SUPERIOR COURT OF JUSTICE
JUDGES' CHAMBERS
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DATE SENT: 30 August 2013

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FROM: Dawn Michelle

NUMBER OF PAGES: 5

RE: **F.L. Ravin Ltd. v. Southwestern Ontario Student Transportation Services**
St. Thomas Court File No.: 6155/13

MESSAGE: **Please find attached the Costs Endorsement of Justice Nolan on the above mention file.**

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CITATION: F.L. Ravin Limited v. Southwestern, 2013 ONSC 5268
COURT FILE NO.: 6155/13 (St. Thomas)
DATE: 20130830

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: F.L. RAVIN LIMITED and THE BADDER GROUP INCORPORATED, Plaintiffs

AND:

SOUTHWESTERN ONTARIO STUDENT TRANSPORTATION SERVICES, Defendant

BEFORE: Nolan J.

COUNSEL: Jonathan C. Lisus, Daniel A. Schwartz and Matthew Law, for the Plaintiffs

David B. Williams and Allison M. Webster, for the Defendant

HEARD: Written Submissions

ENDORSEMENT ON COSTS

[1] On April 2, 2013, I granted the plaintiffs' motion for an interim injunction which ordered that the defendant withdraw its request for proposal ("RFP") pending the outcome of an expedited trial to be held in Kingston dealing with the same issues as exist in this action or, in the alternative, the outcome of an expedited trial in St. Thomas to take place in September 2013. At the conclusion of my reasons, I determined that the plaintiffs were entitled to costs as they were successful on their motion. Since the parties themselves were unable to agree on the scale or quantum of the costs, I have received cost submissions and reply submissions from the plaintiffs and responding submissions from the defendant.

[2] The plaintiffs seek a total of $210,052.79 in costs on a partial indemnity basis, inclusive of disbursements and HST.

[3] It was the position of the defendant that I should fix costs in an amount to be ordered payable in the cause or left to the discretion of the trial judge as the merits of the case have yet to be tried and it is possible that the issues may be decided in favour of the defendant.

[4] In the alternative, the defendant suggests that costs should be payable in an amount between $50,000 to $60,000, inclusive of fees, HST and disbursements.

DISCUSSION

[5] Section 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, provides that the costs of a proceeding or a step in a proceeding are in the discretion of the court. The court is entitled to exercise a wide discretion in assessing these costs taking into account those items set out in rule 57.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. Apart from the relevance of the factors set out in section 57.01(1), the current practice by which costs are fixed can be extracted from two significant decisions of the Court of Appeal for Ontario: *Boucher v. Public Accountants Counsel for the Province of Ontario* (2004), O. R. (3d) 291 (C.A.) ("*Boucher*"); and *Moon v. Sher,* [2004] 246 (4th) 440 (Ont. C.A.) ("*Moon*"). In *Boucher,* Armstrong J. A. held that the fixing of costs is not to be regarded as a mere mechanical exercise. Rather, "the objective is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding" (para. 26).

[6] *Boucher, Moon,* and other leading cases, remind us that cost awards must be considered in accordance with the principles of fairness, reasonableness, and proportionality. The application of these principles means that the total amount to be awarded will often not be an exact measure of the actual costs incurred by the successful litigant. As of January 1, 2010, the principle of proportionality has gained special prominence within the *Rules of Civil Procedure*. This principle means that the time and expense devoted to a proceeding ought to be proportionate, or relative, to what is truly at stake in the proceeding. In other words, the lawsuit should be planned and carried out in a manner that reflects the monetary value, complexity, and the importance of the dispute.

Rule 57.01(1)(0.a) Lawyer Rates

[7] The hourly rates of counsel for the plaintiffs are not excessive. The defendant objected particularly to the hourly rate of $350 for Mr. Lisus based on the fact that this was the maximum hourly rate under the tariff for counsel who had been practising more than 20 years. Mr. Lisus had only been practising for 21 years. The defendant's counsel argued that because he himself had been at the bar 32 years, and would be entitled to the $350 per hour charged by Mr. Lisus, Mr. Lisus should not be entitled to charge that amount. I disagree. The amount was charged by him in another case and approved by Peppall J. I see no reason to reduce that hourly rate.

Rule 57.01(1)(O.b) Expectations of Unsuccessful Party

[8] In my view, given the intractable stand of the defendant to forge ahead with the RFP, even though the defendant was the only consortium in Ontario to have taken that position, the plaintiffs had no choice but to commence the action and bring the motion for an interim injunction. The consequences to the plaintiffs, had they not done so, could have caused irreparable harm to them for the reasons that were set out in my endorsement granting the interim injunction. The defendant also had to know that given the short time between when the plaintiffs were advised that the defendant would not agree to put the RFP on hold pending the outcome of the expedited trial in the East Region, the plaintiffs' counsel would have to move quickly to be able to get the matter before the courts. The defendant had to know that counsel for the plaintiffs would have to produce a significant

amount of material in a very short period of time. And a large amount of material it was. While some parts of it were unnecessary, in particular the evidence of the "expert", the vast majority of it was detailed, comprehensive, necessary and helpful to the court. In surveying the volume of material, I was reminded of the words of Mark Twain "I apologize for writing you such a long letter but I did not have time to write a short one."

[9] I also accept that the amount of time it took three lawyers, at times working independently and at others consulting with each other, was not unreasonable in all the circumstances of this case. Again, given the seriousness of the issues facing the plaintiffs because of the position taken by the defendant, the amount of costs being sought by the plaintiffs is in the range of what the defendant should reasonably have expected to pay if it was unsuccessful.

[10] The consequences to the defendant, if unsuccessful in defending the motion for the injunction, were much less serious than were the consequences to the plaintiffs if they were unsuccessful in obtaining one. In my view, this is not a case in which the defendant's cost to defend the motion can be compared to the costs to the plaintiffs to bring it as a measure of reasonableness. Given the "life or death" nature of the matter and the consequences to the plaintiffs if thorough and detailed evidence was not before the court, accounts in large measure for the amount of costs being sought. The defendant had to know that if it was not successful in defeating the motion that the costs for which they would be responsible would be significant. The decision by the defendant to proceed with the RFP, thus forcing the plaintiffs to bring the action and the motion for an interim injunction and then opposing the motion rather than attempting to reach a reasonable compromise is difficult to understand. Indeed, there was no evidence before me that the defendant was in any different position than all of the other consortia in the province who took a different position. They made the decision to force the issue and thus are responsible for some of the financial consequences to the plaintiffs.

Rule 57.01(1)(c),(d) Complexity and Importance

[11] The issues at stake were complex, involving somewhat complicated and at times obtuse directives from the government. A significant amount of research was required. The defendant argued that much of the material produced by counsel for the plaintiffs was "regurgitated" as the same counsel had been involved on the STEO action. I accept the position of plaintiffs' counsel that the bulk of the time was spent in preparing the very detailed affidavits of the plaintiffs and the exhibits which accompanied them. The involvement of the Ministry as an '"informal intervener" and the arguments made by its counsel demonstrated the seriousness of the issues being dealt with by the parties and the government. The involvement of the Ministry at the apparent request of the defendant added another layer of complexity and time required in preparation. Counsel for the defendant argued that the defendant should not be responsible for costs incurred by the plaintiffs to deal with anticipated arguments of the Ministry. I disagree. The defendant invited the Ministry as support for its position and much of the argument of Crown counsel made that role clear. It is only fair that the defendant be responsible for the additional work required of plaintiffs' counsel to deal with the Ministry's position as well.

Rule 57.01(1)(e) Conduct of the Parties

[12] Given the volume of material and the complexity and importance of the issues, all counsel are to be commended for keeping the argument to one day. It was only possible however, because of the quality and completeness of the material, particularly that of the plaintiffs who, of course had the burden to establish on the facts that they were entitled to the relief they sought.

[13] With respect to costs themselves, the reasonableness of the plaintiffs' position is demonstrated by the fact that they are only seeking costs on a partial indemnity basis. It seems to be the practice these days that parties seek substantial indemnity costs in the first instance, recognizing that they may be unlikely to be successful but "giving it a shot" in their submissions. That practice was reflected in a number of the cases to which I was referred by both counsel. In the end, the court usually found the costs should be awarded on a partial indemnity basis. Counsel for the plaintiffs are to be commended for not adopting this practice and on seeking costs on a partial indemnity basis.

CONCLUSION

[14] As to the amount of the costs sought for fees, while within the range I would have expected for all the reasons set out above, I have reduced the amount claimed for fees to reflect the finding in my endorsement on the argument that the use of the expert was not helpful and was not relied on by me. I also have reduced the fees claimed because there is no basis on which I can find that it was necessary to have three counsel attend cross-examinations.

[15] For all these reasons, the defendant shall pay costs to the plaintiffs on a partial indemnity scale in the all inclusive amount of $190,000. This is not a case in which it is appropriate to order the costs to be paid in the cause or in any event of the cause. They are to be paid forthwith. It hardly behoves the defendant to argue that any payment of the costs should await the outcome of the trial in the East Region when it was not prepared to await that outcome before proceeding with its RFP. The defendant's decision to proceed with the RFP was the direct cause of the plaintiffs' need to bring the motion.

Mary Jo M. Nolan
Justice
(Dictated but not read.)

Date: August 30, 2013