09, 2024

CITATION: Townley v. Saunders, 2024 ONSC 4435
COURT FILE NO.: CV-19-336
DATE: 2024/08/09

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Erin Townley

Plaintiff

– and –

Robert Saunders, Irene Spike, and
Security National Insurance Company

Defendants

– and –

Perth Insurance, added by order pursuant to section
258(14) of the *Insurance Act*, R.S.O. 1990, c.I.8, as
amended Dennis Holden, Courtney Boomhower, and
Pancreatic Cancer Canada Foundation

Third Parties

COSTS ENDORSEMENT

Somji J

Released: August 9, 2024