

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:)
))
FAMILY DELICATESSEN LTD. 643254) Angela Assuras & Thomas J. Corbett, for
ONTARIO INC., 687810 ONTARIO INC.,) the Plaintiffs
ARSHALUICE AINTABLIAN carrying on)
business as KNICKERBOCKERS FINE)
FOOD EMPORIUM)
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Plaintiffs)
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- and -)
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THE COVENT GARDEN MARKET) Ian Dantzer & Shawn Macdonald, for the
CORPORATION) Defendants
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Defendants)
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) **HEARD:** April 23, 2008 at London,
) Ontario

W. A. JENKINS J.

REASONS FOR DECISION ON COSTS

[1] This action involved claims by three tenants of the Covent Garden Market for damages for breach of their leasehold agreements and for negligent misrepresentation. The trial lasted 13 days and judgment was given on February 5, 2008 awarding the Family Delicatessen damages of \$223,162.98 and dismissing the claims of the numbered companies carrying on business as the

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Green Apron and Arshaluice Aintablian carrying on business as Knickerbockers Fine Food Emporium.

[2] The general principle relating to costs where several plaintiffs sue by the same solicitor and one succeeds while the others fail is found in Orkin, *The Law of Costs*, 2nd edition, para. 208.01;

Where several plaintiffs sue by the same solicitor and one succeeds while others fail, the successful plaintiff will be entitled to recover the whole of his or her costs from the defendant and not merely a proportion. The unsuccessful plaintiffs will be obliged to pay the defendants' costs occasioned by their having joined unless the court otherwise orders.

[3] I see no reason to deviate from this general principle in assessing the Family Delicatessen's costs and the costs of the defendant. I therefore find that the Family Delicatessen is entitled to its costs against the defendant, Covent Garden Market and the Market is entitled to its costs incurred in defending the claims of the unsuccessful plaintiffs.

[4] The plaintiff numbered companies carrying on business as the Green Apron are said to be insolvent and inactive and the submission of the plaintiff's counsel dated April 22, 2008 does not include any comments concerning the Green Apron.

[5] The Green Apron had very little chance of success in this action. Its rent was in arrears at the time the Market closed and in spite of that, the Market made it a reasonable offer of space in the new premises. It rejected that offer and I see no reason why it should not be ordered to pay its share of the Market's costs.

[6] Counsel for the plaintiffs asks that I not award costs against Arshaluice Aintablian on the grounds that the demolition clause in her lease was confusing and the Market was not able to interpret the clause as late as the examination for discovery held within six months of the trial. Further she contends that it would be a hardship to award costs against Mrs. Aintablian who is a woman of modest means.

[7] Mrs. Aintablian's position is different from the Green Apron's only to the extent that the demolition clause in her lease was unclear. At trial she argued that the phrase "for use as

required by the landlord” was vague and that neither party knew what it meant. The Market alleged that the phrase meant that it reserved the right to specify the type of restaurant business the plaintiff could operate in the new market. I found that the Market, in fact, made her a reasonable offer of space in compliance with its obligations under her lease. I am, therefore, satisfied that Mrs. Aintablian is liable to the Market for its costs of the action. The fact that she is a woman of limited means is a matter that I will take into account in assessing the amount she is ordered to pay.

SCALE OF COSTS

[8] The plaintiffs all made offers to settle their claims. The defendant did not make any offer of settlement. Rule 49 has not, however, been invoked. As a result, all of the costs in this matter will be assessed on a partial indemnity basis.

FAMILY DELICATESSEN’S COSTS

[9] The Family Delicatessen was entirely successful in the action and it is entitled to its costs. It seeks fees on a partial indemnity basis of approximately \$388,000. It bases this claim on the fact that over 1,000 hours were spent on preparation for trial, there were two pretrial hearings, and the trial lasted 13 days.

[10] The Family Delicatessen allowed \$1,800 a day for a counsel fee for Ms. Assuras and \$3,200 a day for a counsel fee for Mr. Corbett for the 13 days of trial. It contends that the time spent on the claims of the unsuccessful plaintiffs has been removed from its calculation of the costs.

[11] Mr. Dantzer, counsel for the Market contends that \$388,000 is excessive as fees calculated on a solicitor and client basis would total approximately \$500,000 which is unwarranted. He takes the position that the Family Delicatessen’s fees should total approximately \$100,000 on a solicitor and client basis, and \$65,000 on a partial indemnity basis. He bases that on the time that should have been spent on this matter in view of the amount involved.

ANALYSIS

[12] The preparation for trial charged by Ms. Assuras includes more than 1,000 hours at \$220 per hour and Mr. Corbett charged an additional \$13,000. The counsel fees charged by Ms. Assuras and Mr. Corbett total \$5,000 per day for the duration of the trial which lasted 13 days. These amounts are excessive.

[13] The plaintiffs' Bill of Costs includes claims of over \$2,500 for attendance at assignment court, over \$3,600 for preparation for a motion for an adjournment, over \$5,000 for preparation for an attendance at a pretrial hearing, and over \$6,000 for preparation of a Bill of Costs. All of these amounts are unreasonably high.

[14] This was a 13 day trial involving a claim by the Family Delicatessen which the plaintiff offered to settle for \$365,000. At the trial the plaintiff recovered \$223,162.98. The amounts involved do not warrant the expenditure of time that the plaintiff is claiming in its Bill of Costs.

[15] Had the Offer of Settlement for \$365,000 been accepted, the Market would not have reasonably anticipated paying \$388,000 in costs. That claim for costs does not reflect the concept of proportionality, or the concept of what an unsuccessful defendant would reasonably expect to pay.

[16] In part, the plaintiff's claim for costs reflects the fact that its Bill of Costs includes over \$60,000 charged by Mr. Corbett the counsel retained by Ms. Assuras to assist her at the trial. While there was nothing wrong with that, it was expensive and the defendant cannot be expected to pay more than the case warrants.

[17] I am satisfied that a reasonable amount for fees in this case, including discovery, motions, preparation for trial, production, pretrial conferences, the trial itself and preparation of the Bill of Costs is \$156,000. I include in that amount the following fees:

Pleadings:	\$ 1,000.00
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Documents	\$ 5,000.00
Discovery	\$14,000.00
Pretrial	\$ 3,000.00
Motions	\$ 2,000.00
Assignment Court	\$ 1,000.00
Preparation	\$ 75,000.00
Trial	\$ 54,000.00
Bill of Costs	<u>\$ 1,000.00</u>
Total	\$156,000.00

DISBURSEMENTS

[18] The Plaintiff's disbursements total \$38,183.17. The plaintiff states that disbursements relating to the unsuccessful plaintiffs are not included in this amount.

[19] The Market contends that the experts' reports which total \$15,795 are excessive and that part of those fees include services provided to the unsuccessful plaintiffs. The Market also contends that the amounts claimed for faxes, telephone and postage should be deleted from the party and party Bill of Costs, and the amount claimed for photocopies should be reduced.

[20] The Market contends that the disbursements are too high and that there should be some further apportionment between the three plaintiffs. The Market suggests that the disbursements should total approximately \$20,000.

[21] Charges for photocopying, facsimiles and telephone are routinely included in claims for party and party costs. As a result, I do not propose to make any reduction in the claims for those amounts.

[22] The expert fees include charges of \$8,950 for Rich Rotstein whose representative testified at the trial. As well, there are claims of \$1,875 and \$4,970 for accountants' reports. As a result, the total claim for experts' reports is \$15,795.

[23] The Market contends that these bills are too high and that they include fees for work on the claims of all three plaintiffs. I agree that the experts have charged too much for the work done on behalf of the Family Delicatessen and I am reducing their accounts by \$3,000. The amount allowed for disbursements is \$35,183.17.

PRE-JUDGMENT INTEREST

[24] The plaintiff claims pre-judgment interest at the rate of 5% per annum from February 22, 1998 when the Market delivered its Offer to Lease to February 5, 2008 which was the date of judgment. That interest totals \$111,158.49.

[25] The Market contends that the interest should be calculated from the date the Statement of Claim was issued which was June 9, 1998. Interest from that date at 5% totals approximately \$107,000.

[26] The Market contends that the case should not have taken ten years to get to trial and that delay was caused primarily by the plaintiffs.

[27] I agree that it took a long time for this case to get to trial. I am satisfied, however, that both parties contributed to the delay and I am allowing pre-judgment interest at the rate of 5% per annum from the issuance of the Statement of Claim to the date of the judgment.

CONCLUSION

[28] The plaintiff Family Delicatessen is entitled to costs of the action in the amount of \$191,183.17 plus GST and prejudgment interest at the rate of 5% per annum from the date the Statement of Claim was issued on June 9, 1998.

THE COVENT GARDEN MARKET CORPORATION COSTS

[29] The defendant Covent Garden Market was successful in defending the action with respect to the claims of the Green Apron and Knickerbockers Fine Food Emporium. As a result, it seeks its costs of defending those claims.

[30] The solicitor for the Market has filed a Bill of Costs on a partial indemnity basis totaling \$413,870, plus \$20,693.50 for GST and disbursements of \$53,553.63. He indicated that this Bill is all-inclusive and it must be divided by 3 as it includes party and party costs for the defence of the entire action.

[31] During his submissions, the solicitor for the Market suggested that his client should recover party and party costs on a partial indemnity basis of \$65,000, plus a portion of the disbursements against each of the two unsuccessful plaintiffs.

[32] I agree with the defendant's submissions that there were three separate claims involved in this action. I also agree that the Market was successful in defending the claims of the Green Apron and Knickerbockers and it is entitled to its costs against those plaintiffs on a partial indemnity basis. Each of those awards must be assessed separately and must be payable severally and not jointly.

[33] The fees claimed by the Market for each of the claims have not been broken down into categories. As a result, I have assessed the defendants' costs with respect to each claim on a global basis.

THE GREEN APRON CLAIM

[34] The Green Apron offered to settle its claim for \$135,000, plus prejudgment interest and costs. As I have indicated before, this plaintiff had very little chance of succeeding and very little time was spent on its claim. John Ramage, the Green Apron principal testified over about two-and-a-half days and a significant part of his evidence was background information relating

to all three claims. A small part of the expert evidence called by the plaintiffs related to the Green Apron's claim for damages.

[35] The Market called evidence relating to the Green Apron's status as an overholding tenant whose rent was in arrears and its claim for damages. As a result, the defendant is entitled to recover part of its fees and part of its disbursements as its costs of defending this claim.

[36] In addition, the Market is entitled to recover a portion of its costs thrown away as ordered on two motions for adjournment of the trial. In both cases the judge hearing the motions ordered that the costs of the motion be reserved to the trial judge.

ANALYSIS

[37] Counsel for the Market bases his claim for fees in the amount of \$65,000 on the amount involved which he contends was \$135,000, together with the complexity of the proceedings, the importance of the issues, and the conduct of the parties. As to the complexity of the issues, he points to the fact that the defendant called six witnesses at trial, including expert evidence. As to the importance of the issues, he notes that there was an application for judicial review and an injunction application associated with this action. He also points out that the proceedings lasted almost 10 years.

[38] In addition to the factors referred to by counsel for the defendant, I must also consider the amount of time devoted to the Green Apron claim during the course of the trial. As I have indicated earlier, the Green Apron had very little chance of succeeding in this action and, in any event, defending a claim ordinarily takes less time than proving a claim. As well, in this particular case, the defendant had to spend more time on the claims of the Family Delicatessen and Knickerbockers as those claims had more potential than the claim of the Green Apron.

[39] Taking all of these factors into account, I assess the fees payable to the defendant Covent Garden Market by the Green Apron on a partial indemnity basis in the amount of \$55,000.

DISBURSEMENTS

[40] The disbursements total \$53,553.63. Defendants' counsel conceded that the disbursements for Simmons and Mirtitsch should be deleted and the amount claimed for photocopies should be reduced by \$7,110.45. When these amounts totalling \$22,831.55 are deducted from the disbursements of \$53,553.63, the total allowable disbursements are \$30,722.08.

[41] Although less time was spent defending the Green Apron claim than the others, the time spent does not have a significant effect on the allocation of disbursements. There are, however, some disbursements that the Market would have incurred even if the Green Apron had not been a party. Those expenses include charges for filing the Notice of Intent to Defend, Notice of Motion, LPIC Levy and photocopying charges.

[42] I am therefore, allowing one-third of the disbursements or \$10,240.69, less \$500 for a total of \$9,740.69 for disbursements relating to the defence of the Green Apron claim.

CONCLUSION

[43] The defendant Covent Garden Market is entitled to its costs of defending the Green Apron claim in the amount of \$64,740.69, plus GST payable by the numbered companies.

THE KNICKERBOCKERS CLAIM

[44] The plaintiff Arshaluice Aintablian offered to settle this claim prior to trial for \$185,000, plus interest and costs. She was unsuccessful at trial and counsel for the defendant seeks costs on a partial indemnity basis, including fees of \$65,000, plus disbursements and GST.

[45] Counsel for the plaintiff Arshaluice Aintablian contends that this claim is different than the Green Apron claim because the demolition clause in the plaintiff's lease was unclear and the defendant, who was the landlord named in the lease, was unable to say what the demolition clause meant. Since the Market made no offer of settlement the plaintiff contends that she was justified in trying this action and she should not have to pay any costs.

[46] Although the Market did not make any offer of settlement prior to the trial, it had previously made a reasonable offer of space to the plaintiff. I am satisfied that given the wording of the demolition clause, the plaintiff knew that there was a risk she could lose this action and that she might be ordered to pay costs. I therefore, find that the defendant is entitled to recover its costs of defending the claim on a partial indemnity basis.

ANALYSIS

[47] The Market's claim for costs in excess of \$75,000 is, excessive. Ordinarily, the defendant would probably be entitled to recover about the same amount for costs against Arshaluice Aintablian as it was awarded against the Green Apron. Since more time was spent defending the Knickerbocker's claim than was spent defending the Green Apron claim, the defendant's costs are probably somewhat higher.

[48] In this case, however, there are factors other than the time spent in defending the claim that must be taken into account. Arshaluice Aintablian is a woman of limited means who is close to retirement. She suffered significant expense as a result of the market closing. Consequently, some thought must be given to these and other factors.

[49] In *Boucher et al v. Public Accounts Council for the Province of Ontario et al*, [2004] 71 O.R. (3d) 291, the court held that:

The expressed language of Rule 57.01(3) makes it clear that the fixing of costs is not simply a mechanical exercise. In particular, the rule makes it clear that the fixing of costs does not begin and end with a calculation of hours, times, rates. The introduction of a costs grid was not meant to produce that result but rather to signal that this is one factor in the assessment process, together with the other factors in Rule 57.01. Overall this court has said the 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.

[50] In deciding what is fair and reasonable the Court of Appeal held that the expectation of the parties concerning the quantum of costs is a relevant factor. Although the costs grid no longer applies, the principles referred to in *Boucher* are still relevant.

[51] In *Schein v. Saugeen Valley Conservation Authority*, [1995] O.J. No. 2045 McKay J. said at para. 6:

Counsel for the applicants referred the court to the case of *Peter Reese, et al. vs. Ministry of Forestry (Albera)* 13 C.P.C. (3d) 323. This case concerned the assessment of party and party costs by an unsuccessful plaintiff against the Crown. McDonald, J. at page 333 states as follows:

“In my view, the level of party and party costs which the Crown should be permitted to recover from an unsuccessful applicant for judicial review should not be such as to discourage future prospective applicants for judicial review from initiating such an application, when the application is reasonably meritorious but there is a risk of failure. An application for judicial review has as its object the invocation of judicial power to prevent the executive from violating the law. It is in the public interest that even applications which may turn out to be unsuccessful not be discouraged by the risk of heavy costs being awarded against the applicant.”

I agree with submissions by counsel for the applicants that by analogy this principle should have application in assessing or fixing costs against an unsuccessful citizen in an action involving a municipality.

[52] In this case, the Market is a creature of the municipality. It engaged in sloppy drafting when it prepared the Knickerbockers’ lease. That led, in part, to this litigation.

[53] The Market offered Arshaluice Aintablian space in the new market, however, it did not make any effort to settle her claim. That claim had some merit because of the lack of precision in her lease. Although the Market succeeded against Arshaluice Aintablian, it cannot avoid some responsibility for the fact that this matter proceeded to trial.

[54] Taking all of these factors into account, I assess the fees allowed the Market at \$30,000. Following the same processes I adopted in assessing the disbursements payable by the Green Apron, I allow the same amount or \$9,740.60 for disbursements relating to this claim.

CONCLUSIONS

[55] The defendant Covent Garden Market is entitled to its costs of defending the Knickerbockers’ claim in the amount of \$39,740.69 plus GST payable by Arshaluice Aintablian.

ORDER

[56] The plaintiff Family Delicatessen is therefore entitled to its costs of the action against the defendant Covent Garden Market in the amount of \$191,183.17 plus GST. The defendant Covent Garden Market is entitled to its costs of defending the Green Apron claim in the amount of \$64,740.69, plus GST payable severally by the numbered companies. The defendant Covent Garden Market is entitled to its costs of defending the Knickerbocker's claim in the amount of \$39,740.69, plus GST payable severally by the plaintiff Arshaluice Aintablian.

"Justice W. A. Jenkins"
Justice W. A. Jenkins

Released: June 25, 2008