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Phillips defendants and Heather Brook; the submissions of the plaintiff in response; and the reply submissions of the defendants. The plaintiff and the Phillips defendants have reached an agreement on costs. The plaintiff shall pay to the Phillips defendants costs fixed in the amount of \$175,000.00 all inclusive.

[2] In making my decision on costs, I am mindful that the determination of the issue of costs is an exercise of discretion as set out in s.131 of the *Courts of Justice Act*, R.S.O. 1990 c. C.43.

[3] Rule 57.01 of the *Rules of Civil Procedure* sets out factors that the court may consider in the exercise of its discretion. The court is to consider the principle of proportionality as set out in rule 1.04(1.1) of the *Rules of Civil Procedure*. The Court of Appeal in *Boucher v. Public Accountants Council for the Province of Ontario* (2004) CanLII 14579 (ONCA), 71 O.R. (3d) 291, and *Davies v. Clarington (Municipality)* (2009), 100 O.R. (3d) 66, has made it clear that the overall objective of fixing costs is to fix an amount that is fair and reasonable for the losing party to pay, and not simply an amount fixed by the actual costs incurred by the winning party.

[4] This case started as a contested passing of accounts and then became a full-fledged action with examinations for discovery, pretrial motions, and pretrial conferences, culminating in a 23-day trial. The parties were well-represented by counsel. The case was tried efficiently. The counsel and Ms. Brook were civil and courteous at all times.

[5] The plaintiff was unsuccessful and so will have to pay costs. The defendants assert that they are each entitled to costs on a substantial or full indemnity basis. This is in part, they say, because of the nature of the allegations made and also that offers to settle were made which were not accepted by the plaintiff. In addition, Ms. Brook as the estate trustee of Lillian Wilhelm who was the Estate trustee of the Estate of Russell Phillips, claims costs on a full indemnity basis by virtue of the role of estate trustee. I shall address each of these arguments individually.

**Does the nature of the unproven allegations warrant the award of costs on a substantial indemnity basis?**

[6] The allegations against Miller Thomson LLP and Clark, Pollard & Gagliardi (“the Professional Defendants”) focused on the knowing assistance in the breach of trust and also the assertion of collusion under s.18 of the *Trustee Act*. This aspect of the claim was related to the sale of the shares. The allegations made were, for the most part, linked to the specific allegations of breach of trust.

[7] I am not persuaded that the allegations in this case are such that they invite costs on a substantial indemnity basis. These were not allegations of criminal behaviour or fraud. While there are cases where these types of allegations have been unsuccessfully made and the courts have seen fit to award costs on a substantial

indemnity basis, I do not consider it appropriate in this case. I decline to exercise my discretion to order costs on a substantial indemnity basis in favour of Miller Thomson LLP or Clark, Pollard & Gagliardi or the estate trustee based on the nature of the allegations made.

**Do the offers to settle made by the defendants warrant the awarding of costs on a substantial indemnity basis?**

[8] The Professional Defendants both made offers to settle the proceedings. The offer to settle of Miller Thomson LLP was to agree to a dismissal of the action without costs made on March 5, 2015. Clark, Pollard & Gagliardi's last offer to settle was to pay the plaintiff \$25,000.00 of claims, plus \$2,500.00 for prejudgment interest, plus costs on August 17, 2015. The ultimate result was worse for the plaintiff than the offers to settle.

[9] The mandatory cost consequences arising as a result of formal offers to settle are set out in rule 49 of the *Rules of Civil Procedure*. The effect of rule 49 is that a defendant who is wholly successful in defending an action can never recover more than partial indemnity costs. The anomaly that the plaintiff can obtain substantial indemnity costs if he or she obtains a result more favorable than its offer in writing, whereas the defendant is only entitled to partial indemnity costs, was discussed by Carthy J.A. in *S & A Strasser Ltd. v. Richmond Hill (Town)* (1990), 1 O.R. (3d) 243. In *Strasser*, Carthy J.A. held that a court, in exercising its discretion pursuant to rule 57.01, may find it appropriate to award costs on a substantial indemnity basis from the day of the defendant's offer to settle, if the defendant made an offer to settle and the plaintiff recovered nothing.

[10] In this case, I decline to exercise my discretion to award costs on a substantial indemnity basis from the dates of the offers to settle made by each of the Professional Defendants. The plaintiff was entitled to have her trial.

**Is the estate trustee entitled to costs on a full indemnity basis?**

[11] The matter commenced as an application to pass accounts. Costs were incurred with respect to the passing of accounts by the estate trustee. Ultimately, the matter was converted to an action and the estate trustee became a defendant to that action.

[12] If the matter had simply proceeded as a contested passing of accounts, I would be open to the argument that the trustee might be entitled to costs on a full indemnity basis. However, in the context of the action, the estate trustee was simply a defendant along with the other defendants. The estate trustee is, therefore, entitled to partial indemnity costs with respect to the defence of the action. There was clearly an overlap of issues and time was spent in the context of this proceeding dealing with the issues only relevant to the passing of accounts. The challenge to legal fees and executor's compensation was all addressed in the context of the trial and really related to the

passing of accounts. I shall address this matter in considering the quantum of costs sought by Ms. Brook.

### **QUANTUM OF COSTS ON PARTIAL INDEMNITY BASIS**

[13] In determining the appropriate quantum of costs, the court is not simply engaged in a line-by-line assessment process. I shall address the partial indemnity costs of each of the defendants.

#### **Miller Thomson LLP**

[14] Miller Thomson claims costs of \$483,327.89 on a partial indemnity basis inclusive of HST, plus disbursements of \$264,379.59. The plaintiff asserts that the costs should be fixed in the range of \$150,000.00 to \$175,000.00. This is based on the costs claimed by, and agreed to be paid to, the Phillips defendants in the amount of \$175,000.00 all inclusive, and the amounts claimed by Clark, Pollard & Gagliardi. The plaintiff says that these are reasonable. The plaintiff has failed to provide a bill of costs of her own. However, that does not preclude the plaintiff from raising issues with respect to the reasonableness of the fees, especially where she can refer to the costs of other parties.

[15] The plaintiff raises two specific issues with respect to the disbursements claimed: (1) the travel expenses and (2) the expert fees of David Atlin.

#### *Travel Expenses*

[16] The defendant Miller Thomson claims approximately \$19,500.00 on account of expenses which are related to travel. This includes \$14,663.04 for accommodations, approximately \$3,700.00 for meals and beverages, plus parking and mileage.

[17] The plaintiff says she should not be responsible for paying travel costs when competent counsel could have been retained in this jurisdiction. The defendant asserts it was reasonable to choose counsel from out of the jurisdiction and the accommodation disbursements are roughly comparable to the fees which would be charged if the travel occurred on a daily basis.

[18] While a party is entitled to counsel of his or her choice, his or her opponent ought not to be required to pay the travel expenses and costs of that counsel to attend in the jurisdiction except in exceptional circumstances. In my view, there are no exceptional circumstances in this case. There are experienced counsel available within the jurisdiction who could have acted. In the circumstances, I decline to award any costs for travel time or travel-related disbursements. Therefore, there will be a reduction of \$22,300.00 from Miller Thomson's disbursements as a result of travel-related expenses.

[19] With respect to the expert David Atlin, the defendant claims \$121,871.10 for his services. This is an extraordinary amount of money. The plaintiff observes that her own expert, Mr. Griesbaum, charged \$24,137.50 in total for his services as an expert witness. The obligation to establish entitlement to expert fees rests with the party who is claiming the disbursement. Miller Thomson has failed to provide any detailed accounts or bills for this significant disbursement, so I have no way of determining the basis upon which the amounts were paid.

[20] The plaintiff says with respect to the expert Nancy Rogers, her fees are 10% higher than the fees for the comparable plaintiff's expert. The plaintiff does not object to the disbursement with respect to Ms. Rogers.

[21] I will allow \$50,000.00 all inclusive for Mr. Atlin's expert fees. This is not meant as a criticism of his expertise or the value of his opinion. It is fixed based on the reasonable expectations of the losing party, and in the absence of any detailed accounts to support this significant disbursement.

[22] A number of the disbursements claimed are, in my view, appropriately considered as overhead and not proper disbursements for an opposing party to pay. These include legal research, long distance telephone calls, conference calls, and postage. These items will be deducted from the disbursements claimed.

### *Legal Fees*

[23] With respect to the legal fees associated with the conduct of the action, Miller Thomson claims \$427,723.80 on a partial indemnity basis based on 3,817.7 hours. There is no question that Miller Thomson was ably represented by counsel. Counsel for Miller Thomson took the lead on a number of areas in the defence of the claim. However, I must examine the amounts claimed with a view to reasonableness and what the losing party ought to be expected to pay.

[24] I make the following observations with respect to the legal fees:

- (1) The Phillips defendants' counsel claimed 806.7 hours in total for the defence of the action and the Clark, Pollard & Gagliardi claimed 903.8 hours in total time in defending the action.
- (2) With respect to the examination for discovery, 333 hours are claimed for a 10 days total examination. This includes time for travelling to and from examinations. As I have noted, travel time will not be paid by the plaintiff.
- (3) There were two motions argued at the trial: (i) to exclude the plaintiff's expert Clare Burns' evidence and (ii) to challenge the admission of the audiotapes, both of which were unsuccessful.

- (4) The total of 129.4 hours, or \$17,017.00 on a partial indemnity basis, attributed to working with expert witnesses, is excessive. Although counsel for Miller Thomson took the lead with respect to the experts, it is still an extraordinary amount of time spent. The time related to experts is properly included in my allowance for trial preparation.
- (5) Trial preparation time is claimed at 1,225 hours for a total of \$117,040.00.
- (6) Trial time was claimed at 1,098 hours for a total of \$120,652.00 for the 23 days of trial.

[25] Given the extraordinary amount of time claimed with respect to pretrial preparation and trial, I employ an analysis similar to that used by D.M. Brown J. (as he then was) in *Beach v. Toronto Real Estate Board*, 2010 ONSC 848 (CanLII). In that case, the costs of counsel at trial were calculated by allowing senior counsel's time at 10 hours per day multiplied by the partial indemnity rate. This amount was then doubled to allow one day of preparation time by senior counsel for each day of trial. Junior counsel was calculated at 10 hours per day multiplied by the partial indemnity rate and then multiplied by three, assuming two days of preparation time for each day of trial for junior counsel.

[26] The partial indemnity rate of Mr. Lobl, based on \$285.00 per hour actual rate at 60%, is \$171.00, and Mr. Pasalic, based on \$120.00 per hour actual rate, at 60% is \$70.00. I would round this up to \$2,500.00 per day - \$57,500.00 for 23 days of trial. The trial preparation time should be based on a maximum eight hours per day. The trial preparation for Mr. Lobl would be \$31,465.00 and for Mr. Pasalic \$25,760. This is a total of \$57,225.00. While I acknowledge there are additional persons who were involved, in my view, this is a reasonable approach to take to calculate trial preparation and counsel fees at trial.

[27] There were two motions argued which were not successful. I will deduct \$5,000.00 from the trial time related to those motions. The net trial time is \$52,500.00.

[28] I have reviewed the various steps and the amounts claimed. On the various items, I allow the following:

Item	Amount Allowed
Pleadings, general correspondence, discovery of documents	\$ 5,000
Motion for litigation guardian	\$ 3,000
Preparation and attendance for examinations for discovery	\$ 17,500

Motion by plaintiff to strike Statements of Defence	\$ 2,500
Motion by plaintiff regarding net proceeds of sale	\$ 500
Motion by Phillips Bros. for release of money from court	\$ 0.00
Refusals motions	\$ 3,500
Representation motion	\$ 5,000
Case conferences, including pretrial conference	\$ 15,000
Trial preparation	\$ 57,225
Trial	\$ 52,500
Costs Submissions	<u>\$ 5,000</u>
Total	\$166,725
HST on Fees	\$ 21,674
Plus Disbursements (inclusive of HST)	<u>\$170,000</u>
	\$358,399

Rounded up to \$360,000

[29] Therefore the plaintiff shall pay to the defendant Miller Thomson costs fixed in the amount of \$360,000.00.

**Clark, Pollard & Gagliardi**

[30] Clark, Pollard & Gagliardi claims costs on a partial indemnity basis in the amount of \$166,695.05 inclusive of HST, plus \$23,920.00 for disbursements inclusive of HST.

[31] The amounts claimed for travel, hotel and meals expenses, \$15,178.65, are not allowed as disbursements for the reasons outlined above. The net disbursements are allowed at \$8,741.35.

[32] The legal fees are claimed for Ms. Henneberry and Ms. Reynolds based on actual fee of \$295 per hour. Partial indemnity at 60% is \$177. Clark, Pollard & Gagliardi took the lead on the motion to exclude the audiotapes, which was unsuccessful. Two senior counsel appeared, but the plaintiff should not bear the costs of such a decision. The lead on the experts was taken by counsel for Miller Thomson which lightened the load for this defendant. In the circumstances, I believe that the appropriate costs on a partial indemnity basis for this defendant are \$140,000.00 inclusive of HST, plus disbursements of \$8,741.35 for a total of \$148,750.00

### **Heather Brook**

[33] Ms. Brook acted as the estate trustee for her mother Lillian Wilhelm, who was the estate trustee for Russell Bernard Phillips. Ms. Brook was present throughout the course of the trial and the passing of accounts.

[34] Ms. Brook seeks costs on a full indemnity basis in the amount of \$85,990.00. This includes \$50,000.00 that was paid to Brian Kelly; \$11,300.00 which was said to be paid to Robert W. Reinhart, who assisted Ms. Brook; \$10,000.00 for lost income and expenses of Heather Brook; and \$14,690.00 as the payment of the refund of fees by Miller Thomson.

[35] The plaintiff asserts that there should be no costs awarded to Ms. Brook. The plaintiff asserts that she was successful in the passing of accounts and that the allegations against Ms. Brook were the same in the action and the passing of accounts.

[36] As I have stated, Ms. Brook is entitled to her costs in defending the action on a partial indemnity basis. These costs include the fees paid to Mr. Kelly in defending the action. The evidence discloses that \$50,000.00 was paid to Mr. Kelly. Of that \$50,000.00, approximately \$5,000.00 were disbursements. Of the \$45,000.00 Ms. Brook would be entitled to partial indemnity at 60%. This would be \$27,000.00 plus \$5,000.00 for disbursements for a total of \$33,000.00 on account of Mr. Kelly's legal fees.

[37] With respect to the fees of Mr. Reinhart, the plaintiff has provided no account setting out those fees. I am unwilling to award costs simply on the basis of a bald assertion of the amount. Accordingly, I allow nothing for costs related to Mr. Reinhart.

[38] Ms. Brook has claimed \$10,000.00 for her own time. Unfortunately, Ms. Brook has provided me with no particulars as to the calculation of this amount. In *Fong v. Chan*, [1999] O.J. No. 4600, 46 O.R. (3d) 330, the Court of Appeal clarified that the self-



represented litigant may be entitled to some costs. However, there is no automatic right to recover costs. Self-represented litigants should not recover costs for time and effort that any litigant would have to devote to the case. It is the obligation of the litigant to demonstrate he or she devoted time and effort to work ordinarily done by a lawyer or that he or she incurred an opportunity cost by foregoing some remunerative activity. Ms. Brook did participate in the trial and provided written submissions. However, she has provided no method by which I could calculate the lost opportunity or income forgone as a result of her participation in the trial. In the circumstances, and acknowledging that she did actively participate, It is appropriate to award her costs in the amount of \$9,200.00 for her participation in the trial based on \$20.00/hr for 10 hours a day for 23 days, plus equal time for preparation. Of this \$9,200.00, I find that \$4,500.00 was related to the passing of accounts issues and is payable from the Estate directly.

[39] I will not order the payment by Miller Thomson of \$14,690.00. Miller Thomson provided significant legal services in the conduct of the passing of accounts, for which they received no payment.

[40] Therefore, the plaintiff shall pay to Ms. Brook costs fixed in the amount of \$37,700.00 all inclusive. In addition, Ms. Brook shall be entitled to receive \$4,500.00 from the Estate as costs on the passing of accounts.

## **DISPOSITION**

[41] It is ordered that:

- (1) The plaintiff shall pay to the Phillips defendants costs fixed in the amount of \$175,000.00 all inclusive.
- (2) The plaintiff shall pay to the defendant Miller Thomson LLP costs fixed in the amount of \$360,000.00 all inclusive.
- (3) The plaintiff shall pay to the defendant Clark, Pollard & Gagliardi costs fixed in the amount of \$148,750.00 all inclusive.
- (4) The plaintiff shall pay to the defendant Heather Brook as Estate Trustee of Lillian Wilhelm costs fixed in the amount of \$37,700.00 all inclusive.
- (5) Heather Brook shall receive the sum of \$4,500.00 from the Estate as costs on the passing of accounts.

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Sweeny J.

**Released:** May 27, 2016

**CITATION:** Eve v. Brook, 2016 ONSC 3532  
**COURT FILE NO.:** ES-756-11  
**DATE:** 2016/05/27

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

**B E T W E E N:**

Roslynn Valera Eve

Plaintiff

- and -

Heather Brook as Estate Trustee of the Estate of Lillian Wilhelm as Estate Trustee of the Estate of the late Russell Bernard Phillips and in her personal capacity, Gregory Phillips as Estate Trustee of the Estate of Arthur Earl Phillips, Gregory Phillips as Estate Trustee for the Estate of Earl Phillips in trust, 345023 Ontario Inc. also known as Phillips Bros. Radiator Service Limited, Gregory Earl Phillips, Phillips Bros. Radiator Service Ltd., Miller Thomson LLP, Clark, Pollard & Gagliardi

Defendants

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**SUPPLEMENTARY REASONS FOR  
JUDGMENT - COSTS**

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Sweeny J.

**Released:** May 27, 2016