Davies v. Clarington (Municipality), [2019] O.J. No. 1890

Ontario Judgments

Ontario Superior Court of Justice

M.L. Edwards J.

Heard: March 8, 2019.

Judgment: April 15, 2019.

Court File No.: CV-00-1075-00CP

[2019] O.J. No. 1890 | 2019 ONSC 2292

Between Bonnie Davies, Plaintiff, and The Corporation of the Municipality of Clarington, via Rail Canada Inc., Canadian National Railway Company, Timothy Garnham, The BLM Group Inc., Apache Specialized Equipment Inc., Apache Transportation Services Inc., Blue Circle Canada Inc., and Hydro One Networks Inc., Defendants

(133 paras.)

Counsel

Jeffrey W. Strype and Mark De Sanctis, for Class Member Zuber.

James M. Regan, Q.C., and Angelo Sciacca, for the Defendants Apache Specialized Equipment Inc., Apache Transportation Services Inc., and Timothy Garnham.

Stephen J. MacDonald, for the Defendant Hydro One Networks Inc.

David Merner, for the Defendants VIA Rail Canada Inc. and Canadian National Railway Company.

Alon Barda, for the Defendant BLM Group Inc.

REASONS FOR DECISION -- COSTS

M.L. EDWARDS J.

Overview

1 If there was ever any case that demonstrates how expensive it is to litigate in the 21st Century, this case is the gold standard. Few in this country could afford to litigate a case where the costs sought by Mr. Zuber total close to $7,000,000, and the costs on a partial indemnity sought collectively from the defence total approximately $3,000,000. The magnitude of these costs is brought into focus given that the court's judgment was for a total recovery by Mr. Zuber of $50,000 plus prejudgment interest.

2 The wisdom of litigating a case where the costs incurred far outweighed the award of damages, should be further scrutinized in light of the offers exchanged between the parties. Mr. Zuber appears to have made a number of offers

beginning in November 2009, when he offered to settle his claims for $35,000,000. By the time this case got to trial, Mr. Zuber had reduced his expectations, as reflected in an offer made in June 2014, for $26,200,000 plus costs. Clearly, Mr. Zuber and his counsel believed that Mr. Zuber would obtain a damages award that far exceeded anything that this court has ever heard of being awarded in a personal injury action in this country. The defence, on the other hand, saw this case rather differently. In November 2009, the defence offered Mr. Zuber $150,000 inclusive of prejudgment interest, plus costs. On the eve of trial in June 2014, the defence offered Mr. Zuber $500,000 inclusive of prejudgment interest, plus costs to be assessed or agreed upon.

3 Despite the offers made by the defence, Mr. Zuber argues that he is the successful party and should be entitled to his costs. Those costs are broken down as follows: fees on a partial indemnity basis - $3,261,759; disbursements - $1,610,855; and interest on litigation loans - $2,204,587; for a total of $7,077,201 which is discounted by 15%, for a total of $6,015,620.85. Not surprisingly, the defence says it is entitled to their costs from the date of the Defendants' first offer in November 2009. The costs are sought by the defence on a substantial indemnity basis. These Reasons will explain why Mr. Zuber is entitled to recover his costs up to the date that the defence made its first offer, and thereafter, the defence is entitled to its costs on a partial indemnity basis.

The Facts

4 This action started, continued and finished, as a class action proceeding under the *Class Proceedings Act*, 1992, *S.O. 1992 c. 6* ("*CPA*"). While the named Plaintiff is Bonnie Davies, the trial that took place before me involved Mr. Christopher Zuber, and it was his claim alone that proceeded to a trial that lasted 106 trial days.

5 On August 30, 2000, McKinnon J. certified this class action, and amongst other things endorsed a litigation plan which was appended to his order and provided:

> The parties shall endeavour to resolve individual damage claims in direct negotiation. If there is a need to assess any damage claim, or claims, the parties will seek the court's direction.
>
> Class members requiring individual assessments or otherwise participating in individual damage assessments shall be entitled to retain a personal lawyer to conduct the assessment, if they so desire.

6 The issue of liability was determined through the course of a 10-week trial beginning in 2004. Ultimately, the parties entered into minutes of settlement on October 26, 2006, which were approved pursuant to the Order of Ferguson J. of December 13, 2006.

7 At the time that the parties entered into the minutes of settlement, it was understood that there were two class members; specifically, Ann Pritchard and Christopher Zuber, whose claims had not been settled. The Order of Ferguson J. specifically approved the settlement on the basis that the claim of Christopher Zuber and Ann Pritchard were not compromised.

8 Subsequent to the Order of Ferguson J. of December 13, 2006, there is no indication that any of the parties sought further guidance of the court in terms of the approval of a litigation plan. It is argued, on behalf of Mr. Zuber, that the Defendants bore the responsibility of preparing a litigation plan for approval of this court. In that regard, it is argued that at the time that the initial litigation plan was approved by McKinnon J., the Plaintiff, Bonnie Davies, was represented by class counsel Walker Head and, as such, Mr. Strype, counsel for Mr. Zuber, had no input into the preparation of that litigation plan.

9 Mr. Zuber obtained a judgment for $50,000 plus prejudgment interest. The prejudgment interest calculation adds to the total judgment, approximately $96,000. As such, Mr. Zuber is entitled to recover a judgment of approximately $146,000.

The Offers to Settle

10 On November 4, 2009, the Defendants offered to settle Mr. Zuber's claims on the basis of a payment of $150,000, which was inclusive of prejudgment interest. In addition, the Defendants would pay Mr. Zuber's costs, to be agreed upon or taxed to the date of the offer. I will refer to this offer as "the Defendants' 2009 offer".

11 In response to the Defendants' 2009 offer, Mr. Zuber responded through correspondence from Mr. Strype's office with a counter-offer of $35,000,000 all-inclusive. I will refer to this offer as "the Plaintiff's first offer".

12 When the Defendants made the Defendants' 2009 offer, it was inclusive of interest. The amount of the judgment in this case, as previously noted, was $50,000 plus interest. If interest was calculated to the date of the Defendants' 2009 offer using a 5% interest rate and not compounded, the amount of interest Mr. Zuber would have been entitled to on a $50,000 judgment would, at that time, have totalled $22,500. The total value of the court's judgment then, as of November 2009, would have been $72,500. Clearly, Mr. Zuber would have been better off to accept an offer of $150,000 plus costs.

13 On November 23, 2013, the Defendants served a second offer to settle, the terms of which provided:

a) The Defendants will pay Zuber the all-inclusive sum of $500,000 in satisfaction of all claims, damages and interest.

b) The Defendants will pay Zuber the all-inclusive sum of $250,000 in satisfaction of all claims for costs, disbursements and GST/HST...

I will refer to this offer as "the Defendants' 2013 offer". This offer had additional terms that for the purposes of this discussion are not overly relevant.

14 The Defendants' final offer in this matter was made on June 5, 2014. I will refer to this offer as the Defendants' final offer. The essential terms of the Defendants' final offer provided:

1) The Defendants will pay Zuber the all-inclusive sum of $500,000 in satisfaction of all claims, damages and interest.

2) The Defendants will pay Zuber the costs of his action to be agreed upon or assessed.

3) This offer remains open for acceptance until one minute after the commencement of trial.

4) This offer revokes all prior offers to settle by the Defendants.

15 Mr. Zuber responded to the Defendants' final offer with his final offer to settle on June 16, 2014. Had the Defendants accepted Mr. Zuber's final offer, they would have been required to pay Mr. Zuber $26,200,000 for all claims, damages and interest. In addition, Mr. Zuber required the Defendants to pay to him his costs including disbursements, together with all litigation loan interest up to and including June 16, 2014. Factoring in the costs, disbursements, and the accrued litigation loan interest, Mr. Zuber's final offer on an "all-in" basis would have easily exceeded $30,000,000.

Litigation Loans Advanced to Mr. Zuber

16 The issue of the litigation loans and the interest that has accrued on these loans, is very much an issue that Mr. Zuber believes is fundamental to the ultimate outcome this court has arrived at, as it relates to the issue of costs. The details of these loans are set forth below.

17 There are two loans made by Lexfund Management Inc. ("Lexfund"). The first loan was made on December 18, 2008, and the second loan made on August 26, 2009. Both of these loans were for a principal amount of $53,750, and bore an interest rate of 28.8% compounded monthly.

18 There are two loans made by Seahold Investments Inc. ("Seahold"). The first loan was made on November 30, 2007, for $25,000, and the second loan was made on May 27, 2009, for $10,000. The Seahold loans bear interest at 18% compounded monthly.

19 There are two loans made by York Fund. The first loan was made on January 31, 2013, with a principal sum of $139,320, bearing an interest rate of 24% compounded monthly. The second loan was made on November 1, 2013, for $5,000, also bearing an interest rate of 24% compounded monthly.

20 There are two loans made by BridgePoint Financial Group ("BridgePoint"). The first loan was made on December 8, 2010, with the principal amount of $3,800, and a second loan made on May 28, 2011, for $10,340.18. The interest for both of the BridgePoint loans was 18% compounded monthly.

21 The total amount of the loans, inclusive of the principal advanced and the accrued interest as of December 31, 2018, is $3,153,621.67. Of that total, the principal that was advanced by the various loan providers was $247,210.18. When the principal amount is excluded, the total accrued interest claimed by Mr. Zuber comes to $2,906,411.49.

22 The existence of the litigation loans and the details of those loans, were not made known to the Defendants until copies of the loan agreements were sent under cover of a letter dated January 31, 2014, from Mr. Strype's office to counsel for the Defendants. The existence and details of those loan agreements were provided as a result of an Endorsement made by Justice Vallee, in response to a motion brought by the Defendants for security for costs. Given that the details of the loan agreements were not provided to the Defendants until January 31, 2014, it will be readily appreciated that at the time that the Defendants made their 2009 offer and their 2013 offer, they were completely unaware that Mr. Zuber had obtained any litigation loans and, as such, would not have been aware of the interest that would have accrued on those loans.

Position of Mr. Zuber

23 Mr. Zuber asserts that he is entitled to his costs throughout the action as he successfully obtained judgment for $50,000 plus prejudgment interest.

24 Mr. Zuber argues that while the Defendants submitted three offers to settle, that as a matter of law any successive offer of a party rescinds a previous offer: see *Stradiotto v. BMO Nesbitt Burns Inc*., *2015 ONSC 1760*, at para. 17. As such, it is argued that there is only one Rule 49 offer made by the Defendants that engages the costs consequences of Rule 49 of the *Rules* - that being the Defendants' final offer made in 2014.

25 Mr. Zuber argues that there were significant changes in the wording of the Defendants' offers, such that the Defendants' final offer was never capable of being accepted. Mr. Zuber argues that the Defendants' final offer was not crystal clear, so as to trigger the provisions of Rule 49.10. Mr. Zuber argues that an offer to settle must be "fixed, certain, ascertainable and remain outstanding to the commencement of trial", and in that regard relies heavily on a recent decision of H.J. Williams J. in *Bon Rathwell Howland v. The Estate of Pamela Howland*, *2019 ONSC 749*.

26 As it relates to the Defendants' 2009 offer, Mr. Zuber argues that at the time that this offer was presented, the total of his loans inclusive of interest was well in excess of the entire offer and, as such, the offer was not capable of being accepted because "it would have left Mr. Zuber in a position of a net loss". In that regard, Mr. Zuber relies on the decision of Gomery J. in *Singh v. Shoppers et al*., *2018 ONSC 6879*, that if an offer does not contain any real element of compromise it does not advance the policy rationale underlying Rule 49.

27 Relying on the decision of the Court of Appeal in *Lawson v. Viersen*, *2012 ONCA 25*, at paras. 20 and 49, Mr. Zuber argues that the Defendants failed to present an offer with a reasonable element of compromise, and that it

would have been impossible for him to have accepted the November 2009 offer given the fact that it would have left him in a net deficit position.

28 As it relates to the Defendants' 2013 offer, Mr. Zuber points out that unlike any of the other offers made by the Defendants there was specific reference to disbursements, as the Defendants offered to pay Mr. Zuber the all-inclusive sum of $250,000 in satisfaction of his claims for costs and disbursements. Mr. Zuber argues that the Defendants' 2013 offer was vague, and thus cannot trigger Rule 49 consequences because there had been no determination made, as of November 2013, as to whether the repayment of the litigation loans would be treated as a disbursement. In point of fact, the Defendants had no knowledge that Mr. Zuber had obtained any litigation loans at the time of the Defendants' 2013 offer.

29 As it relates to the Defendants' final offer, Mr. Zuber argues this offer contained further ambiguous language, in that the reference to disbursements and prejudgment interest were no longer employed by the Defendants in their offer. In that regard, the offer specifically refers to the Defendants paying Mr. Zuber the all-inclusive sum of $500,000, in satisfaction of "all claims, damages and interest".

30 Mr. Zuber argues that while the offer contained a provision that the Defendants would pay Mr. Zuber's costs of his action, to be agreed upon or assessed, the offer does not refer to payment of his disbursements. Mr. Zuber argues that the removal of the language of prejudgment interest and disbursements from the Defendants' final offer, leads to an interpretation that the Defendants encapsulated these claims under the category of "all claims, damages and interest". Fundamentally, Mr. Zuber argues that the calculation of the litigation loans and interest as of June 5, 2014, amounts to a total of approximately $684,000. As such, the repayment of the litigation loans by the Defendants to Mr. Zuber in this class proceeding, supports the fact that Mr. Zuber will obtain a more favourable result at trial than the Defendants have offered. As such, Mr. Zuber argues that he is presumptively entitled to costs throughout the action.

31 As this action was a class action, Mr. Zuber argues that the starting point for the analysis of costs is s. 31 of the *CPA*, which provides:

> In exercising its discretion with respect to costs under subsection 131(1) of the *Courts of Justice Act*, the court may consider whether the class proceeding was a test case, raised a novel point of law or involved a matter of public interest.

32 Mr. Zuber argues that the trial of this action was a "test" case, and relies on the decision of the Supreme Court of Canada in *Dickason v. University of Alberta*, *[1992] 2 S.C.R. 1103*, at para. 56, that where a case is determined to be a test case the court has the discretion not to order costs.

33 Mr. Zuber argues that the trial of this action raised issues concerning a class of litigants, specifically a foreign national, that brings it within the context of a test case.

34 As it relates to the issue of whether this case involved novel points of law, Mr. Zuber suggests that this action, in fact, did engage novel points of law -- including such items as the tax treatment of a Polish expat, as well as cash payments made during a turbulent time in post-communist Polish history, such that a court should exercise its discretion to order no costs of the proceeding. Mr. Zuber fundamentally argues that the assessment of his claim for income loss engaged novel points of law that had not previously been considered by Ontario courts.

35 As it relates to the trial being a matter of public interest, Mr. Zuber argues that the reasons of this court stand, in part, for the proposition that jurisdictional, political and economic structure of a foreign claimant, will be held up against Canadian rules and regulations.

36 Collectively, Mr. Zuber argues this case was a test case and raised novel points of law involving a matter of public interest and, as such, s. 31 of the *CPA* is engaged. It is also argued that if this court comes to the conclusion

that Mr. Zuber was the unsuccessful party, this court should exercise its discretion and make no order of costs as against Mr. Zuber.

37 As it relates to the conduct of the Defendants and the length of the trial, Mr. Zuber argues that the length of the trial was exacerbated as a result of the Defendants' lengthy cross-examinations, and that this trial would never have taken 106 days of trial time if the Defendants had utilized some of the tools available under the *Rules*. Specifically, it is argued that the Defendants should have brought a motion to have the evidence of the various witnesses who testified from Poland, taken by way of video evidence pursuant to Rule 31.10 and/or Rule 36.

38 It is also argued that part of the responsibility for the length of the trial lies in the fact that the Defendants did not propose an efficient and effective litigation plan, that would have allowed the court to have engaged in more effective case management of the action leading up to trial, and resulted in a shorter trial than the one that ultimately unfolded.

Position of the Defendants

39 As it relates to the arguments made by Mr. Zuber in the context of s. 31(1) of the *CPA*, the Defendants argue that this case was not a test case; that it did not raise any novel points of law; and that the action did not raise any matters of public interest. Also, the Defendants essentially argue that while this was a class action, the trial, in reality, was nothing more than a personal injury action raising issues and facts that are routinely seen in personal injury actions across this province. The fact that the trial involved a foreign national did not raise any novel points of law, nor did it engage any issues of public interest.

40 As it relates to the claim asserted for his past and future loss of income, counsel for the Defendants argue that while this issue was the fundamental issue at trial, the reason why the trial involved so many witnesses over such a lengthy period of time was solely as a result of the failure of Mr. Zuber to produce the documentation necessary to meet his onus of proof.

41 In that regard, it is worth recalling Mr. Zuber's own evidence at trial, that the reason why he did not have the documents to prove much of his loss of income was as a result of his lack of knowledge that these types of documents were required. He also testified that he did not know that these documents should be produced until well after 2004, at which time most of the documents were no longer in existence given that in Poland, retention of such records is required for only six years. Mr. Zuber's evidence in this regard, needs to be contrasted with evidence that has now been produced to the court by way of the dockets filed by Mr. Strype in support of his claim for costs. One of the docket entries of Mr. Strype dated April 23, 2003, covering a time period of one hour, is the following:

> Discussion with clerk regarding meeting with Zuber; instructing clerk to set up a meeting between himself and client, and if available, I would advise clerk to obtain all the income loss documents from client, if possible, and/or advise him that we will not be proceeding with the income loss claim.

42 There is a further docket dated May 8, 2003, this time reflecting the following:

> Trying to obtain the business records for the loss of income; to giving clerk instructions re

This docket was also for one hour.

43 Even prior to the aforesaid entries in Mr. Strype's dockets there is an entry on May 28, 2002, lasting two and a half hours, which reflects:

> Extensive meeting with Chris Zuber after his medical appointment with Dr. O-H (Ogilvie-Harris).

44 The aforesaid dockets, in my view, reflect the inescapable conclusion that Mr. Zuber was well represented by

Mr. Strype, and that he fully understood his obligations to obtain the necessary documentation to prove his loss of income - likely as early as mid-2002.

45 In respect of Mr. Zuber's assertion that the defence is solely responsible for the length of the trial by reason of the Defendants' failure to examine non-parties prior to trial, for the length of the cross-examination of Mr. Zuber and his witnesses, and for its failure to prepare and invoke a litigation plan, the Defendants argue -- in my view correctly, that they had no choice but to fully test the evidence tendered by Mr. Zuber given the quantum of his claim.

46 Regarding the possibility that any of the witnesses called from Poland could have been examined prior to trial pursuant to Rule 36, counsel for the Defendants point out that at no time did Mr. Strype ever suggest that such an approach would be appropriate. There is also no evidence that any of these witnesses would have complied with any order that this court might have made pursuant to Rule 36. I also observe that even if all of the witnesses from Poland and beyond had been examined by video prior to trial, this court would still have had to expend the time to watch and absorb such evidence. I fail to see how such an approach would have resulted in much economy of time.

47 In regard to the issue of a litigation plan, counsel for the Defendants argue that at no time did Mr. Strype ever suggest a litigation plan with respect to the conduct of Mr. Zuber's claim. Moreover, it is pointed out that this action was case managed by Lauwers J. (as he was then), from the time that Mr. Zuber was successful with his motion to increase the prayer for relief until his appointment to the Court of Appeal. Amongst the things that Lauwers J. ordered in his capacity as the case management judge, were orders that dealt with the following: production of documents; attending a further seven days of discovery; attending a defence medical; translation of documents; and the provision of fulsome witness statements.

48 As it relates to the application of whether or not the interest on litigation loans is a recoverable disbursement, counsel for the Defendants argue that because there is no evidence of any causal link between the loans and the accident, Mr. Zuber cannot recover the interest on those loans, either as special damages or as a disbursement, as part of any costs assessment.

49 The Defendants, in my view, correctly argue that while the courts in Ontario have not yet expressed or ruled on the recovery of litigation loan interest as a disbursement, for the most part the jurisprudence has rejected such claims. As it relates to Mr. Zuber's reliance on a decision of the New Brunswick Court of Appeal, *LeBlanc v. Doucet*, *2012 NBCA 88*, counsel for the Defendants note that in *LeBlanc* there was an evidentiary basis for the finding that the litigation financing was recoverable.

50 It is pointed out by counsel for the Defendants that *LeBlanc* has not been followed anywhere other than in New Brunswick, and was specifically rejected by Lauwers J. (as he was then), in *Warsh v. Warsh*, *2013 ONSC 1886*, at paras. 26 through 34.

51 The fundamental position that is asserted on behalf of the Defendants, is that the Defendants were the successful parties at trial. As it relates to the issue of the existence of the litigation loans and how they may have impacted on any of the Defendants' offers, it is pointed out by counsel for the Defendants that they were unaware of the existence of the litigation loans until sometime after January 6, 2014, and as such the court should not take the loans and accrued interest into account when assessing whether or not the Defendants' offers were better than the judgment.

52 In any case, it is argued on behalf of the Defendants that there is no need for "semantics or mental gymnastics" when interpreting the offers. It is argued that the offers are clear, and the words set forth in any of the Defendants' offers should bear their ordinary and grammatical meaning. Specifically as it relates to the use of the word "costs" in the Defendants' offers, it is suggested that any reference to costs means both legal fees and disbursements. I agree. The fact that the Defendants expressly referenced disbursements and taxes in the second offer, did not change the meaning of the costs in the first and third offers.

53 While the Defendants argue that in accordance with Rule 49.10 they are presumptively entitled to their partial

indemnity costs from June 5, 2014 (the date of the Defendants' final offer), they are, nonetheless, entitled to their costs from November 4, 2009, as this court has the discretion under Rule 49.13 to take into account that offer.

The Law

54 Ultimately, in making an award of costs the court must be guided by statute, the rules and the law as it has evolved, as interpreted by the courts and, in particular, the Court of Appeal.

55 In that regard, s. 131(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 ("*CJA*"), provides:

> Subject to the provisions of an *Act* or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

The *CPA*, and specifically s. 31, incorporates s. 131 of the *CJA*, but goes further and requires the court to give special weight to whether the class proceeding was a test case, raised a novel point of law, or involved a matter of public interest.

56 As it relates to the *Rules*, Rule 49.10(2) is engaged along with Rule 49.13. It is well understood that the application of Rule 49.10(2) requires an analysis of any offer to settle made by a defendant. Provided it was made at least seven days prior to trial and was not withdrawn, and if the plaintiff does not obtain a judgment more favourable than the defendant's offer, the plaintiff will then only be entitled to its partial indemnity costs up to the date of the offer, and thereafter the defendant will be entitled to partial indemnity costs from the date of the offer unless the court otherwise orders.

57 Perhaps more importantly, Rule 49.13 provides a discretion to the court, as it relates to costs, to take into account any offer to settle made in writing, the date the offer was made and the terms of the offer.

58 The general principles that the court is required to take into account in exercising its discretion as it relates to costs are set forth in Rule 57.01. In the context of the trial which unfolded before me, the general principles set forth in Rule 57.01, which in my view are engaged, are the following:

> (0.b) 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;
>
> a) the amount claimed (in this case $60,000,000) and the amount recovered in the proceeding ($50,000 plus prejudgment interest);
>
> b) the complexity of the proceeding;
>
> c) the importance of the issues;
>
> d) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding.

59 As it relates to the issue of disbursements, Tariff Item A2 Disbursements sets forth those disbursements that are recoverable, and include:

> Item 26:
>
> For expert's reports that were supplied to the other parties as required by the *Evidence Act* or the *Rules* and that were reasonably necessary for the conduct of the proceeding, a reasonable amount.
>
> Item 35:

> Where ordered by the presiding judge or officer, for any other disbursements reasonably necessary for the conduct of the proceeding, a reasonable amount in the discretion of the assessment officer.

60 There is no specific provision in Tariff Item A for the recovery of interest on litigation loans.

61 The only other statutory reference that could guide this court in relation to the issue of costs is found in the *Law Society Act*, R.S.O. 1990 c. L.8. Specifically, the establishment of the Class Proceedings Fund ("the Fund") under s. 59.1(1), and the purposes for which the Fund are to be used are as follows:

1. Financial support for plaintiffs to class proceedings and to proceedings commenced under the *Class Proceedings Act, 1992*, in respect of disbursements related to the proceeding.
2. Payments to defendants in respect of costs awards made in their favour against plaintiffs who have received financial support from the Fund.

62 The *Law Society Act*, and specifically s. 59.3(1), contemplates an application by a plaintiff in a class proceeding to apply to the committee of the Fund for financial support from the Fund in respect of disbursements related to the proceeding. In the event a plaintiff has received funding from the Fund, s. 59.4(1) contemplates a situation where a defendant who has been successful in the class action and has obtained a costs award in its favour, may apply to the Board for payment from the Fund in connection with the costs awarded to the defendant. As it relates to a plaintiff faced with a costs award in a class proceeding, s. 59.5 of the *Law Society Act* provides:

> A defendant who has the right to apply for payment from the Class Proceedings Fund in respect of a costs award against a plaintiff may not recover any part of the award from the plaintiff.

63 Distilled to its essence, if a plaintiff has been successful in obtaining funding from the Fund, that plaintiff is essentially then immunized from any costs award made against them in a class action. Equally important, in a situation where a plaintiff has received funding from the Fund, it is then open to the defendants to seek payment from the Fund with respect to any costs award made in favour of the defendant. In this case, Mr. Zuber made no application to the Fund until my Reasons for Decision were released. Only then did Mr. Zuber seek funding from the Fund, which I am advised was unsuccessful.

64 Finally, in the context of an application to the Fund, reference should also be made to Rule 12.04(4) of the *Rules*, which specifically provides that Rule 49.10 does not apply in a situation where a plaintiff in a class proceedings action has received financial support from the Fund. In this case, if Mr. Zuber had applied to and received funding from the Fund, he would have been further immunized from paying the Defendants' costs, as the cost consequences of Rule 49.10(2) would not apply.

65 I have now set forth all of the relevant statutes and rules as they apply to the issue of costs in these proceedings. As for the common law, it is well understood that the basic principle this court must be guided by, in assessing costs, is the overriding principle of reasonableness. The Court of Appeal in *Davies v. Clarington (Municipality)*, 2009 ONCA 722, endorsed several principles set forth by the Divisional Court in *Anderson v. St. Jude Medical Inc.*, 2006 264 DLR (4th) 557, when awarding costs. These principles include the following:

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);
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: see *Boucher et al. v. Public Accountants Council for the Province of Ontario et al.*, 71 O.R. (3d) 291 (C.A.). 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;

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;
4. The court should seek to avoid inconsistency with comparable awards in other cases;
5. The court should seek to balance the indemnity principle with the fundamental objective of access to justice.

66 As it relates to how this court should apply s. 31(1) of the *CPA*, the Court of Appeal, in *Das v. George Weston Limited*, *2018 ONCA 1053*, makes clear at para. 239 that the court must have regard to the circumstances of the particular case, and the purposes of the *CPA* which include promoting access to justice, effecting behavioural modification and making effective use of limited judicial resources. Doherty J.A., at para. 239, concludes as follows:

> When considered alongside the other factors relevant to costs, most notably the outcome of the litigation, the s. 31(1) factors will often lead to some reduction in the costs awarded to a successful defendant.

67 As Doherty J.A. makes clear in *Das* at para. 270, it is a reversible error for a judge to fail to take special consideration of the factors in s. 31(1) of the *CPA*.

68 As it relates to the specific application of Rule 49.13, a review of recent jurisprudence from the Court of Appeal for Ontario has made clear that strict compliance with Rule 49 is not necessary for a court to consider an offer when awarding costs, and that in some situations even non-compliant offers may be considered: see *Konig v. Hobza*, *2015 ONCA 885*, at para. 35.

The Principles Applied

The Issue of Loan Interest

69 It is fundamental to Mr. Zuber's position that in the court's analysis of the various offers made by the Defendants, the court has to take into account the loan interest that has accumulated and find that such loan interest is a disbursement. I reject this argument for a number of reasons.

70 From a factual perspective, at the time of the Defendants' 2009 offer and the Defendants' 2013 offer, the Defendants had absolutely no knowledge whatsoever of the fact that Mr. Zuber had received any litigation loans and, as such, would have had no knowledge of any accumulation of loan interest that might have been considered a disbursement. More importantly, in my view the argument fails, because Mr. Zuber possibly had available to him a much more reasonable alternative source to fund the disbursements that were being incurred on his behalf to prosecute this action. That source was the Fund, that not only may have provided the funding for his disbursements if his application had been successful, but more importantly, would have immunized Mr. Zuber from the costs consequences of Rule 49.10. For whatever reason, Mr. Zuber never applied to the Fund until this court's Reasons were released. It is hardly surprising that the Fund turned down Mr. Zuber's request for funding. If the Fund had approved his request for funding, then the Fund would have been exposed to paying the Defendants' costs.

71 I also reject Mr. Zuber's argument with respect to the issue of loan interest being a properly recoverable disbursement, because Mr. Zuber did not submit the issue of the various litigation loan agreements for approval by this court. This issue was recently dealt with by E.M. Morgan J. in *J.B. & M. Walker Ltd. v. TDL Group,* *2019 ONSC 999*, at para. 5, as follows:

> Under the *Class Proceedings Act, 1992*, *SO 1992, c. 6* ("*CPA*"), it is necessary for the plaintiffs to obtain court approval for the Agreement and Budget in order for them to be legally in force: *Bayens v. Kinross Gold Corporation*, *2013 ONSC 4974* (CanLII), at para. 41. Previous cases have held that, 'The general test for determining whether to approve a third-funding agreement is that the agreement should not be champertous or illegal and it must be a fair and reasonable agreement that facilitates access to justice

while protecting the interests of the defendants': *Houle v. St. Jude Medical Inc.*, *2017 ONSC 5129*, at para. 71, aff'd *2018 ONSC 6352* (Div. Ct.).

72 At no time did Mr. Zuber seek court approval for the litigation loan agreements as they were unfolding. Had Mr. Zuber done so, the Defendants would have been well aware of their potential exposure to the interest that would have accrued on those loan agreements. The court could also have considered whether or not the loan agreements were champertous or illegal, and whether they were fair and reasonable in the context of facilitating access to justice.

73 I also reject the suggestion that the interest that has accrued on the loan agreements should be a recoverable disbursement, as I have no evidence that the proceeds of the various loans advanced to Mr. Zuber were used to fund disbursements as they were being incurred on his behalf. What evidence I do have, in fact, points in the opposite direction. Included amongst the materials filed by Mr. Strype is a listing of his various disbursements that would suggest that at least some, and possibly all of the principle amount of the loans advanced to Mr. Zuber, were sent directly to Mr. Zuber for his own purposes. In that regard, I refer to an entry of June 5-14, 2014, which reflects the following: "disbursement loan and accrued interest, wired funds to Poland -- C. Zuber, $21,663.91", and a further entry on July 16, 2018 (the date when my Reasons were released), "disbursement loan and accrued interest -- loans wired to Poland -- C. Zuber, including accrued interest $91,790.23".

74 In my view, if the court is to consider whether interest on a litigation loan is a properly recoverable disbursement, the court must be provided with the necessary tools that would allow the court to consider whether, in fact, the principle amount of the loan was incurred, and actually used for the purpose of funding disbursements. In my view, there should also be evidence in the context of a class action that the plaintiff has considered the advisability of making an application to the Class Proceedings Fund and, if not, an explanation as to why a litigation loan is more preferable to funding from the Fund.

75 There is no evidence that Mr. Zuber applied to the Fund until after the release of my Reasons. I have no evidence that the proceeds of the litigation loans were actually used to pay for disbursements that were being incurred on behalf of Mr. Zuber. For these reasons and others referred to below, I decline to exercise my discretion to allow accrued interest on the litigation loans as a proper disbursement incurred on behalf of the Plaintiff.

76 As for the jurisprudence as it relates to the recovery of interest on a litigation loan, Mr. Strype relies heavily on the decision of the New Brunswick Court of Appeal in *LeBlanc*. In this case, an assessment officer, as well as a justice of the New Brunswick Court of Queen's Bench, had disallowed interest on a litigation loan as an allowable disbursement. The New Brunswick Court of Appeal allowed the Plaintiff's appeal and ordered the Defendants to pay the disbursement. There was affidavit evidence before the court to address the financial circumstances of the Plaintiff, including his own testimony that he had been turned down by several financial institutions before he had been able to obtain a loan which charged interest at 2% per month compounded. There was a factual finding made by the assessment officer, to the effect that the Plaintiff did not have the means to finance his action against the Defendants.

77 In allowing the Plaintiff's appeal, the New Brunswick Court of Appeal considered the application of a particular portion of the disbursement tariff section of the New Brunswick Rules Court, specifically subpara. 2(14) of Tariff D of Rule 59, which prescribes that allowable disbursements include "all other reasonable expenses necessarily incurred, when allowed by the assessing officer" (The New Brunswick tariff).

78 I decline to follow the decision of the Court of Appeal in *LeBlanc* for a number of reasons. First, in *LeBlanc*, the wording of the New Brunswick tariff is different from Tariff Item 35 of the *Ontario Rules of Procedure* quoted in paragraph 59 above. Specifically, Tariff Item 35 allows for "any other disbursement reasonably necessary for the conduct of the proceeding". The New Brunswick tariff allows for disbursements that include "all other reasonable expenses **necessarily incurred**". [Emphasis added.]

79 In my view, the difference in the wording is such that in Ontario, under Tariff Item 35, while allowing the court

some discretion with respect to all manner of disbursements, those disbursements must necessarily be found to be reasonable for the conduct of the proceeding.

80 I also note that *LeBlanc* has not been followed, to the best of my knowledge, anywhere else in Canada. The first occasion when *LeBlanc* appears to have been judicially considered in Ontario was in a decision of Lauwers J. in *Warsh*, where at para. 34 he stated:

> In my view the policy implications of awarding interest on litigation costs as a disbursement are significant and I decline to exercise my discretion to make such an award where the issue has not been properly argued and where a more fulsome policy development process is plainly required.

81 The issue of whether interest incurred on a litigation loan was a recoverable disbursement, was also addressed by the British Columbia Court of Appeal in *MacKenzie v. Rogalasky*, *2014 BCCA 446*, leave to appeal to SCC refused, 2015 S.C.C.A. No. 24. In *MacKenzie*, the *LeBlanc* decision was cited to the British Columbia Court of Appeal as authority for the proposition that interest on a litigation loan was a recoverable disbursement. Ultimately, the court in *MacKenzie* determined that disbursements that were properly recoverable under the British Columbia tariff, should be limited to those arising out of the factual legal issues inherent in the proceeding. The wording of the British Columbia tariff contains the words "incurred in the conduct of the proceeding". Ultimately, the British Columbia Court of Appeal held that recoverable disbursements were limited to:

> ...[T]hose expenses that arise inherently and directly from the issues in the case which relate...to the direction, management, or control of litigation and which pay for materials and services used to prove a claim or defence. These expenses arise directly from the nature and conduct of the allegations in a proceeding. By contrast, interest expenses do not arise from the nature of the allegations or the conduct of proceedings, they arise from unrelated causes including the financial circumstances of a party. In my view, as such, they do not fall within the meaning of the word "disbursements" in the context of a costs rule.

82 In *Cabana v. Newfoundland and Labrador et al*., *2016 NLCA 75*, after citing *LeBlanc* and *MacKenzie*, the Supreme Court of Newfoundland and Labrador Court of Appeal dealt with the question of whether interest incurred on a litigation loan was a proper disbursement. Green C.J.N.L., at para. 52, stated:

> Of greater significance to me, however, is the concern that allowing general recovery of interest as a disbursement will, depending on the financial circumstances of the parties, have the potential result of making costs awards for similar types and length of litigation widely variable and will introduce considerable uncertainty in the ability of a litigant being able to predict in advance the financial costs-risks he or she may be facing if the litigation is proceeded with. As noted above, costs rules are designed to achieve several objectives, only one of which is partial indemnity.

83 I am also mindful of the principle of uniformity and predictability emphasized by the Supreme Court of Canada in *Walker v. Ritchie*, *2006 SCC 45*, when dealing with potential costs awards. This principle was addressed by Green C.J.N.L. in *Cabana*, at para. 54:

> A similar observation could be made in respect of awarding interest on money borrowed to finance the litigation. The existence and extent of interest incurred would vary widely and the other party will have little ability to predict in advance what his or her exposure may be in the event of loss. This point also resonated with the court in *MacKenzie* in deciding against general interest recovery:
>
> > [82] ...[C]osts awards should be predictable and consistent across similar cases. Only if this is the case can parties accurately assess the risks of engaging in litigation and make rational decisions about settling or prosecuting the case. Recognizing interest expenses as recoverable disbursements is inconsistent with this objective because exposure to costs and disbursements would not depend on the nature of the case itself, but on the particular circumstances of a party.

84 Ultimately, the Supreme Court of Newfoundland and Labrador Court of Appeal came down in favour of disallowing interest on litigation loans, and followed the approach that appears to have been adopted in both British Columbia and Ontario. The decision of the New Brunswick Court of Appeal in *LeBlanc* appears to be limited to the particular facts of that case, and the interpretation of a tariff item that is materially different from any tariff item found in Ontario. For these reasons, I decline to follow *LeBlanc.*

85 Built into the fact that a litigation loan agreement requires court approval, is an element of fairness to the potential party that may be called upon to pay such interest at the end of the litigation. The defendant faced with the potential for paying such interest on a litigation loan will at least have knowledge in advance that the court may assess, as part of the Plaintiff's disbursement entitlement, the interest incurred on the litigation loan.

86 On the facts before me, the Defendants had no knowledge whatsoever of any exposure to paying accrued interest on litigation loans taken out by Mr. Zuber until early 2014. By this time the class action had been ongoing through its liability phase, and ultimately the assessment of Mr. Zuber's damages, for close to 15 years. To require the Defendants to pay interest incurred on Mr. Zuber's loans in the absence of court approval, and in the absence of any information communicated to the Defendants until early 2014, in my view would result in a gross unfairness to the Defendants. Mr. Zuber had it within his hands, had he chosen to do so, to have sought court approval, as he should have done. Mr. Zuber did not do what he was supposed to do, and he cannot now complain when this court disallows any consideration of the interest incurred on his litigation loans.

The *Class Proceedings Act*, Section 31(1)

87 I agree with Mr. Strype that this court must consider the factors set forth in s. 31(1) of the *Class Proceedings Act,* specifically whether this action was a test case; whether it raised a novel point of law; and whether it involved a matter of public interest. As well, I must consider the comments of Doherty J.A. in *Das*, and have regard to the circumstances of this particular case. The purposes referred to by Doherty J.A. in *Das*, para. 239, include promoting access to justice, effecting behavioural modification, and making effective use of limited judicial resources.

88 In my view, the trial, as it unfolded before me, in no way resembled a test case. It is not remotely possible to conclude that this case involved any novel points of law or a matter of public interest. In my view, Mr. Zuber's claim, while brought under the *Class Proceedings Act*, was nothing more than a typical personal injury claim involving a grossly overstated claim for past and future income losses.

89 Mr. Strype argues that this court has the discretion not to order costs in a test case. I agree. Mr. Strype suggests that a test case is one that is advanced to determine a principle of law, and to ascertain a legal principle that would govern a number of similar actions pending or contemplated: see *Kerr v. Danier Leather Inc.*, [2007] 2 S.C.R. 331, at para. 65, and *Edwards v. Law Society of Upper Canada*, *[1998] O.J. No. 6192*, at para. 11.

90 It is argued on behalf of Mr. Zuber that this case fits the definition of a test case, because the litigation involved the following issues:

i. foreign witnesses testifying through the use of affidavit and then subjected to lengthy oral cross-examinations;

ii. discovery of foreign documents juxtaposed to a Canadian standard;

iii. credibility assessments of foreign government officers and the Polish government;

iv. numerous Rulings on expert witnesses;

v. future costs of care in a foreign country;

vi. the effects of an alleged prior criminal past weighed against a claim for loss of earning capacity; and

vii. the effects of video evidence and trial management.

Mr. Strype further argues that the ultimate outcome, given the unique circumstances of this case, will "undoubtedly discourage any foreign national seeking to litigate in Ontario". Mr. Strype further goes on to suggest that the result in this case "will apply to the prospect of any future foreign litigant's potential success if the native country does not have equivalent principles regarding retention of documents (medical, business or otherwise), and the assessment of credibility of foreign witnesses in Ontario".

91 I entirely disagree that there was anything unique about the trial of this matter. It falls far short of any definition that would allow this court to conclude that Mr. Zuber's case was a test case. The harsh reality of what occurred throughout most of the trial, in terms of Mr. Zuber's attempts to prove his past and future income loss, had nothing to do with any unique principles, but rather flowed solely from the fact that Mr. Zuber failed to meet his onus of proof. His failure in that regard was entirely his fault because he chose to ignore what appears to be the legal advice, reflected in his counsel's dockets from the earliest stages of this litigation, that he produce the necessary backup documentation to prove his loss of income. This issue was also addressed by Lauwers J. at the time when he allowed the increase in the prayer for relief from $10,000,000 to $50,000,000. In opposing Mr. Zuber's motion to increase the prayer for relief, the Defendants cited, as one of their reasons for opposing the motion, the prejudice that they may face as a result of Mr. Zuber having admitted to destroying a number of documents that would have supported or contradicted his claim for damage for loss of income. In addressing this issue at para. 56 of his Reasons, Lauwers J. stated:

> The fact that Mr. Zuber destroyed documents may make it difficult for him to prove his case but there is no 'link' between the request for an amendment and the prejudice to the manner required by *Iroquois Power Corp. v. Jacobs Canada Inc.*, *supra*. I am not persuaded that I should refuse the amendment on this ground.

92 Mr. Zuber would have been well advised to have taken to heart the further comments of Lauwers J. in *Davies*, where at para. 60 he stated:

> I have real trouble giving weight to this argument. This motion was argued by as accomplished and experienced an array of senior civil and personal injury counsel as might appear in any Superior Court in this province. They are well familiar with the range of personal injury awards and are well able to assess the risk of whether in a judge-alone trial that the award to Mr. Zuber would exceed $10 million. ***If it did it would be a record breaker***. [Emphasis added.]

93 In short, Mr. Zuber chose to advance the case in the manner that he did. This case was not a test case, nor did it involve any novel points of law. While this court was called upon to make numerous rulings, the types of rulings that I made were not in any way unusual in the context of a personal injury action. This case also did not involve any matters of public interest. Claims for past and future loss of income are adjudicated in our courts every day in this province and across the country.

94 In short, none of the considerations that I am required to take into account under s. 31 of the *CPA*, as elaborated upon by Doherty J.A. in *Das*, cause me to exercise my discretion in a manner other than as required under s. 131 of the *CJA*, the *Rules of Civil Procedure*, specifically Rules 49 and 57, as well as the jurisprudence that guides me in my ultimate determination.

The Offers and Rule 49.10 and Rule 49.13

95 Fundamental to this court's analysis of the position advanced by Mr. Zuber as it relates to costs, is whether the litigation loan interest is a recoverable disbursement. This is so, because if the loan interest as calculated as of the dates of the various offers made by Defendants is included as a disbursement, then Mr. Zuber argues the judgment he obtained - if it is inclusive of the loan interest, is more favourable than the Defendants' various offers.

96 I have already decided that the loan interest claimed by Mr. Zuber is not a recoverable disbursement. As an alternative argument, to avoid the consequences of either Rule 49.10 and Rule 49.13, Mr. Zuber argues that he could not accept any of the Defendants' offers because if he had done so he would have been left in a deficit position -- this because of the accumulated loan interest. Mr. Zuber also argues that the offers made by the Defendants did not reflect any element of compromise, and relies on a decision of Gomery J. in *Singh*, where she stated:

> If an offer does not contain any real element of compromise, it does not advance the policy rationale underlying Rule 49. Faced with such an offer, a judge could exercise their residual discretion under Rule 49.10 to escape the rule's usual cost consequences.

97 I do not accept either of Mr. Zuber's arguments. Whether or not Mr. Zuber was left in a deficit position is not a relevant consideration. The real issue, is whether any or all of the offers made by the Defendants represented an effort on their part to work a compromise resolution with the Plaintiff. The measure of whether there was an element of compromise must be assessed from the perspective of how much was offered to the Plaintiff, and how much was awarded to the Plaintiff at the end of the trial by way of the court's judgment.

98 In this case, Mr. Zuber was awarded $50,000 plus prejudgment interest, which as of November 2009, when the Defendants first attempted to resolve this case, would have put approximately $72,000 into Mr. Zuber's pocket. Had he accepted the Defendants' 2009 offer, he would have received $150,000 and would also have been entitled to recover his costs. It is very difficult to conceive how the Defendants' 2009 offer did not reflect a sincere attempt on the part of the Defendants to affect a compromise with Mr. Zuber. The harsh reality is that Mr. Zuber perceived he had a case that was wildly different from how the Defendants saw the case - but more importantly, quite different from the actual outcome at trial. The same comments equally apply to both the Defendants' 2013 and final offers, that would have left Mr. Zuber with substantially more money in his pocket had he accepted either one of the offers.

99 Mr. Zuber also argues that all three of the Defendants' offers were defective, as they were ambiguous. By way of example, it is argued that the November 2013 offer refers to a payment of costs which included disbursements, while the Defendants' final offer only refers to paying the Plaintiff's costs and makes no mention of disbursements. It is also argued that the reference to interest in the various offers is ambiguous, as there is no clarity as to whether the interest referred to included just prejudgment interest or whether it also included the litigation loan interest.

100 It is beyond dispute that an offer to settle must have such clarity that the party presented with the offer can, with certainty, understand and calculate the amount being offered. It is a well understood principle when dealing with Rule 49, that offers must be crystal clear in order to attract the cost consequences attendant with the Rule: see *Rooney v. Graham,* 2001 53 O.R. (3rd) 685, and *Malik v. Sirois*, 2003 CanLII 29931.

101 In this case, all of the offers presented to Mr. Zuber included terms that are well understood within the personal injury Bar. To suggest that an offer to pay Mr. Zuber's costs did not include the payment of his assessable disbursements, flies in the face of what the court may assess in costs as set forth in Rule 57.01(3), which requires the court to fix costs in accordance with Rule 57.01(1) and the tariffs (which I conclude includes the tariff that deals with disbursements). To further suggest the offers lacked clarity as it relates to the issue of the accrued interest on the litigation loans Mr. Zuber had chosen to accept, also flies in the face of common sense given that the defence had no knowledge of those loans until early 2014.

102 If I am wrong in my assessment of the clarity of the various offers made by the Defendants, there remains the issue of whether this court should exercise its discretion as allowed by Rule 49.13. In that regard, as the trial judge I am entitled to take into account any offer to settle that was made in writing. I am also to take into account when the offer was made and the terms of the offer. In my view, in considering the Defendants' offers they must be reviewed from the perspective of not only what was offered and when, but also what response, if any, was made by the Plaintiff. In this way, when weighed against the ultimate result at trial, this court can then consider which side was

the most reasonable in their attempts to resolve the litigation, and which side can be said to have conducted, what some might say, was a needless trial.

103 Mr. Zuber clearly thought his case was worth in excess of $30,000,000, as reflected in his two offers to settle. His view of the case was quite clearly an unreasonable view when contrasted with the ultimate result. It was also an unreasonable view when contrasted with the Defendants' offers to settle. If the purpose of Rule 49 is to encourage settlement between the parties, with the threat of cost consequences against a party who adopts an unreasonable settlement position, then this case - in my view, highlights why this court should exercise its discretion under Rule 49.13 as an alternative to the automatic cost consequences of Rule 49.10(2).

104 The Defendants' November 2009 offer was superseded by the Defendants' November 2013 offer, which itself was superseded by the Defendants' final offer. As such, Mr. Zuber argues the automatic cost consequences of Rule 49.10(2) only applies to the Defendants' costs after June 5, 2014. In principle I agree, except for the application of Rule 49.13. In my view, to disregard the Defendants' 2009 offer would be to reward Mr. Zuber for his intransigence in pursuing a hopeless theory of his damages claim. Litigants must be encouraged to settle their claims in an age when court time is precious, and which should be reserved for those litigants who have a real *lis* that requires adjudication. Civil trials are an important part of our judicial system. Courtrooms are there to adjudicate real disputes between parties who have made a real effort to resolve their dispute through an exchange of offers. In this case, Mr. Zuber, in my view, entirely failed in his obligation to present a reasonable offer to the Defendants.

105 The Defendants tried to settle with Mr. Zuber. The wisdom of Mr. Zuber not accepting the Defendants' 2009 offer was borne out three years later when the Defendants presented their 2013 offer, and was further rewarded by waiting for the Defendants' final offer. In each case, the Defendants improved on their earlier offer. Had he accepted any of the Defendants' offers, he would have been in a far better position than he found himself after 26 weeks of trial.

106 If part of the rationale behind Rule 49.10 is to encourage parties to settle, the fact that Mr. Zuber caused the Defendants to improve on their earlier settlement offers demonstrates the wisdom behind Rule 49. Presumptively, the Defendants are entitled to their costs on a partial indemnity basis from the date of the Defendants' final offer. In arriving at my ultimate decision, however, I have also considered the efforts made by the Defendants to settle with Mr. Zuber, as reflected in the Defendants' 2009 and 2013 offers. My decision reflects the fact that both Rule 49.13 and the preamble to Rule 57.01 allow the court to consider "any offer to settle". While I allow the Defendants' costs from the date of the Defendants' last offer it is, in my view, a proper exercise of this court's discretion to disallow any of the costs incurred by Mr. Zuber after November 2009. The only remaining issues for this court to consider then, is the quantum of those costs and whether they should be on a partial or substantial indemnity basis.

Substantial Indemnity or Partial Indemnity

107 The Defendants argue that this court should award the Defendants their costs on a substantial indemnity basis, and point to what they describe as the egregious conduct of Mr. Zuber as a factor this court should consider in exercising its discretion. In *S & A Strasser Ltd. v. Richmond Hill (Town)*, *1990 CanLII 6856*, the Plaintiff advanced a claim in the amount of $1,000,000, that was reduced to a claim for $70,000 by the time the case went to trial. Prior to trial, the Defendant had offered the Plaintiff $30,000. The ultimate judgment resulted in a dismissal of the Plaintiff's case. On these facts, the Court of Appeal allowed the Defendants' costs on a substantial indemnity basis from the time of the Defendants' offer. In Mr. Zuber's case, the prayer for relief went from $10,000,000 to $60,000,000 by the time the case went to trial. While his case was not dismissed as in *Strasser*, it is not inappropriate to consider these factors in the court's determination of the appropriate level of costs to award the Defendants.

108 The guiding principle in whether to award the Defendants' costs on a substantial indemnity basis was revisited in *Davies.* The Court of Appeal, at para. 40, emphasized that substantial indemnity costs should only be considered where there is a "clear finding of reprehensible conduct on the part of the party against which the cost award is being made". Framed differently, was there "egregious conduct" on the part of Mr. Zuber deserving of sanction?

109 Mr. Zuber's conduct, which is worthy of this court's consideration as it relates to whether it was reprehensible and egregious includes, but is not limited to, the following:

a) his failure to retain and produce basic documents normally used in the proof of a claim for past and future wage loss - a failure which necessitated the calling of numerous witnesses from Poland in an effort to prove that loss;

b) his destruction of documents that were part of his claim for loss of income, documents which had been viewed and considered by the expert called to provide evidence regarding the quantification of his loss of income;

c) his violation of court orders, including witness exclusion orders where he spoke to witnesses yet to be called knowing full well he was not allowed to do so;

d) his collusion with witnesses to either fabricate evidence or refresh their memories in an attempt to prove his case.

110 The aforesaid factors are certainly relevant to whether this court should sanction Mr. Zuber's conduct with an award of substantial indemnity costs in favour of the Defendants. I am, however, not satisfied that his conduct was so egregious and reprehensible that such a sanction is appropriate. This is not a case where Mr. Zuber perpetrated a fraud on the court. He may have been very "loose with the truth"; he may have overreached in terms of his claim; and he may have violated a number of the Orders made by the court; but, even taken collectively, I am not prepared to say that his conduct reached that level where the court should sanction his conduct. The Defendants shall be entitled to their partial indemnity costs, after setting off Mr. Zuber's costs incurred on a partial indemnity basis up to the date of the Defendants' 2009 offer.

One Set of Defence Costs or Four Sets of Defence Costs?

111 Mr. Strype argues that the defence should be limited to the costs incurred by the Defendant Apache, represented by Mr. Regan throughout these proceedings. The rationale for this argument lies in the suggestion that Mr. Regan, for all intents and purposes, "ran the show" and almost exclusively took the lead throughout the trial. There is little doubt in my mind, that Mr. Regan did bear the brunt of the responsibility for cross-examining the multitude of witnesses called on behalf of Mr. Zuber. That said, both Mr. Merner and Mr. MacDonald, while playing a lesser role than that undertaken by Mr. Regan, were also quite active and helpful during the course of the trial. Mr. Barda, counsel for BLM Group Inc., was in attendance throughout the trial but did not play an active role in the examination of the witnesses.

112 What underlies Mr. Strype's submission that the defence should be limited to one set of defence costs, is the fact that the defence, after the liability trial before Ferguson J., had decided to continue the defence of the remaining damages claims of Mr. Zuber and Ms. Pritchard with one defence counsel. This was an entirely appropriate manner of dealing with claims, and specifically, Mr. Zuber's claim that was perceived to be relatively modest. The modesty of Mr. Zuber's claim at that time (2007), can be tested by Mr. Zuber's $1,000,000 prayer for relief. When Mr. Zuber was initially examined for discovery in 2006, his claim warranted the attendance of relatively junior counsel. It was not until 2010, when Mr. Zuber successfully argued before Lauwers J. his motion increasing his prayer for relief to $50,000,000, that the defence was forced to revisit the wisdom of having just one defence counsel handling Mr. Zuber's claim for damages.

113 It is difficult to fault the various Defendants who retained separate counsel after the prayer for relief moved from $1,000,000 to $10,000,000, and thereafter to $50,000,000, and finally, $60,000,000. The case, as presented by Mr. Zuber, changed dramatically after 2007. He served an expert's report calculating his claim for loss of income that on its face, in its different iterations, supported a potential damages exposure commensurate with the increases in the prayer for relief. Mr. Zuber never suggested that any of the Defendants who appeared through counsel at the trial should be let out of the action. Mr. Zuber never resiled from his position (as evidenced by his offers to settle)

that his claim was anything other than one worth well in excess of $20,000,000. In my view, all of the Defendants were entitled to separate counsel. The fact that Mr. Regan bore the brunt of the responsibility for cross- examining witnesses, does not detract from the role played by the other defence counsel - in particular, Mr. Merner and Mr. MacDonald.

Did the Defendants Unnecessarily Increase the Length of the Trial?

114 Mr. Strype argues that the Defendants were the ones responsible for the length of the trial. He argues that if the Defendants had examined the various Polish witnesses pursuant to Rule 36, that the trial could have been significantly shortened. As I have already indicated, the flaw in this argument is twofold. First, Mr. Strype never suggested this approach, nor did he bring a motion under Rule 36 to obtain the evidence of the Polish witnesses in this manner. Second, I have no evidence that any of the witnesses from Poland and elsewhere in Europe, would have responded to an order made by this court under Rule 36. While many of the witnesses at trial did testify via video from Poland and elsewhere, it is fair to comment that this occurred because Mr. Zuber had the ability, being in Poland, to obtain their co-operation.

115 Mr. Strype also argues that the cross-examination of the various witnesses called by Mr. Zuber were needlessly long and protracted. I disagree. As my Reasons make clear, many of the witnesses called by Mr. Zuber were lacking in credibility. Their credibility was undermined through the effective cross-examination of defence counsel. If anyone is responsible for the length of the trial it was Mr. Zuber, who remained steadfast in his position asserting a wildly inflated claim for past and future loss of income that I ultimately found was devoid of merit.

116 Mr. Strype is also critical of the defence for their collective failure to have proposed an effective litigation plan. In that regard, Mr. Strype points to the comments in *Lundy v. VIA Rail Canada Inc.*, 2015 ONSC 7063, made by Perell J., emphasizing the importance of developing a litigation plan for the final stage of a class action. At para. 22, Perell J. states:

> As I noted at the outset, the design of the individual issues phase of a class action is a matter of substantial importance. Metaphorically, after moving the ball the length of the class action field, it is to fumble and to lose the game to design a dysfunctional Plan for the individual issues phase.

117 The difficulty that I have with Mr. Strype's assertion, as it relates to the absence of an effective litigation plan, is that it presupposes that the defence has the sole responsibility for the development of a litigation plan. In that regard, the comments of the Court of Appeal in *McCracken v. Canadian National Railway Company*, 2012 ONCA 445, at para. 146, are worth repeating:

> Preparing a litigation plan requires the plaintiff to translate his or her analytical proposal for a class proceeding into practice by having to explain, in concrete terms, the process whereby the common issues, and any remaining individual issues, will be decided. The need for a clear explanation of how a proposed common issue would be resolved for all class members on a common basis serves as an important check in considering if the plaintiff has met the common issues and preferable procedure criteria.

118 Mr. Strype may well be correct that the Defendants do bear some responsibility for their failure to propose an effective litigation plan that may have shortened the trial. However, Mr. Strype ignores that his client has the primary responsibility for the preparation of a litigation plan. Mr. Strype is quite correct that the litigation plan prepared by the original law firm with carriage of the class action was not one that he could participate in. However, once the liability trial was completed before Ferguson J. in 2006, and the only remaining issue was the damages assessment of Mr. Zuber and Ms. Pritchard, Mr. Strype then had the sole responsibility for the preparation of a litigation plan that could address the trial as it eventually unfolded before me.

119 Mr. Strype's arguments, as they relate to the absence of a litigation plan, also ignore the efforts of Lauwers J. as the case management judge. His argument also fails to recognize that at no time prior to the trial or during the trial, did anyone ask the court to consider the advisability of requiring the parties to sit down and prepare a litigation

plan. In fact, it was the court that actually required the parties to present their evidence in-chief by way of affidavit in an attempt to shorten the trial, and it was the court that required the parties to map out a plan for when each witness would testify and for how long.

120 For all of these reasons, I decline to penalize the Defendants by reducing their entitlement to costs. Everyone associated with this trial from Mr. Zuber, his counsel, the Defendants and their counsel, all bear some responsibility for the length of the trial - and in that regard, I include myself. We all learn by our mistakes, and I accept that I could have shortened the trial with more aggressive and robust trial management.

Quantum of Mr. Zuber's Costs to November 2009

121 There is no reason to deny Mr. Zuber his costs from the date of the inception of his claim until the date of the Defendants' 2009 offer. I intend to fix those costs on a partial indemnity scale. In that regard, Mr. Strype's Bill of Costs covering this time period claims costs of approximately $276,000 (inclusive of HST), and disbursements of approximately $83,000.

122 The defence argues that Mr. Zuber's costs for the time period ending in November 2009 should assess out in the amount of $100,000, and his allowable disbursements are approximately $12,000.

123 It has been said many times that the assessment of costs is not an exercise in the number of hours times an acceptable hourly rate. Rather, the court must approach its task from the perspective of determining what is reasonable and what the losing party might reasonably have expected to pay in costs. As it relates to disbursements, the court must also consider whether the amount claimed is reasonable and whether the disbursement falls under the tariff. The tariff specifically speaks to the payment of a disbursement incurred for an expert's report "that was supplied to the other party...and was reasonably necessary for the conduct of the proceeding". The tariff also allows the court to allow as a disbursement "... any other disbursement reasonably necessary for the conduct of the proceeding..."

124 Having considered the guiding principles laid down by the Court of Appeal in *Boucher* and *Davies*, as well as the requirements of Rule 57.01, I am of the view that Mr. Zuber's partial indemnity costs should be allowed in the amount of $200,000, inclusive of HST. As for his disbursements, there are a number of items that I fail to see are recoverable as a tariff item disbursement. Amongst the disbursements reflected in Mr. Strype's list of disbursements, are payments paid directly to Mr. Zuber as "petty cash". As well, there were payments made on behalf of Mr. Zuber for airfare and hotel accommodation. I fail to see how any such payments fall within the definition of an assessable disbursement under the tariff. The defence has taken issue with the disbursement cost of Mr. Smoczynski, who was called as an expert to prove Mr. Zuber's loss of income claim. The Defendants argue that this evidence was rejected by the court and, as such, they should not have to pay for the cost of Mr. Smoczynski. In my view, that is not a basis to exclude the cost of an expert, where the disbursement reflects the cost of an expert's report served on the Defendants, that was reasonably necessary for the conduct of the proceeding.

125 The Defendants also take issue with the cost incurred by Mr. Strype with Rich Rotstein in the amount of $7,160, a cost that was never reflected in any evidence called from this expert. As well, the defence takes issue with respect to the quantum of the costs incurred for photocopying - $27,117, and online research - $11,209. I agree that the quantum of photocopying does seem excessive, particularly at this time of the proceedings. As for the Rich Rotstein disbursement, it seems to me that the defence should be responsible for the cost in retaining one expert to prove the loss of income, but not the cost of two similar experts. As for online research, I am satisfied that in the context of this action, such research is a recoverable disbursement.

126 I have considered the arguments of the Defendants as they specifically relate to the disbursements claimed by Mr. Zuber to November 2009. Removing from those disbursements payments either made directly to Mr. Zuber and/or paid on his behalf, as well as the other concerns I have dealt with above, I am allowing the disbursements

claimed in the total amount of $50,000. As such, with the fees I have assessed in the amount of $200,000, Mr. Zuber will have a credit of $250,000 to be set off against the Defendants' costs.

The Defendants' Costs

127 There is a significant disparity in the costs presented by the various counsel on behalf of the Defendants. This can be partially explained by the different roles each counsel took in the trial, and the cost sharing arrangement that they agreed to after the liability trial before Ferguson J. The disparity can also be partially explained by the hourly rates counsel actually charged to their clients, which are then to be reduced to reflect a partial indemnity rate.

128 I do not propose to go into a detailed analysis of the bills of costs presented by the Defendants. It is clear from a review of the Bill of Costs presented by Mr. Strype, that Mr. Zuber must have known that as a potential losing party he could be exposed to paying a very substantial amount of costs to the successful Defendants. As a point of comparison, Mr. Strype's Bill of Costs on a partial indemnity basis totals $3,261,759, plus disbursements of $1,610,855. By any stretch of imagination, when the Defendants' various Bills of Costs are scrutinized from the perspective of what the losing party might reasonably have expected to pay, (*Boucher* and Rule 57.01(0.b)), Mr. Zuber can hardly complain about the costs claimed by the Defendants.

129 Mr. Strype quite properly provided the court with numerous reasons why this court should either award Mr. Zuber his costs, or not award the Defendants any costs. I have dealt with all of those submissions at some length. What Mr. Strype did not do, is perform a line by line critique of the various Bills of Costs presented by the Defendants. Mr. Strype did not seriously question the hourly rates of the various counsel, nor did he seriously question the disbursements incurred. In his approach, Mr. Strype was reasonable and fair, and I suspect somewhat guided by the fact that his own fees and disbursements well exceeded anything claimed by the Defendants.

130 I do, however, recognize that in a trial of the length that unfolded before me, there will inevitably be some duplication of time and effort amongst the various lawyers. Some may refer to this as "slippage". I also recognize that some of the disbursement costs for the various experts retained by the Defendants, may reflect a cost that does not pass the reasonableness test. As I commented in *Hamfler v. Mink,* 2011 CanLII 86201, the mere presentation of an invoice from an expert does not make that invoice reasonable. The reasonableness of an expert's fee must be determined, at least in part, by reference to the expert's hourly rate, which should also be scrutinized from the perspective of what is considered reasonable from that expert's professional governing body. As well, the expert's fee must be assessed from the perspective of what amount of time was spent by the expert in the retainer reflected in his or her fee. All of this information needs to be supplied to the court, in its assessment of the reasonableness of the claim made by counsel for the various disbursements reflected in a bill of costs. None of this information is before me. I have, therefore, determined that the various disbursements claimed should be reduced to reflect an element of "slippage".

131 With all of these factors in mind I am awarding Apache (Mr. Regan's client) its costs, that I am fixing in the amount of $1,400,000 plus HST, and disbursements of $600,000. I award Hydro One Networks Inc. (Mr. MacDonald's client) its costs, that I am fixing in the amount of $328,000 inclusive of HST, plus disbursements of $45,000. I award VIA Rail Canada Inc. and Canadian National Railway Company (Mr. Merner' client) their costs, that I fix in the amount of $661,000 plus HST, plus disbursements of $195,000. Finally, I award BLM Group Inc. (Mr. Barda's) its costs, that I fix in the amount of $173,000 inclusive of HST, plus disbursements of $14,000. Mr. Zuber's costs awarded up to November 2009 shall be set off against these costs awarded on a pro rata basis.

132 The total costs awarded to all Defendants before setoff is $2,562,000. The Plaintiff sought costs of $3,261,000. In my view, weighing all of the relevant factors that I have reviewed in these Reasons, it is not unfair nor is it unreasonable to expect that four sets of defence counsel representing four different defendants should receive 78% of the costs demanded by the Plaintiff.

133 There remains the issue raised in argument by the Defendants, that they may seek payment of the costs awarded as against the various litigation loan providers. Counsel for at least one of the loan providers made it clear

to the court, that no issue was going to be taken as it relates to who amongst the parties to this action would be responsible for the costs, and no position was going to be taken as to quantum. The sole issue is whether any or all of the loan providers has any responsibility for the costs that have now been awarded to the Defendants. If this issue is still to be asserted, counsel may contact the court to arrange a date for further argument.

M.L. EDWARDS J.

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