

CITATION: McConnell v. Fraser, 2020 ONSC 7262
COURT FILE NO.: CV-17-1383
DATE: 20201125

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: David McConnell, Plaintiff

AND:

Karen Michelle Fraser, Gary Fraser, Home Depot of Canada Inc. and Home Depot of Canada Inc. o/a The Home Depot

BEFORE: Justice C. Boswell

COUNSEL: W. Patrick Sloane for the Plaintiff

Eric W.D. Boate for the Defendants/Moving Parties, Karen Michelle Fraser and Gary Fraser

No one appearing for Home Depot of Canada Inc.

HEARD: In Writing

COSTS ENDORSEMENT

[1] On October 30, 2020 I released a ruling on a motion brought by the plaintiff to amend the statement of claim. I dismissed the motion on the basis that, in my view, it sought to introduce a new cause of action against the Frasers; one which was statute-barred by the provisions of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B. Home Depot was not a party to the motion.

[2] I invited the parties to make written submissions on the issue of costs, should they not be able to sort that issue out between themselves. I have received and considered their submissions and make the following ruling.

The Law

[3] The costs of a proceeding, or any step in a proceeding, are in the discretion of the court. The discretion flows from section 131 of the *Courts of Justice Act*, R.S.O. 1990 c. C.43.

[4] The exercise of the discretion to award costs is guided by Rule 57.01 of the *Rules of Civil Procedure*. Rule 57 lists a number of factors to be considered in the assessment of costs, including:

- (a) the complexity of the proceeding;
- (b) the importance of the issues;

- (c) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
- (d) whether any step in the proceeding was improper, vexatious or unnecessary or taken through negligence, mistake or excessive caution;
- (e) the principle of indemnity; and,
- (f) the concept of proportionality, which includes at least two factors:
 - i. the amount claimed and the amount recovered in the proceeding; and,
 - ii. 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.

[5] The weight to be applied to any of the enumerated, or other, factors in any given assessment may vary. It is, however, now well-settled that the overarching principles to be observed in the exercise of the court's discretion to fix costs are fairness, proportionality and reasonableness: see *Beaver v. Hill*, 2018 ONCA 840; *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.); and *Moon v. Sher* (2004), 246 D.L.R. (4th) 440 (C.A.).

[6] By convention, costs will be awarded to a successful party and will generally be measured on a partial indemnity basis: *Bell Canada v. Olympia & York Developments Limited et. al.* (1994), 17 O.R. (3d) 135 (C.A.). In special circumstances, costs may be awarded on a higher scale, but those cases are exceptional and generally involve circumstances where one party to the litigation has behaved in an abusive manner, brought proceedings wholly devoid of merit, and/or unnecessarily run up the costs of the litigation: *Standard Life Assurance Company v. Elliott* (2007), 86 O.R. (3d) 221 (S.C.J.).

The Parties' Positions

[7] The Frasers seek their costs of the proceeding, as the successful parties. They urge the court to award substantial indemnity costs of \$13,815, all inclusive. Those costs include disbursements for discovery transcripts and for an expert's report to respond to the plaintiff's discoverability argument on the limitation issue.

[8] The plaintiff accepts that the Frasers are entitled to their costs, but contends that the amount sought is excessive. They submit the costs should be fixed, on a partial indemnity scale, in the amount of \$1,500. They also ask that the court order that the costs be paid in any event of the cause, rather than forthwith.

Discussion

[9] I will begin with the observation that this is not an appropriate case for the award of substantial indemnity costs. There was nothing exceptional about this motion that would

warrant departing from the usual convention, which is that costs will be awarded on a partial indemnity scale.

[10] I follow up that observation with another: this is also not an appropriate case to order that the costs be payable “in any event of the cause”. Rule 57.03(1) creates a presumption that the costs of a contested motion are to be paid within 30 days. The court retains a discretion to make a different order, in the interests of justice. In this case, however, there is no evidence before me that away from the application of the presumptive rule.

[11] In the result, the Frasers will have their costs, fixed on a partial indemnity scale and payable within 30 days.

[12] The core issue for determination is, as always, quantum.

[13] This was a fairly straightforward motion. It was able to be dealt with in writing and did not require oral submissions. Factums were required, but the legal principles involved were not particularly complex or contentious.

[14] In my view, a fair and reasonable award of costs on account of fees is \$3,500.

[15] The more contentious issue relates to allowable disbursements. Two are in issue. First, the sum of about \$1,800 for discovery transcripts. Second, the sum of about \$7,000 for an expert’s report on the issue of discoverability.

[16] I tend to share the view of the plaintiff that these disbursements are not recoverable as costs on this motion. Both are expenditures that are more closely tied to the overall costs of the proceedings.

[17] The transcripts were not of cross-examinations on affidavits filed in relation to the motion. They relate to examinations on the issues raised in the pleadings. Ordering them would normally be a part of standard trial preparation. Moreover, the plaintiff included a copy of the transcripts in his motion materials, so I am not clear why the Frasers felt compelled to order second copies at this stage of the proceedings.

[18] The expert’s report is also an element of trial preparation. Though it was relevant to discoverability, it will also be relevant to the broader issues in the proceedings. In my view, the costs associated with obtaining it are best left to the assessment of the overall costs of the proceedings.

[19] In the result, I fix costs at \$3,500 plus HST of \$455, for a total of \$3,955 which costs are payable by the plaintiff within 30 days.



C. Boswell J.

Date: November 25, 2020