

Case Name:

Cossette v. Gojit (Brampton) Inc.

Between

**Marie-Louise Cossette and 1460930 Ontario Limited
carrying on business as AZ Tractor Transport, and
Gojit (Brampton) Inc.**

[2005] O.J. No. 6098

Court File No. 02-CV-233411CM1

Ontario Superior Court of Justice

Master R. Dash

September 20, 2005.

(11 paras.)

Counsel:

Wayne Cipollone, for the plaintiffs.

Martin Forget, for the defendant.

COSTS ENDORSEMENT

1 MASTER R. DASH:-- This endorsement deals with my determination of costs of the defendant's motion to dismiss the action heard by me on August 18, 2005. On August 22, 2005 I released my order that the plaintiffs' loss of income claim be struck, and that the plaintiffs produce further documents, a further and better affidavit of documents and re-attend for discovery. I have received and reviewed the defendant's submissions dated August 29, 2005 and the plaintiffs' submissions dated September 15, 2005 together with plaintiffs' submissions made on an earlier motion heard by Master Kelly which the plaintiffs ask me to consider for purposes of this costs determination.

2 Under section 131 of the Courts of Justice Act, costs of any step in the proceeding are in the discretion of the court. Rule 57.01(1) provides that in addition to the result of the proceeding, in exercising its discretion to award costs the court may consider the factors enumerated in that section. I

have in particular considered the factors set out in subsections (c), (d), (e), (f), (0.a) and (0.b) of rule 57.01(1). In the result I must determine what are fair and reasonable costs to award on this motion in all of the circumstances.

3 The defendant was substantially successful on the motion. Although the entire action was not dismissed, I dismissed the plaintiffs' pecuniary claim and ordered the further productions and re-attendance as requested. The issue on the motion was factually complex, requiring extensive material detailing the history of the litigation, and took approximately 3.5 hours to argue. The issues were of particular importance to the defendant as it was facing an impending trial date without adequate financial and corporate production and was of importance to the plaintiffs as they were at risk of having their action dismissed. The conduct of the plaintiffs, which I found to be cavalier in their disregard of their production and discovery obligations and of court orders, tended to complicate and unnecessarily lengthen the duration of the proceedings. The defendant spent considerable time in preparing extensive materials for the court outlining in some detail the history of the litigation and the plaintiffs' breaches as well as a factum and book of authorities. The material was helpful and to the point. The plaintiffs, by their behaviour, have caused the defendant to incur unnecessary costs for which the defendant should properly receive some indemnification.

4 In their submissions, the plaintiffs state that costs should follow the event because of the indulgence the court granted to the defendant in allowing a re-attendance after the date set out in Master Kelly's order. I have outlined in my reasons, and particularly at paragraphs 38 and 39 thereof, the plaintiffs' "tactics" that led to the delay in the re-attendance and need for the court's assistance. To the extent that the defendant was granted an indulgence it does not come close to the indulgences granted to the plaintiffs over the course of this litigation. In fact, it was only as a result of an indulgence granted to the plaintiffs that their action was not dismissed on the motion, although I had determined that the court would have been justified in so doing. The plaintiff also refers to defendant's incorrect assertions made during argument on the motion. This in my view is yet another attempt by the plaintiffs to re-argue the motion.

5 The defendant is clearly entitled to its costs of the motion. The defendant asks me to award costs on a substantial indemnity basis based on the plaintiffs' egregious behaviour, however, I decline to do so for two reasons. In the first place the defendant should not be rewarded for setting a trial date with production and discovery issues outstanding and for not moving on these issues prior to the settlement conference. Secondly, the defendant was unsuccessful in striking the entire action, which could be considered as a division of success, although success was weighted heavily in favour of the defendant. The plaintiff's partial success in resisting a final dismissal is insufficient to deny the defendant its costs herein, but is a factor in denying the defendant costs on a substantial indemnity scale. Costs will be to the defendant on a partial indemnity basis.

6 The defendant presents a Costs Outline claiming fees on a substantial indemnity basis of \$13,016, GST thereon of \$911.12 and disbursements of \$657.85 for a total of \$14,584.94. Applying what I consider to be appropriate partial indemnity rates of \$200 and \$150 respectively for Mr. Forget and Ms. Zisckind would result in partial indemnity fees of \$10,870. With GST of \$760.90 and disbursements of \$657.85 the total would be \$12,288.75. An award of costs is not however a mere arithmetic exercise of multiplying hours by hourly rates. I must consider all of the above factors and determine what is fair and reasonable in all the circumstances.

7 I have no doubt that Mr. Forget and Ms. Zisckind put in 35.3 and 25.4 hours respectively on this motion. As indicated, the factual issues were complicated and the court benefited from the ex-

tensive materials, the detailed history and the thorough factum. There is in fact nothing in the plaintiffs' submissions that questions the hours spent. The defendant included complete dockets, but these are not addressed by the plaintiffs. There is no suggestion that the defendant duplicated any work previously prepared in the motion before Master Kelly. There are in fact no submissions by the plaintiffs as to quantum whatsoever except that Master Kelly on the earlier motion awarded a sum substantially less than what was claimed. The plaintiff's submissions are directed primarily to liability for and timing of costs.

8 The plaintiffs do not assert that the costs claimed exceed the reasonable expectations of the plaintiffs on a motion of this nature, importance and level of complexity. In fact, the plaintiffs' solicitor suggests that costs be awarded to the plaintiffs "in the quantum claimed by the defendant." Nonetheless, despite the great deal of work done by defendant's solicitors and the importance of the motion, in my view the costs do exceed what would be fair and reasonable on a motion of this nature and complexity, although not substantially. In my view a fair and reasonable award of costs on this motion would be \$9500 inclusive of disbursements and GST.

9 When should costs be payable? The plaintiffs appear to take a contradictory position. On one hand the plaintiffs refer to Master Kelly's awarding of costs in any event of the cause. On the other hand, the plaintiffs ask that I award costs to them "forthwith." On a generous reading of plaintiffs' submissions I proceed on the basis that their position is that costs be payable after trial. Master Kelly made his award of costs mindful of a trial date "fast approaching" and "viewing this motion as a whole." The trial is no longer fast approaching in light of events that transpired subsequent to the motion, including an indication by the plaintiffs' counsel that he (as well as defendant) would seek an adjournment of the trial. Furthermore, the plaintiff's actions become even more egregious than they were at the time of the motion before Master Kelly since the plaintiffs continued to be in breach of their production and discovery obligations and of court orders, including the very order of Master Kelly. Further, the plaintiffs do not assert that they are impecunious or that payment of costs would be a financial hardship, let alone provide evidence thereof. Even had such evidence been proffered, a party should not be allowed to flout its production obligations and orders of the court and then hide behind a shield of impecuniosity, or else the conduct would go unsanctioned and the court would lose all pretence of control over the party's conduct: *Stacey v. Barrie Yacht Club*, [2003] O.J. No. 4171 (S.C.J.)

10 There is no adequate reason why the costs should not be payable other than in accordance with the presumptive provisions of rule 57.03(1)(a) and they shall be payable within 30 days,

ORDER

11 The court hereby orders as follows:

1. The plaintiffs shall pay to the defendant its costs of the motion argued on August 18, 2005 within 30 days fixed in the sum of \$9500.00.

MASTER R. DASH

cp/s/qw/qlqs