COURT FILE NO.: C-1444/01
DATE: 20020905

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Riordan v. Veer, et al.

BEFORE: The Honourable Mr. Justice C.S. Glithero

COUNSEL: Gary L. Petker, for the Applicant

Justin J. Robinson, for the Respondents Bill McFadden Ltd. and Jap Truck & Trailer Repairs Inc.

RULING AS TO COSTS

[1] In reasons released on July 22, 2002, I made rulings on the issues in the within matter and indicated that my preliminary thought was that it would be appropriate in this case to make no order as to costs, but I invited counsel to make submissions as to that issue.

[2] Submissions have now been received from both counsel.

[3] On behalf of Riordan, a bill of costs totaling $15,951.23, inclusive of fees, disbursements and GST, has been submitted.

[4] Until receiving the submissions, and for obvious reasons, I had not been made aware of an offer of settlement advanced by Riordan prior to the hearing of the application. In my opinion, the applicant Riordan succeeded in obtaining relief that was as favourable or more favourable than that proposed in the offer to settle. Accordingly, Rule 49.10 would suggest that

Riordan be entitled to costs on a partial indemnity basis to the date of the offer and thereafter on a substantial indemnity basis.

[5] The main thrust of the submissions on behalf of the respondents McFadden and Jap is that Riordan had essentially made allegations of fraud which were not accepted in that I was not prepared to reject the evidence of Mr. Singh that the repair work had been done, despite the suspicious and curious state of Jap's accounting records. In essence, the respondent's submission is that the unaccepted alleged allegation of fraud at least offsets the successful offer to settle by the applicant and that there should be no order as to costs.

[6] In my opinion, the court should be cautious in applying the normal approach to allegations of fraud in the circumstances of this case. The failure to produce full accounting records, although some were undertaken to be produced, and the unsatisfactory state of the accounting records, and the lack of any adequate detailed explanation as to the duplicity of records all in my opinion make it quite understandable that the applicant would challenge the legitimacy of the repair amounts claimed.

[7] The fact that the applicant put the respondent Jap to the proof of its claim ought not in itself equate to an allegation of fraud. While the affidavit allegations in this case went beyond merely requiring proof of the claims, and suggested such claims to be invalid, in my opinion the circumstances of this case, including those of Jap's accounting methodology, made such allegations reasonable and legitimate.

[8] While the amounts in issue in this matter were comparatively small, and certainly small in relation to the amount claimed for costs, I remind myself that the matter was put to me as

being one involving issues of importance to those involved in this type of industry. I also take into account that both sides were represented by competent counsel and can only assume that each party was informed of the costs consequences, both in terms of the effect of offers to settle, and in terms of the quantum of costs being incurred given the amount of effort going into the litigation.

[9] In my opinion the "offer to settle" regime is important both to the courts and to litigants. It is in the best interests of litigants that they be encouraged to seriously consider offers to settle so that where amicable agreements can be reached, the increasingly high expense of litigation can be avoided, or at least reduced. In this case there was a reasonable offer to settle advanced and not accepted and the applicant should be entitled to its costs accordingly, on a partial indemnity basis to the date of the offer and on a substantial indemnity basis thereafter.

[10] As to quantum, the amount claimed for costs is indeed high compared to the amounts in issue. The respondents' materials takes no issue with the claims as to the amount of time expended or the rates being claimed.

[11] The largest items in the bill of costs are for the counsel fees for Mr. Petker and Mr. Postnikoff. In respect of each, the claim is for $350 per hour on a partial indemnity scale and $450 per hour on a substantial indemnity scale for Mr. Petker, and $300 per hour on a partial indemnity scale and $400 per hour on a substantial indemnity scale for Mr. Postnikoff. The bill of costs notes such claims to be the "tariff rate". I note that the costs grid shows those amounts to be maximums for gentlemen having their respective number of years of experience. They are not automatic amounts. Similarly, the amount claimed for counsel fee is $2,400, which is the

maximum allowable on a substantial indemnity scale for a half-day motion. Again, that rate is not automatic.

[12] I in no way impugn the effort, ability or experience of either counsel. I do take into account, however, that in fixing costs, one of the factors to be considered is the amount in issue and the importance of the issue to the client. In my opinion, the maximum amounts allowable under the costs grid are not appropriate in matters involving comparatively small amounts of money, as was the case here.

[13] As already noted previously, however, presumably all parties were made aware of the potential costs consequences by their counsel and regardless and continue to engage in the litigation.

[14] In this case, I think it appropriate that the fees for Mr. Postnikoff be fixed at $250 per hour on a partial indemnity scale and $300 per hour on a substantial indemnity scale, and that Mr. Petker's hourly fee be set at $300 per hour on a partial indemnity scale and $375 per hour on a substantial indemnity scale. In my opinion, it would also be appropriate to fix the counsel fee for the half-day motion at $2,000 rather than the $2,400 claimed. In all other respects, I accept the bill of costs as presented and I fix the costs payable to the applicant by the respondents in the amount set forth in the bill of costs as to be revised for the hourly rates claimed and the counsel fee claimed as previously indicated.

[15] Mr. Robinson is counsel for all of the respondents who appeared in this motion. In the absence of any submissions to the contrary as to distribution of the liability to pay costs as between the respondents, the order will be that they are jointly and severally bound to pay the

costs to the applicant as I fix them to be in the preceding paragraphs. As between the respondents, it may be appropriate to simply note that in my opinion Jap achieved some success on the application in that the legitimacy of its repair claims was upheld, whereas McFadden was entirely unsuccessful.

C.S. GLITHERO, J.

DATE: September 5, 2002