

**CITATION:** Titus v. Hack, 2024 ONSC 5363  
**COURT FILE NO.:** CV-17-00567438  
**DATE:** 20240927

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:** )  
)  
TITUS STEEL COMPANY LIMITED ) F. Scott Turton, for the Plaintiff  
Plaintiff )  
)  
**– and –** )  
)  
WAYNE ROBERT HACK , 9589864 ) Martin Forget, for the Defendants  
CANADA INCORPORATED doing )  
business as PROGRESSIVE ARMOR, and )  
PROGRESSIVE ARMOR )  
INCORPORATED USA )  
Defendants )  
)  
)  
)  
) **READ:** In Writing

2024 ONSC 5363 (CanLII)

**PAPAGEORGIU J.**

**COSTS ENDORSEMENT**

**Overview**

[1] On June 26, 2024, I released my decision in this matter which involved a dispute between an employer and former employee.

**Decision**

[2] For the reasons that follow I award the defendants costs in the amount of \$161,264.

**Issues**

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

- 3: What is the reasonable quantum of costs?

### **Issue 1: Which party is entitled to costs?**

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

[4] Where there are a number of issues before the court, it may have regards to the dominant issue at trial for the purpose of determining the successful party: *Firth v. Allerton*, 2013 ONSC 5434 at paras 17-22 and *Mondino v. Mondino*, 2014 ONSC 1102 at para 13.

[5] This case was primarily about whether or not the defendant Wayne Hack was a fiduciary, and whether he breached fiduciary obligations by beginning a competing business after he resigned. Mr. Hack alleged that he was a mere employee and that he could compete after resignation as such. Most of the evidence and argument at trial related to the designation of Wayne as either a fiduciary or an employee, and what flowed from that finding.

[6] Titus' also alleged that Wayne breached a duty of confidence by taking and using Titus confidential business documents. Although it was clear that Wayne had taken approximately 1200 Titus business documents, Titus led no evidence in chief on these documents with respect to the issue of breach of confidence. It did not even refer to many of them during the trial at all. It only established that 2 such documents had a quality of confidence through Wayne's cross-examination, and still failed to prove that they were used in any way that caused Titus damage.

[7] Titus also alleged that Wayne had intentionally used his position at Titus to do things secretly to damage it. Specifically, it alleged that he "had worked to damage the reputation of Titus" before he left and set up his business. This claim related to alleged gross negligence/intentional misconduct in respect of his actions with respect to two Titus customers before he resigned.

[8] Titus was unsuccessful on all of these claims. I found that Wayne was a mere employee who was entitled to compete after he resigned, that he had only taken preparatory steps while he was employed which were permitted. I also found that Titus failed to prove any of the actions he took before he resigned were deliberate attempts to harm Titus. I rejected the claim that he was liable for gross negligence or intentional misconduct with respect to two customers.

[9] The only success Titus achieved was pyrrhic.

[10] One of its claims related to the taking of Titus documents prior to Wayne's departure. It was obvious that Wayne had done so since he and his company listed 1200 Titus documents in their affidavit of documents, even though Wayne told Titus that he had returned all Titus documents when he resigned, and even pleaded that he had done so.

[11] However, Titus failed to establish that these documents had any value, or that they were used in any tortious manner, apart from the taking of them.

[12] In my view, even though I find Mr. Hack's conduct related to Titus documents extremely concerning, Wayne was by far the successful party. He was successful on almost every single issue and the only issue Titus succeeded on was minimal. Indeed, it was very easy to prove that Wayne had taken and kept documents because, as I have said, the defendants listed them in their affidavit of documents.

[13] An eight-day trial was not required to establish the fact that Wayne had kept the Titus documents. It was plain from the defendants' affidavit of documents and confirmed through approximately five minutes of Wayne's cross examination. Titus could have achieved the outcome of this trial with a 15-minute motion for summary judgment on that issue.

[14] As the successful party, the defendants are presumptively entitled to their costs.

## **2: What is the appropriate scale of costs?**

[15] The defendants seek substantial indemnity costs throughout on the basis that there were several unproven allegations of dishonesty, including misuse of confidential information.

[16] The defendants reference *Nazarinia Holdings Inc. v. 2049080 Ontario Inc.* 2010 ONSC 2559 at para 21, where Strathy J. (as he then was) as justifying a substantial indemnity award in this case:

Costs on the higher scale can be awarded as a form of chastisement and as a mark of the court's disapproval of a litigant's conduct. This is intended to punish as well as to deter others from engaging in similar conduct. Unproven allegations of fraud frequently attract awards on the higher scale. Unproved allegations of breach of trust, conspiracy, misrepresentation, breach of fiduciary duty, and the like, may also attract this kind of award: *Beaver Lumber Co v. 222044 Ontario Ltd.* (1997) 5 C.P.C. (4<sup>th</sup>) 253 at p. 256.

[17] They reference the following unproven claims:

"Wayne was able to secretly work at harming Titus Steel" (paragraph 5) "Wayne Hack used his position and ability that position gave him to do things secretly to damage Titus Steel " (paragraph 5)

"The obvious conclusion is that Wayne Hack tried to damage the reputation of Titus Steel while he was still working there ... " (paragraph 10)

"Wayne Hack's attempts to harm Titus Steel will be described in a Statement of Claim" (paragraph 10)

"Wayne Hack knew that, but his actions once he decided to damage Titus Steel and try to acquire its armour plate customers ... " (paragraph 13)

Wayne tried "to lure away customers from Titus Steel"" (paragraph 15)

"Wayne had already been conducting a secret campaign of trying to sabotage the reputation of Titus Steel in the armour plate market" (paragraph 15)

"Wayne Hack's deliberate attempts to damage the reputation of Titus Steel in the marketplace and for punitive damages." (paragraph 26)

"Wayne Hack causes a lawsuit in Texas for fraud" (heading on page 15)

"Wayne Hack wrongfully took from Titus Steel to try to solicit the customers of Titus Steel to do business with Wayne Hack and his company" (paragraph 33)

"This situation requires the remedy of an injunction to stop Wayne Hack and his two companies from continuing the exploit confidential information they wrongly obtained from Titus Steel and from operating the same type of business Titus Steel operates in." (paragraph 37)

[18] Despite the above, I do not find that the conduct exhibited by Titus rises to the level of justifying a substantial indemnity award throughout. As noted in the following cases, while the court has the discretion to award substantial indemnity costs, such costs are "rare and exceptional" and only warranted where there has been reprehensible, scandalous or outrageous conduct on the part of a party: see *DUCA Financial Services Credit Union Ltd. v. Bozzo*, 2010 ONSC 4601, at para. 5; *Foulis v. Robinson* (1978), 21 O.R. (2d) 769 (C.A.); and most recently *Mars Canada Inc. v. Bemco Cash & Carry Inc.*, 2018 ONCA 239, 140 O.R. (3d) 81, at para. 43.

[19] I add again that despite the serious unproven allegations against Wayne, Wayne did take Titus' documents and misrepresented that he had returned them. His conduct with respect to these documents and the computers is what triggered Titus' concerns, even if Titus could not prove any damages in relation to these issues.

[20] In the alternative, the defendants seek substantial indemnity costs after the date of their first offer to settle on February 9, 2024, in the amount of \$25,000. (They also made a second offer to settle on February 20, 2024 for \$50,000.) The defendants concede in their submissions that because there was no monetary judgment in favour of Titus, r. 49.10 does not apply.

[21] The plaintiff rejected both of these offers and, in my view, the defendants beat their offer because the only thing the plaintiff achieved was an order for the return of documents that it could not even establish had any value or were used in any way that harmed Titus.

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

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

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

[25] Despite the above, I decline to award any substantial indemnity costs in the exercise of my discretion. Again, this is because the defendants were not innocent in this matter. Their conduct in misappropriating these documents is deeply concerning. It is not just and appropriate that they be awarded any substantial indemnity costs in all the circumstances.

### **3: What is the reasonable quantum of costs?**

[26] Pursuant to s. 131(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, costs are in the discretion of the court. Rule 57 of the *Rules* sets out the factors which courts should have regard to when awarding costs. The overall objective is “to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding, rather than an amount fixed by the actual costs incurred by the successful litigant”: *Zesta Engineering Ltd. v. Cloutier* (2002), 21 C.C.E.L. (3d) 161 (Ont. C.A.), at para. 4; *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.), at para. 26; *Clarington (Municipality) v. Blue Circle Canada Inc.*, 2009 ONCA 722, 100 O.R. (3d) 66, at para. 52; and *G.C. v. Ontario (Attorney General)*, 2014 ONSC 1191, at para. 5.

#### **Rule 57.01(1) (0.a): Indemnity and Rates.**

[27] The defendants have used the following rates which I find fair and reasonable and consistent with market rates for counsel of similar experience:

Mr. Forget, who has 25 years’ experience: \$350 partial indemnity rate

Mr. Seretis, who has 11 years \$ \$300 partial indemnity rate

Mr. Ruzza, who has 23 years’ experience: \$300 on a partial indemnity rate

#### **Amount claimed and Recovered**

[28] Titus claimed the significant sum of \$10,000,000 in this case and recovered no damages. It should have expected that the defendants would devote significant resources to this matter.

#### **Complexity**

[29] There were eight witnesses, one of whom was an expert, and the trial lasted eight days.

[30] The matters were highly complex. Titus alleged several different causes of action set out above including a claim for punitive damages. These required reference to many authorities.

#### **Importance of the Issues**

[31] The issues were important as they were significant allegations of wrongdoing that the defendants had to defend against.

**Conduct of the Parties that tended to shorten or lengthen unnecessarily the duration of the proceeding.**

[32] Titus raises a number of ways that it alleges the defendants lengthened the proceeding including:

- The defendants failed to respond to the discovery plan or deliver an affidavit of documents which required a motion. Master Jolley ordered costs in the amount of \$1,200 against the defendants on October 3, 2017.
- Titus says that the defendants failed to list any Progressive Armor documents in its affidavit of documents and brought a motion. On July 4, 2019 Master Muir determined that “the defendants production appears to be much more extensive than the plaintiff’s production. This is not a case where it is obvious that a party’s production is inadequate.” He did, however, order Progressive Armor’s financial books and records stating: “I agree that this is a broad request. Ordinarily, financial statements and tax returns would be sufficient, however, the request is proportional in the context of this action.” Master Muir ordered no costs.
- A dispute arose as to the scope of Master Muir’s Order.
- The defendants would not approve the form of the Order which necessitated an attendance before the Registrar and it was settled in the same form provided by Titus on October 25, 2019.
- The defendants appealed this to Master Muir who approved it in the same form on December 3, 2019, with costs in the amount of \$500 in favour of Titus. In doing so however, he stated:

“I would note that it was unclear until today exactly what was required to answer the refusal in issue and obviously that would have some effect on any motion to enforce my July 4, 2019 order.”

- The defendants then had 60 days to provide the further productions ordered to be produced and produced additional materials on February 28, 2020, which was late and which Titus considered did not comply.
- Titus took the position that the defendant had disobeyed Master Muir’s order. It brought a motion for contempt before Sanfilippo J. on March 5, 2020. He found that the motion had been improperly brought before a Judge. He dismissed the motion without prejudice to it being brought to a Master. In his endorsement Justice Sanfilippo did award \$600 in costs

to Titus and did find that the defendants had delivered additional materials in non-compliance with the timeline set out in Master Muir's July 4, 2019 Order which he did not condone.

- Titus then brought a motion before Master Muir, recast to take into account materials produced by the defendants. Master Muir determined that the motion was necessary and yielded some documents and information which should have been produced sooner. He awarded costs in favour of Titus in the amount of \$2,800.
- On March 3, 2021, Titus then brought a motion before Master Muir, recast to take into account materials produced by the defendants. It also sought production from third parties Pivot Financial, Books by E, and the Bank of Nova Scotia for all documentation relating to Progressive Armor. The matter proceeded on consent and Master McGraw awarded \$2,800 in favour of Titus.
- Titus also complains that the defendants took longer than the amount of time estimated to present its case in the Trial Management Form while Titus took less time than it estimated.

[33] It is important to note that the costs of these various matters except for the ultimate one, were all resolved. I do not consider the above matters to be significant or out of the ordinary in the context of the kinds of issues being litigated. Litigation is often hard fought.

[34] Titus in fact delayed between October 3, 2017, and July 4, 2019, when it brought its first motion in respect of further productions. Titus also delayed between the motion before Sanfilippo J. which occurred on March 5, 2020, and the March 3, 2021, motion before Master Muir, although those delays may have been delays related to obtaining court dates.

[35] And the more important thing to note is that despite all of these procedural steps where the defendants sought and obtained further productions, Titus did not obtain any documents that actually assisted them with this case.

#### **Overall Quantum and the Amount that Titus could reasonably expect to pay.**

[36] The defendants did not provide any calculation of their partial indemnity costs for the entire matter. Rather, they provided only the calculation of their substantial indemnity costs for the entire matter which was \$187,930 or the calculation of their partial indemnity costs up to the date of the first offer and substantial indemnity thereafter which is \$163,661. In both instances they claimed disbursements in the amount of \$12,712 as well.

[37] I have not decided to award them any substantial indemnity costs and so their Bill of Costs are to some extent unhelpful.

[38] In Titus' Bill of Costs, it only claimed \$92,415 for its fees as well as \$46,000 for disbursements such that its total costs claim was approximately \$150,000, although I recognize

that this was only as of February 20, 2024, prior to the trial time. Its disbursements were higher than the defendants because it retained an expert.

[39] Taking into account the amount claimed by Titus for its partial indemnity costs as well as the defendants Bills of Costs, and all of the relevant circumstances, I decide that the appropriate quantum of costs for the entire matter is \$130,000 in legal fees and \$12,712.39 in disbursements as claimed.

[40] The costs award is \$142,712 with HST of \$18,552 for a total of \$161,264.

### **Conclusion**

[41] In all the circumstances I award costs to the defendants in the amount of \$161,264 payable within 60 days.

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Papageorgiou J.

Released: September 27, 2024



