

2011 CarswellOnt 13858  
2011 ONSC 6621, 7 C.L.R. (4th) 20, 210 A.C.W.S. (3d) 313

*Kay v. Caverson*

*Diane Kay, Plaintiff v. Gerard Caverson, Guiliana D'Orazio Caverson also known as Julie Caverson, The Corporation of the City of Mississauga and M & I Contracting Inc., Defendants v. Namroud Khachi and Architectural Technology Services, Third Parties*

Ontario Superior Court of Justice

Daley J.

Heard: November 23-30, December 2-4, 2009; January 18-28, June 7-18, November 29 - December 2, 2010; February 22-23, 2011  
Judgment: November 13, 2011  
Docket: 03-BN-10495-00A1

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Counsel: James Kay, for Plaintiff

Brian E. Lucas, for Defendants, Gerald Caverson, Guliana D'Orazio Caverson, also known as Julie Caverson

Scott E. Hamilton, for Defendant, Corporation of the City of Mississauga

Julian Binavince, for Defendant, M & I Contracting Inc.

John Aikins, for Third Party, Architectural Technology Services

Subject: Civil Practice and Procedure; Torts

*Civil practice and procedure --- Costs — Costs of particular proceedings — Third party proceedings*

*Plaintiff K instituted action against her neighbours, defendant Cs, for water damage to her home — K also brought claims against defendant municipality M for allowing and approving renovations at Cs' home and against defendant contractors M Inc. for negligence in renovations at Cs' home — Cs instituted third-party action against ATS, architectural design firm they retained to prepare drawings related to renovations to their home — Action proceeded to trial and K's action was dismissed, as against all defendants — Third party, ATS, was released from action by Cs and it was agreed ATS's costs would be fixed in all-inclusive sum of \$50,000.00 — Parties made submissions as to costs — It was submitted on behalf of ATS that those costs should be borne equally by Cs, and K — Cs submitted that K should fully bear costs incurred with respect to involvement of third party, ATS — Costs to ATS were awarded against Cs — Previous decision by this court noted that normal rule is that unsuccessful plaintiff will not be charged with costs of third party but that there were situations on peculiar facts, where fairness required that unsuccessful plaintiff bear costs claimed by successful third party — This was not one of those cases — Cs instituted third-party action against ATS, and as evidence unfolded at trial, made determination that it was prudent to withdraw that claim — While third-party proceeding against ATS could be described as flowing naturally from commencement of K's action, institution of third-party action should not be characterized as inevitable, based on nature of claims made by K — Fairness dictated that Cs bear costs of involving ATS in this action.*

*Civil practice and procedure --- Costs — Particular orders as to costs — Costs on solicitor and client basis — Grounds for awarding — Miscellaneous*

*Unsuccessful plaintiff sued same party twice and essence of both claims arose from same cause of action — Although this type of litigation strategy should be strongly discouraged, her decision did not reach level of reprehensible conduct that formed basis for award of substantial indemnity costs, but it*

was "a close call".

*Civil practice and procedure --- Costs — Jurisdiction and discretion as to costs*

*Only in exceptional case should court refer costs for assessment, with directions, to assessment office; there was no unusual or exceptional feature to this case that warranted reference of these claims for costs to assessment officer.*

*Civil practice and procedure --- Costs — Particular orders as to costs — General principles*

*While costs must be fair and reasonable, mere fact that costs exceed damages does not render costs award inappropriate.*

### **Cases considered by Daley J.:**

*Agius v. Home Depot Holdings Inc. (2011), 2011 CarswellOnt 10322, 2011 ONSC 5272 (Ont. S.C.J.) — referred to*

*Asco Construction Ltd. v. Epoxy Solutions Inc. (2011), 2011 ONSC 2454, 2011 CarswellOnt 4215, 2 C.L.R. (4th) 261 (Ont. S.C.J.) — referred to*

*Davies v. Clarington (Municipality) (2009), (sub nom. Davies v. Clarington (Municipality)) 312 D.L.R. (4th) 278, 100 O.R. (3d) 66, 2009 ONCA 722, 2009 CarswellOnt 6185, 77 C.P.C. (6th) 1, 254 O.A.C. 356 (Ont. C.A.) — followed*

*Dybongco-Rimando Estate v. Jackiewicz (2003), 2003 CarswellOnt 546 (Ont. S.C.J.) — followed*

*Guarantee Co. of North America v. Resource Funding Ltd. (2009), 2009 CarswellOnt 4583, 82 C.P.C. (6th) 258 (Ont. S.C.J.) — considered*

*Risorto v. State Farm Mutual Automobile Insurance Co. (2003), 32 C.P.C. (5th) 304, 2003 CarswellOnt 934, 64 O.R. (3d) 135 (Ont. S.C.J.) — considered*

*S & A Strasser Ltd. v. Richmond Hill (Town) (1990), 1990 CarswellOnt 435, 49 C.P.C. (2d) 234, 1 O.R. (3d) 243, 45 O.A.C. 394 (Ont. C.A.) — considered*

*163972 Canada Inc. v. Isacco (1997), 1997 CarswellOnt 636 (Ont. Gen. Div.) — followed*

### **Statutes considered:**

*Courts of Justice Act, R.S.O. 1990, c. C.43  
s. 131 — considered*

### **Rules considered:**

*Rules of Civil Procedure, R.R.O. 1990, Reg. 194  
R. 49 — referred to*

*R. 57.01(1) — considered*

*RULING on costs of multi-party action.*

### **Daley J.:**

#### **Introduction**

1 This action proceeded to trial and the plaintiff's action was dismissed, as against all

defendants, for the reasons outlined in my decision released on August 11, 2011.

2 The third-party action was dismissed on consent during the trial after several weeks of evidence.

3 The plaintiff instituted this action in 2003 and sought damages from the defendants in the sum of \$500,000.00, along with various forms of injunctive relief allegedly related to damage to her home and property associated with the entry of water onto her land.

4 The plaintiff's action brought against the defendants, the Caversons, ("Caversons") whose home is immediately next to hers, was based in a nuisance and trespass claim.

5 The plaintiff's action against The Corporation of the City of Mississauga ("Mississauga") related to alleged negligence on the part of Mississauga by allowing and approving the renovations at the Caversons' home, and in respect of the grade level assessment at that property.

6 The plaintiff's action as against the defendant M. & I. Contracting Inc. ("M. & I.") was brought for negligence related to its work as the general contractor involved in the renovations at the Caversons' home.

7 The Caversons instituted a third-party action against Architectural Technology Services ("ATS"), the architectural design firm retained by them to prepare the drawings related to the renovations to their home.

8 It was initially estimated that the trial would take two to three weeks.

9 The trial commenced on November 23, 2009 and proceeded through 28 days of evidence spread over several months, with submissions from counsel being completed on February 23, 2011.

10 The plaintiff's action against all defendants was dismissed and the plaintiff's damages were assessed in the sum of \$59,186.25.

### **Position of the parties**

#### **(a) The Plaintiff**

11 Although the plaintiff's action was dismissed in its entirety, it was urged on behalf of the plaintiff that the defendants and third-party should be denied payment of any costs. This submission appears to be based on the plaintiff's position that full oral submissions should have been made on the issue of costs or alternatively, the assessment and awarding of costs should have been referred to an assessment officer.

12 It was further submitted on behalf of the plaintiff that she brought her action in good faith and as such she should bear no cost consequences for the dismissal of her action.

13 It is further the plaintiff's position that she should not face an award of costs in these circumstances as that would erode public confidence in the preservation of access to justice.

14 The plaintiff further takes the position that she should bear no liability with respect to costs of the third-party, ATS, as she did not pursue any claim against this party.

15 As to the costs claimed by defendant's Caversons, it is urged that the costs claimed by these defendants should be assessed at zero, or referred to assessment officer. It is the plaintiff's position that it was beyond her comprehension that she would not succeed at trial and as such costs claimed by the defendants were not reasonably contemplated by her.

16 As to the costs claimed and submitted on behalf of Mississauga, it is submitted on behalf of the plaintiff that she had neither reasonable expectation of a loss, nor of liability for costs in the

amount sought by this defendant. It is further submitted that the bill of costs delivered on behalf of the defendant contains "double billing," although no particulars of this were provided.

17 As to the costs claim of M. & I., it was argued that the costs claimed are neither fair, nor reasonable and as such should be assessed at zero, or referred to an assessment officer.

18 The plaintiff denies any liability with respect to any claim for costs advanced by the third-party, ATS, on the basis that she made no claim against this party.

19 Counsel for the plaintiff did not submit a bill of costs as part of the submissions on her behalf.

### **(b) The Caversons**

20 The Caversons seek costs payable by the plaintiff on a substantial indemnity basis throughout the action, or alternatively, costs on a partial indemnity basis to the date of an offer to settle tendered by these defendants jointly with the defendant M. & I., in April 2009, in the all-inclusive sum of \$30,000.00, and substantial indemnity costs thereafter.

21 The third party action was dismissed on consent prior to the conclusion of the trial. The Caversons seek an order that the plaintiff pay the costs of the third-party ATS, against whom the Caversons had claimed contribution and indemnity.

22 The defendant Caversons, seek costs on a substantial indemnity or partial indemnity basis, inclusive of disbursements, in the sums of \$318,688.40 and \$269,687.40, respectively.

23 It is submitted that the settlement offer tendered by the Caversons, compared with the ultimate dismissal of the plaintiff's action against them, gives rise to circumstances where the court should exercise its discretion and award substantial indemnity costs.

24 Further, it was asserted that the overall conduct of the plaintiff and her counsel warranted an award of substantial indemnity costs.

25 In further support of their claim for substantial indemnity costs, the Caversons cite the fact that the plaintiff had brought a prior action against the defendant, Julie Caverson. This claim arose from the same circumstances giving rise to this action and that action was dismissed at trial and the appeal therefrom was dismissed.

26 These defendants also seek an order that the plaintiff bear the responsibility for the costs of the third-party, ATS, on the basis that they viewed it necessary to add this third party given the nature of the claims asserted against them by the plaintiff.

### **(c) Mississauga**

27 Mississauga seeks costs on a partial indemnity basis from December, 2003 to May 2009, and on a substantial indemnity basis thereafter in the all-inclusive sum of \$192,503.90.

28 Mississauga had tendered a verbal offer to settle in May of 2009, calling for the action against it to be dismissed on a without costs basis.

29 It was submitted on behalf of Mississauga that the plaintiff should be held accountable for substantial indemnity costs on the basis that,

(a) the action against it was complex;

(b) the plaintiff was guilty of excessive delay in the prosecution of the action; and

(c) plaintiff's counsel conducted the trial in a disorganized manner and, as a result of the

*conduct of the plaintiff and her counsel the trial was disproportionately long.*

**(d) M & I**

30 *M & I seek costs on a substantial and partial indemnity basis, based on the offer jointly declined with the Caversons.*

31 *This defendant put forward similar positions to those advanced by its co-defendants.*

**(e) ATS**

32 *ATS seeks costs in the all-inclusive sum of \$50,000.00, payable by the plaintiff and the Caversons, equally.*

33 *ATS did not defend the main action. After several weeks of evidence at trial, the Caversons and ATS agreed to the dismissal of the third-party action with costs fixed at the sum of \$50,000.00, on the basis that the liability for the payment of those costs would be left to be determined at the conclusion of the trial.*

34 *ATS submitted that the costs, fixed by the agreement at \$50,000.00, should be borne on the plaintiff and the Caversons equally.*

35 *ATS delivered a bill of costs on a substantial indemnity basis for the allinclusive sum of \$154,996.44. Counsel for ATS attended court through the entire trial to the point where it was agreed by the Caversons that the third-party action was to be dismissed. Counsel for ATS played a minimal role in the conduct of the trial.*

**Analysis**

36 *The awarding and quantifying of fair and reasonable costs is in the discretion of the court in accordance with s.131 of the Courts of Justice Act, R.S.O. 1990, c. C. 43.*

37 *Rule 57.01(1) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 sets out the considerations that must be examined in exercising the discretion to award and fix a proper sum for costs.*

38 *It was urged on behalf of the plaintiff, in respect of the claims for costs by each defendant, that the issue of costs should be referred to an assessment officer rather than having the trial judge fix the costs. I disagree.*

39 *While historically the setting of a proper sum for costs, following a trial, was done by an assessment officer, that is not the practice today. Only in an exceptional case should the court refer costs for assessment, with directions, to the assessment officer. In my view, there is no unusual or exceptional feature to this case that would warrant a reference of these claims for costs to an assessment officer. In my view, I am best positioned to assess both the entitlement to costs, and what would be a fair and proper sum, in all the circumstances.*

40 *It was asserted that the plaintiff could not have been expected to reasonably believe that her claims would be dismissed, and as such, she should have no liability for costs. In my view, this is not a proper consideration.*

41 *It is the plaintiff's reasonable expectation as to the level and amount of costs that she may be exposed to, if unsuccessful, that must be examined. It is not entirely relevant whether or not she had reasonably held view as to her chance of success in the action.*

42 *I also disagree with the plaintiff's assertion that to award costs against her in these circumstances would amount to a denial of access to justice. Particularly, having regard to her claim as against the Caversons, the plaintiff has fully exercised her rights to pursue claims against the*

*defendants in two actions, both of which have proceeded through trial and one of which has gone to the Court of Appeal.*

43 *The plaintiff has fully accessed all of her rights to the administration of justice in advancing her claims in this action, and in the earlier proceeding. She has litigated her claims against the Caversons, and the other defendants named in the current proceeding over the last eight years. Any reasonable person examining the plaintiff's use of the court, and the administration of justice, could not conclude that she has not had reasonable access to justice.*

44 *I am of the view that in all the circumstances the defendants, having successfully defended the plaintiff's claims, are entitled to some indemnity with respect to the costs that they have incurred in defending this action. The level of costs to which they are entitled, and the amount of fair and reasonable costs, must be determined.*

45 *All of the defendants have asserted an entitlement to costs, at least in part, payable on a substantial indemnity basis.*

46 *In support of the submission that their clients are entitled to some costs on a substantial indemnity basis, counsel have cited and relied upon the Court Of Appeal decision in S & A Strasser Ltd. v. Richmond Hill (Town) (1990), 1 O.R. (3d) 243 (Ont. C.A.) wherein the trial judge awarded the defendant party and party costs to the date of the defendant's offer to settle, and thereafter costs on the solicitor-client basis.*

47 *The Court of Appeal has more recently dealt with the circumstances in which defendants may have an entitlement to costs on a substantial indemnity basis. In Davies v. Clarington (Municipality), [2009] O.J. No. 4236 (Ont. C.A.) the court stated at paras. 37 - 40:*

*This court sought to clarify Strasser in Scapillati v. A. Potvin Construction Ltd. (1999), 44 O.R. (3d) 737, a case in which the defendant had served an offer to settle on the basis that the action be dismissed without costs and the trial judge subsequently dismissed the plaintiff's claim. Purportedly following Strasser, the trial judge awarded party-and-party costs to the date of the offer and solicitor-and-client costs thereafter.*

*On appeal, this court started its analysis of the defendant's appeal of the costs award by observing, once again, that as the plaintiff's claim had failed, rule 49.10 had no application. Then, at p. 750, turning to Strasser, Austin J.A. had this to say:*

*[T]he principle upon which solicitor and client costs were awarded in Strasser is a very narrow one. The plaintiff had made a claim for \$1 million, the defendant made an offer after discovery of \$30,000 and the action was dismissed at trial. In the instant case, no similar offer was made. While the trial judge in the instant case made an award of solicitor and client costs, it does not appear from the record that she felt as strongly about it as the trial judge in Strasser who said "I think this case, in these circumstances, screams for solicitor and client costs."*

*Thus interpreting Strasser as a case where egregious conduct was implicitly found, this court allowed the appeal as to costs, set aside the original costs award and substituted an award of costs on a party-and-party basis. For other cases in which comments have been made on the limited application of Strasser, see Strasser, see St. Louis-Lalonde v. Carlton Condominium Corporation No. 12 (2005), 142 A.C.W.S. (3d) 934 (Ont. S.C.) *aff'd* 155 A.C.W.S. (3d) 479 (C.A.), at para. 15, Dyer v. Mekinda Snyder Partnership Inc. (1998), 40 O.R. (3d) 180 (Ct. J. (Gen. Div.)).*

*In summary, while fixing costs is a discretionary exercise, attracting a high level of deference, it must be on a principled basis. The judicial discretion under rules 49.13 and 57.01 is not so broad as to permit a fundamental change to the law that governs the award of an elevated level of costs. Apart from the operation of rule 49.10, elevated costs should only be awarded on a clear finding of reprehensible conduct on the part of the party against which the cost award is being made. As Austin J.A. established in Scapillati, Strasser should be interpreted to*

*fit within this framework - as a case where the trial judge implicitly found such egregious behaviour, deserving of sanction.*

48 Thus, in *Davies*, the Court of Appeal clearly states that even when a defendant makes a bona fide substantial settlement offer, and the plaintiff's claim is dismissed, this is not by itself sufficient to support an award to the defendant of substantial indemnity costs after the date of the offer. Elevated costs should only be awarded where there is a finding of reprehensible or egregious conduct on the part of the plaintiff. *Agius v. Home Depot Holdings Inc.*, [2011] O.J. No. 4424 (Ont. S.C.J.).

49 While this analysis would appear to discourage defendants from making substantial bona fide offers to resolve claims, the Court in *Davies* stated at para. 48:

*Before turning to the settling defendants' second argument, I make one final comment. In cases such as Beresford-Last (Litigation Guardian of) v. Dworak (2000), 101 A.C.W.S. (3d) 696 (Ont. Sup. Ct.), and Marcella v. Integrated Management and Investments Inc. (2007), 157 A.C.W.S. (3d) 51 (Ont. Sup.Ct.), trial judges have expressed the view that denying elevated costs to defendants who submit an offer to settle, which is later revealed to be more favourable than the result at trial, acts as a disincentive to defendants to make reasonable offers to settle. This view, while understandable, is contrary to the wording, spirit and intent of rule 49. Rules cannot be incrementally changed through jurisprudence. Any change in the rules to take into account the position of the defendants who legitimately tried to curtail what turns out to be unnecessary litigation is a matter for the Rules Committee.*

50 Mississauga did not make a formal written offer under Rule 49 and concedes that its verbal offer in May of 2009 is not compliant with the Rule.

51 The Caversons and M. & I. served upon the plaintiff a joint offer totalling \$30,000.00. While their joint offer appears to come within the scope of Rule 49, given the statements made by the Court of Appeal in *Davies*, the fact that the defendants tendered an offer and the plaintiff failed to achieve a result equal to or better than their offer is, on its own, not determinative of a right to substantial indemnity costs.

52 All of the defendants assert that, apart from any offers tendered, they should be awarded substantial indemnity costs as a result of the conduct of the plaintiff and the manner in which she and her counsel pursued this action.

53 In my view, the Caversons are the only defendants who are in a position to assert a claim for substantial indemnity costs. This is because the plaintiff brought two actions against the defendant, Julie Caverson both arising from similar circumstances, but framed in different causes of action.

54 The plaintiff's choice to sue the same party twice may have been illconceived, as the essence of both claims arose from the same cause of action. This type of litigation strategy should be strongly discouraged, however, I cannot conclude that her decision reaches the level of reprehensible conduct that would form the basis for an award of substantial indemnity costs. However, this is a close call when that conduct is considered in totality along with the manner in which the plaintiff and her counsel conducted themselves throughout the trial of this action.

55 The Plaintiff's counsel presented evidence in a disorganized and haphazard manner; his strategy on cross-examination often unnecessarily prolonged the conduct of the trial.

56 The manner in which the plaintiff's action was prosecuted both in the presentation of the case on behalf of the plaintiff, and with the cross-examining of defence witnesses, resulted in a trial that was disproportionately long in comparison to the size and complexity of the case.

57 Several mid-trial motions were brought by the plaintiff resulting in a number of voir dices which, in my view, related to matters that should have been dealt with in advance of the trial. The

plaintiff also sought re-open her case after having completed her evidence both with respect to submitting additional photographic evidence and calling a further witness. The plaintiff also brought a motion to make significant amendments to her statement of claim near the end of the trial, which further extended the length of the trial.

58 It was submitted on behalf of the plaintiff that the quantum of the costs claimed by the defendants was excessive. It was noted in *Risorto v. State Farm Mutual Automobile Insurance Co.* (2003), 64 O.R. (3d) 135 (Ont. S.C.J.), that where the court does not have before it the bills of costs of all counsel, an attack on the quantum of costs based on excessive time spent "is no more than an attack in the air." It has been held that the court can rightly make the inference that the party devoted as much, or more, time to the proceeding as did the defendants. This, however, is not determinative of a fair and proper amount for costs. Instead, it simply represents a factor that should be taken into account.

59 In *Davies*, the Court of Appeal identified the overarching principle that the amount of costs awarded must be reasonable in the circumstances. Epstein J. A. stated at paras. 51 - 52:

*In Andersen v. St. Jude Medical Inc.* (2006), 264 D.L.R. (4th) 557, the Divisional Court set out several principles that must be considered when awarding costs:

1. The discretion of the court must be exercised in light of the specific facts and circumstances of the case in relation to the factors set out in rule 57.01(1): *Boucher, Moon, and Coldmatic Refrigeration of Canada Ltd. v. Leveltek Processing LLC* (2005), 75 O.R. (3d) 638 (C.A.).
2. A consideration of experience, rates charged and hours spent is appropriate, but is subject to the overriding principle of reasonableness as applied to the factual matrix of the particular case: *Boucher*. The quantum should reflect an amount the court considers to be fair and reasonable rather than any exact measure of the actual costs to the successful litigant: *Zesta Engineering Ltd. v. Cloutier* (2002), 119 A.C.W.S. (3d) 341 (Ont. C.A.), at para. 4.
3. The reasonable expectation of the unsuccessful party is one of the factors to be considered in determining an amount that is fair and reasonable: rule 57.01(1)(0.b).
4. The court should seek to avoid inconsistency with comparable awards in other cases. "Like cases, [if they can be found], should conclude with like substantive results": *Murano v. Bank of Montreal* (1998), 41 O.R. (3d) 222 (C.A.), at p. 249.
5. The court should seek to balance the indemnity principle with the fundamental objective of access to justice: *Boucher*.

As can be seen, the overriding principle is reasonableness. If the judge fails to consider the reasonableness of the costs award, then the result can be contrary to the fundamental objective of access to justice. Rather than engage in a purely mathematical exercise, the judge awarding costs should reflect on what the court views as a reasonable amount that should be paid by the unsuccessful party rather than any exact measure of the actual costs of the successful litigant. In *Boucher*, this court emphasized the importance of fixing costs in an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding at para. 37, where Armstrong J.A. said "[t]he failure to refer, in assessing costs, to the overriding principle of reasonableness, can produce a result that is contrary to the fundamental objective of access to justice."

60 It was urged on behalf of the plaintiff that the fact that the costs claimed by the defendants far exceed the damages assessed is a factor that must be taken into account in the assessment of costs. I disagree. While costs must be fair and reasonable, the mere fact that the costs exceed the damages does not render a costs award inappropriate: *Asco Construction Ltd. v. Epoxy Solutions Inc.*, [2011] O.J. No. 2544 (Ont. S.C.J.)



61 *In 163972 Canada Inc. v. Isacco, [1997] O.J. No. 838 (Ont. Gen. Div.), Lane J. stated at para. 3:*

*That the costs significantly exceed the amounts at stake in the litigation is regrettable, but it is a common experience and is well known to counsel as one of the risks involved in pursuing or defending a case such as this to the bitter end rather than finding a compromise solution. To reduce the plaintiff's otherwise reasonable costs on this basis would simply encourage the kind of intransigence displayed by the defendants in this case.*

62 *This issue was also considered by Quinn J. in Dybongco-Rimando Estate v. Jackiewicz, [2003] O.J. No. 534 (Ont. S.C.J.) at para. 76 where he stated:*

*I see no reason why the Court should be concerned with whether costs exceed the damages awarded. Everyone knows that, in some cases, the costs involved in going to trial will surpass the value of the claim or the amount otherwise in dispute. That is a foreseeable risk of litigation and should not accrue to the benefit of the losing party.*

63 *These statements by Lane J. and Quinn J. are most apt in the circumstances of this case.*

64 *Having determined that the defendants are entitled to costs, and that costs will be determined on a partial immunity basis, I must consider the approach to be applied in fixing a reasonable costs amount.*

65 *The quantum of the costs to which each of the defendants and the third-party, ATS, are entitled must be determined by applying an approach involving the following considerations:*

*(a) what were the parties' reasonable expenses incurred in the context of this action;*

*(b) what were the legal fees reasonably incurred by the parties' counsel in the context of this action;*

*(c) are there any circumstances upon which the court should exercise its discretion to reduce the amount determined under the first and second considerations; and*

*(d) having determined an amount under the above approach is the overall total amount reasonable in the circumstances of this case: Aguis, supra, at para. 34.*

66 *As to the nature of the claims made by the plaintiff and the conduct of the trial, this action was moderately complex.*

67 *The plaintiff sought damages in the sum of \$500,000.00 along with various forms of injunctive relief and unspecified exemplary damages.*

68 *Her action was based on several causes of action including negligence, nuisance, trespass, and breach of statutory duty on the part of Mississauga.*

69 *This action was instituted in October of 2003.*

70 *Several pre-trial motions were brought in the period May, 2004 to September, 2007.*

71 *Examinations for discovery were held on November 30, 2005, December 20, 2006, January 10, 2007 and June 27, 2007. Pre-trial conferences were held in June, 2008 and in April and May of 2009.*

72 *Although the plaintiff's counsel had indicated his belief that the trial in this action would take two to three weeks, including closing submissions, the trial took approximately 6 weeks. Given the nature of the causes of action asserted, the number of issues at stake in the lengthy and the*

*moderately complex technical evidence, the plaintiff should have reasonably expected that, if she failed in obtaining judgment against the defendants, the claims for costs she would face would be significant.*

73 *As the trial proceeded, the focus of the plaintiff's claims shifted and further amendments to the plaintiff's statement of claim were sought near the end of the trial.*

74 *The time spent during the trial and the evidence offered was largely related to the issue of liability with far less time devoted to evidence regarding the plaintiff's claims for damages.*

75 *There was a significant amount of expert evidence from six expert witnesses including engineers, hydrogeologist, and surveyors.*

### **Costs of the Caversons**

76 *With respect to the Caversons' claim for costs, it was urged on behalf of the plaintiff that the addition of the third parties by the Caversons delayed the action. Having considered the history of this matter, I can find no basis for this assertion.*

77 *No detailed submissions were offered on behalf of the plaintiff with respect to the specific items in the bill of costs submitted on behalf of the Caversons.*

78 *Counsel for the Caversons, filed a detailed bill of costs particularizing all of the time spent and hourly rates both on a partial indemnity and substantial indemnity basis.*

79 *The defendants, the Caversons sought partial indemnity costs, inclusive of all disbursements and applicable taxes in a sum of \$269,687.40.*

80 *As to the disbursements incurred on behalf of these defendants, they are grouped in the bill of costs in several categories, namely, court filing fees, fees incurred for the service of documents, fees paid to court reporters and fees paid to experts for opinions sought.*

81 *I have considered the details of the claims for disbursements in the sum of \$22,628.40. The plaintiff did not specifically dispute any item of disbursement claimed by the Caversons. All of the items of disbursement appear in order and were reasonably incurred in the defence of the action, including the disbursements with respect to experts' fees paid.*

82 *Given the nature of the claims made by the plaintiff and the evidence required at trial, I am satisfied that the disbursements with respect to these expert witnesses were reasonably necessary, and properly incurred in the defence of the claims made.*

83 *As a result, I conclude that a reasonable sum for Caversons' disbursements is as claimed in the sum of \$22,628.40.*

84 *As to the fees incurred on behalf of the Caversons, I am satisfied with the hourly rates put forward in the bill of costs for counsel involved. The hourly rates, most particularly put forward with respect to Mr. Lucas, who was called the bar in 1982 are most reasonable and on the partial indemnity basis are set at \$250.00. This is a very reasonable hourly rate for Mr. Lucas's level of experience.*

85 *I have considered the hourly rates of all of the lawyers, students-at-law and law clerks involved in the representation of the Caversons, and I am satisfied that given the nature of the work done and the time, training, and experience of the persons involved, the rates as claimed are reasonable.*

86 *The bill of costs submitted on behalf of the defendants, the Caversons, particularizes the claim for costs on a partial indemnity basis as follows:*

(a) Pleadings	\$3,860.00
(b) Pre-Trial Motions	\$18,067.00
(c) Examinations for Discovery	\$18,585.00
(d) Pre-Trial Conferences	\$11,342.00
(e) Trial Preparation	\$90,495.00
(f) Fees for Attendance at Trial including submissions with respect to costs	\$104,710.00
	TOTAL \$247,059.00

87 No objection was raised by counsel for the plaintiff with respect to time spent by counsel for the Caversons. Further, no objection was raised with respect to the hourly rates claimed.

88 No substantial issue was raised by the plaintiff with respect to the quantum of costs claimed on a partial indemnity basis on behalf of the Caversons.

89 In the absence of any substantive issue taken with the costs as claimed, and having considered the bill of costs submitted on behalf of the Caversons, the time spent, hourly rates, seniority of counsel, nature of the damages and relief sought, the complexity of the action, and lengthening of the trial by the plaintiff's unsuccessful motions brought during the trial, I am satisfied that the fees and disbursements, as claimed, are reasonable in the context of this action.

90 Turning to the consideration as to whether the fees and disbursements claimed by the defendants, the Caversons in the total sum, on a partial indemnity basis, of \$269,687.40 should be reduced on some basis in the exercise of the court's overall jurisdiction to ensure that costs awarded are reasonable and proportionate, I conclude that no such reduction is warranted in this case.

91 The plaintiff vigorously prosecuted this action against the Caversons, and advanced every possible claim that she could against these defendants, even after having failed in the prior action.

92 I can find no basis upon which to exercise the discretion to reduce the claim for fees and disbursements as incurred on behalf of the Caversons. These defendants properly responded to, and defended this action against them. The time spent by their lawyers was reasonable and the hourly rates claimed are modest when considering the seniority of counsel.

93 In the result, I conclude that the plaintiff shall pay to the Caversons, their costs, inclusive of disbursements and taxes, on a partial indemnity basis, in the sum of \$269,687.40. In my view, overall this sum is reasonable and proportionate in the circumstances of this case.

### **Costs of Mississauga**

94 It was submitted on behalf of the defendant, Mississauga, that it was seeking its costs on a partial indemnity basis, from the commencement of the action in October 2003 to the date of its settlement offer of May 5, 2009, and on a substantial indemnity basis from that date forward. For the reasons expressed, I concluded that it would not be appropriate, in the circumstances of this case, to award costs on a substantial indemnity basis.

95 I, therefore, considered the bill of costs submitted on behalf of Mississauga on a partial indemnity basis only. Counsel on behalf of Mississauga did not particularize the hourly rates applicable, as far as the principal lawyer involved, Mr. Hamilton, is concerned within the bill of costs after the defendant's offer in May of 2009 and I have therefore simply taken the hourly rate put forward on behalf of Mr. Hamilton, on a partial indemnity basis, at the rate indicated prior to May of 2009.

96 Without taking into account a reduction to reflect a possible award of costs entirely on a partial indemnity basis, the defendant Mississauga sought costs on the partial indemnity and substantial indemnity basis, inclusive of disbursements and taxes in the sum of \$192,503.90.

97 *The defendant Mississauga sought disbursements inclusive of fees paid to expert witnesses totalling \$21,068.44, inclusive of taxes.*

98 *Counsel for the plaintiff took no issue with respect to any of the items of the disbursements as claimed in the bill of costs. I have considered the disbursements claimed and I conclude that they were reasonably incurred by this defendant in the defence of this action.*

99 *As to fees incurred by the defendant Mississauga in the defence of this action, it is acknowledged that the sum of \$5,000.00 was paid by the plaintiff with respect to a prior award of costs against her.*

100 *On behalf of the plaintiff, it was submitted that the costs submissions delivered on behalf of Mississauga, was "riddled with errors too many to itemize." It was submitted that there is "double billing, or worse," however, no details of this are offered by counsel for the plaintiff.*

101 *Without the benefit of complete submissions on behalf of the plaintiff, and without a full detailed list of the errors present in the submissions, I am left to consider the statements made in the submission and bill of costs as they stand.*

102 *As to the fees claimed by the defendant Mississauga, counsel for the plaintiff did not take issue with the time spent nor the hourly rates as claimed.*

103 *As explained, as costs in favour of this defendant will only be awarded on a partial indemnity basis, I have applied an hourly rate throughout with respect to Mr. Hamilton, counsel for Mississauga at \$125.00 an hour. This is his hourly rate as claimed from the commencement of the examinations for discovery in the proceeding and I have applied it throughout through to the conclusion of the trial and submissions as to costs.*

104 *With respect to the other principle lawyers involved in the proceeding representing Mississauga namely, David Boghosian, I have applied a partial indemnity rate with respect to this lawyer of \$245.00 per hour.*

105 *As indicated, this defendant's bill of costs did not provide a detailed calculation of the partial indemnity fee component of the bill and as such, rather than fully re-calculated each component of the bill of costs submitted, I have applied the partial indemnity hourly rates, indicated above, as well as the partial indemnity hourly rates where indicated in the bill of costs. However, there are several associate lawyers and clerks, whose partial indemnity hourly rates are not available to me. In the result, I have done my best to estimate this component of the bill of costs, on a partial indemnity basis, reducing, where necessary from the substantial indemnity rate claimed so as to reflect a proper partial indemnity amount in the circumstances.*

106 *The total component in the bill of costs submitted on behalf of Mississauga which included both partial indemnity and substantial indemnity costs, totalled \$182,037.55. Reducing the portion of the bill of costs submitted which reflects a claim for substantial indemnity costs to a partial indemnity level, as best as I can determine it, the revised costs sum would be \$150,000.00. This sum was arrived at by reducing the substantial indemnity hourly rate charged. Mr. Hamilton's rate is reduced from \$185.00 per hour to \$125.00 per hour, that being the partial indemnity rate first indicated in the bill of costs. I have applied this hourly rate, as I have no information as to Mr. Hamilton's partial indemnity rate after May of 2009. This amount also reflects adjustments with respect to the substantial indemnity hourly rate charged on behalf of Mr. Boghosian at \$325.00 per hour through the bill of costs down to \$245.00 per hour.*

107 *Counsel for Mississauga took a secondary role during the conduct of the trial, while representing his clients' interests. Mr. Lucas, on behalf of the Caversons, took the lead with respect to the plaintiff's claims and in presenting evidence by way of the expert witnesses called for the defence.*

108 *Having considered the time spent, the modest hourly rate of the principal lawyer, Mr. Hamilton at \$125.00 per hour, the complexity of the proceeding, as is related to the defendant*

*Mississauga, and the nature of the claims made against that defendant, I am of the view that fees in the sum of \$150,000.00, inclusive of taxes were reasonably incurred on behalf of the defendant Mississauga and that this fairly represents a sum that the plaintiff could reasonably have expected to pay were she to fail in her action against this defendant.*

109 *I thus conclude that the fees and disbursements totalling \$171,068.44 were properly incurred on behalf of Mississauga in the defence of this action.*

110 *Turning to the consideration as to whether a discretion should be exercised by the court in reducing the amounts of costs incurred, for reasons expressed with respect to the defendants, the Caversons, I conclude that there is no basis to exercise any discretion to reduce these costs.*

111 *Similar to the defendants, the Caversons, the plaintiff has prosecuted this action vigorously against Mississauga and could only reasonably have expected to pay a large sum of costs given the nature of the claims made and the length of the trial. I can find no special considerations that would give rise to the exercise of any discretion to reduce the costs amount as I have determined it.*

112 *I am also of the view that that this amount is both reasonable and proportionate in all of the circumstances.*

#### **Costs of M. & I.**

113 *This defendant seeks costs on a partial indemnity basis from the commencement of the action until April 27, 2009 and thereafter on a substantial indemnity basis for a total amount, inclusive of taxes and disbursements of \$110,757.96.*

114 *As noted, this defendant seeks substantial indemnity costs after the offer to settle was made in 2009 and for the reasons explained, costs will be awarded to this defendant, on a partial indemnity basis only throughout the action.*

115 *A bill of costs on behalf of this defendant was submitted along with a schedule detailing the hours spent and the partial and substantial indemnity costs resulting. The fee component of the bill of costs, on a partial indemnity basis, totals \$61,526.63, as compared to the substantial indemnity fee component at \$77,539.00.*

116 *Disbursements of \$8,428.94 are claimed on behalf of this defendant. I have considered the disbursements claimed. No issue is taken with the disbursements claimed by this defendant by counsel for the plaintiff. I am satisfied that the disbursements were properly incurred by this defendant in the defence of this action.*

117 *No issue was taken by the plaintiff with respect to neither the hourly rates claimed nor the time spent by counsel on behalf of this defendant. Similar to counsel for Mississauga, Mr. Binavince, on behalf of this defendant, took more of a secondary role in the conduct of this trial while representing his client's position. I have considered the schedule attached to the bill of costs and the time spent. I have also considered the hourly rates on a partial indemnity basis claimed with respect to Mr. Binavince. These rates run from approximately \$144.00 per hour at the commencement of the action to \$230.00 per hour for trial preparation. As to counsel's attendance at trial, a per diem fee of \$1,500.00 was charged on a partial indemnity basis.*

118 *I am satisfied that fees, on a partial indemnity basis, throughout totalling \$79,975.18 along with GST in the amount \$3,352.47 and HST in the amount of \$1,893.18 for a total of \$85,221.63 is a fair and reasonable sum, with respect this defendant's claim for costs. I therefore conclude that the costs and disbursements claimed with respect to this defendant, on a partial indemnity basis, inclusive of taxes, totalling \$93,650.57 are fair and reasonable.*

119 *Turning to the consideration as to whether any discretion should be exercised in reducing the cost and disbursements if determined reasonable, as with the other defendants, I can find no basis for such a reduction.*

120 The plaintiff aggressively pursued her action against this defendant, and counsel for this defendant participated in a measured way throughout the litigation without unnecessarily incurring costs or disbursements. I can find no basis for exercising the discretion in reducing the fees and disbursements which I have found otherwise reasonable in all the circumstances of this case.

121 The partial indemnity costs of \$93,650.57 are overall reasonable and proportionate.

### **Costs of the third party, ATS**

122 The third-party, ATS, was released from the action by the Caversons and it was agreed ATS's costs would be fixed in the all-inclusive sum of \$50,000.00.

123 It is submitted on behalf of ATS that those costs should be borne equally by the Caversons, and the plaintiff.

124 On behalf of the Caversons, it is submitted that the plaintiff should fully bear the costs incurred with respect to the involvement of the third party, ATS.

125 In its submissions on costs, counsel for ATS delivered a bill of costs which outlined a claim for costs, on a substantial indemnity scale inclusive of fees and disbursements, in the total sum of \$154,996.44.

126 In support of its submission that the plaintiff should bear the full costs as resolved with the third-party ATS, namely the sum of \$50,000.00, counsel relies upon the decision of Newbould J. in *Guarantee Co. of North America v. Resource Funding Ltd.*, [2009] O.J. No. 3279 (Ont. S.C.J.).

127 In that decision, Newbould J. references the broad discretion contained in section 131 of the Courts of Justice Act as to who shall pay costs. As he noted, the normal rule is that an unsuccessful plaintiff will not be charged with costs of a third party. It is noted that there are situations on peculiar facts, where fairness requires that an unsuccessful plaintiff bear the costs claimed by a successful third party.

128 I conclude that this is not one of the cases in which fairness calls for the plaintiff to bear the costs of the third-party ATS. The Caversons, instituted the third-party action against ATS, and with the benefit of the evidence as it unfolded at trial, made a determination that it was prudent to withdraw the claim against that third-party. The quantum of the costs otherwise payable to ATS was resolved at this juncture.

129 While the third-party proceeding against ATS could be described as flowing naturally from the commencement of the plaintiff's action, the institution of the third-party action should not be characterized as inevitable, based on the nature of the claims made by the plaintiff.

130 In these circumstances, fairness dictates that the Caversons, bear the costs of involving ATS in this action and as such, the Caversons, shall pay to ATS costs in the sum of \$50,000.00.

### **Conclusion**

131 In summary therefore the costs of this action are fixed and payable as follows:

(A) The plaintiff shall pay costs:

(I) of the Caversons at \$269,687.40;

(II) of Mississauga at \$171,068.44; and

(III) of M & I at \$93,650.57

*(B) The Caversons shall pay the costs of the third party ATS at \$50,000.00.*

132      *An order shall issue accordingly.*

*Order accordingly.*

*END OF DOCUMENT*

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