



[3] Amphenol seeks costs of \$14,000 as against Devappa, Sundaram and Sundev (the “Sundev Defendants”). Devappa submits that costs should be reserved to the trial judge on the belief that this action “will almost certainly proceed to trial” and that the result may well be different.

[4] MTech seeks costs of \$32,101.25, inclusive of HST and disbursements, from Amphenol on a substantial indemnity basis. Amphenol submits that it should be ordered to pay partial indemnity costs of \$11,000 to MTech.

## **ANALYSIS**

[5] The fixing of costs is governed by s. 131 of the *Courts of Justice Act, R.S.O. 1990, c. C.43* and the *Rules of Civil Procedure, R.R.O. 1990, Reg. 194*. Rule 57.01 is the primary rule governing costs. It enumerates various factors to consider when exercising discretion to award costs. Also relevant is Rule 1.04(1.1), which provides that “[i]n applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.”

[6] The ultimate question is whether an award of costs reflects “an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding, rather than an amount fixed by the actual costs incurred by the successful litigant”: *Boucher v. Public Accountants Council (Ontario) (2004)*, 2004 CanLII 14579 (ON CA), 71 O.R. (3d) 291 (C.A.), para. 26.

## **ISSUE #1: SHOULD THE SUNDEV DEFENDANTS BE ORDERED TO PAY AMPHENOL’S COSTS?**

[6] Rule 57.03(1) provides that a court shall fix the costs of a contested motion and order them to be within 30 days unless the court is satisfied that a different order would be more just.

[7] In the case of a contested motion for an interlocutory injunction, costs are awarded forthwith when a defendant has successfully resisted the plaintiff’s motion for an interlocutory injunction. However, when a motion for an interlocutory injunction is unsuccessfully resisted, costs are typically reserved to the trial judge because “... there has been no final determination of the rights of the parties, but rather an order to protect the plaintiff’s position pending trial ...”: Justice Robert J. Sharpe, *Injunctions and Specific Performance*, p. 2-91. In *Rogers Cable T.V. Ltd. v. 373041 Ontario Ltd.*, 2004 CanLII 10547 (ON CA), [2004] O.J. No. 1087, at para. 4, Borins J. stated:

Where it is clear that the granting of the interlocutory injunction will put an effective end to the proceedings it is appropriate for the court to make a costs

order which reflects this fact and to fix the amount of costs. However, in a case such as this in which a trial is a virtual certainty the court will consider the usual alternatives: plaintiff's costs in any event of the cause; plaintiff's costs in the cause; costs in the cause; or costs reserved to the trial judge.

[8] This approach avoids "... the possible injustice of awarding costs to a plaintiff for having succeeded in obtaining an order to protect his or her position pending trial when the outcome of the trial reveals that that plaintiff's position was not worthy of having been protected": *Quizno's Canada Restaurant Corporation v. 1450987 Ontario Corp.*, [2009] O.J. No. 2563, para. 10.

[9] Other courts have taken the view that justice does not require a departure from the rule that costs should be payable forthwith where: (1) a trial on the issue of liability is not highly probable; (2) the plaintiff has established a strong *prima facie* case against the defendants; (3) the conduct of the defendant was egregious; (4) the plaintiff had to engage in lengthy and expensive investigations and litigation procedures in order to expose the defendant's misconduct; (5) the plaintiff was substantially successful on the most important issues: *Precision Fine Papers Inc. Durkin*, [2008] O.J. No. 2189, paras. 19-20; *Accreditation Canada International v. Guerra (c.o.b. Accreditation Council Canada)*, 2017 ONSC 932 (CanLII) (Ontario Divisional Court); *Intercontinental Forest Products SA v. Rugo*, 2004 CanLII 33353 (ON SCDC), [2004] O.J. No. 4190, paras. 6-7 (Ontario Divisional Court).

[10] Devappa unsuccessfully contested the continuation motion. Despite the evidence presented by Devappa, I found that Amphenol had established a strong *prima facie* case against her based on the extensive investigation it had conducted. I reject Devappa's submission that this action will almost certainly proceed to trial. There is no way to know with any certainty whether this action will proceed to trial. Most actions do not proceed to trial. It makes little sense for this action to proceed to trial given the parties' collective costs of litigation and the amount of the claim arising from the alleged fraud.

[11] While Devappa argued at the hearing of this motion that the freezing Order was causing her hardship in meeting in her ongoing living expenses, she refused Amphenol's offer, made on January 22, 2019, to lift the freezing order on her credit card and on her bank account into which her salary was paid if she would move \$24,316.14 from that account into another bank account that would remain frozen. This was a reasonable settlement offer. This offer is essentially what I ordered as I directed the parties, after deciding to continue the Mareva injunction against Devappa, to provide me with terms for the continuation of the Mareva injunction that would ensure that Devappa's salary and credit card would not be frozen.

[12] In my view, a party that unsuccessfully contests the continuation of a Mareva injunction should expect to have the costs of that motion addressed immediately particularly when it has refused an offer to settle that is similar to the terms imposed by the Court. The spectre of an immediate costs award against an unsuccessful party, regardless of whether they are a plaintiff or a defendant, motivates all parties to take a practical and efficient approach to the resolution of a motion for the continuation of a Mareva injunction.

[13] Amphenol's partial indemnity costs in relation to the continuation motion in respect of both Devappa and MTech were \$21,784.58. Amphenol seeks \$14,000.00 in costs from Devappa. Devappa's submission that Amphenol's costs are excessive is, as former Chief Justice Winkler stated, "no more than an attack in the air" given that it has not filed a Costs Outline: *Risorto v. State Farm Mutual Automobile Insurance Co.*, (2003), 2003 CanLII 43566 (ON SC), 64 O.R. (3d) 135, para. 10.

[14] I find that it is fair and reasonable for Devappa to pay costs of \$14,000.00, inclusive of disbursements and HST, within 30 days, to Amphenol in respect of the continuation motion. Given that Sundaram and Sundev did not oppose the continuation motion, I make no order as to costs against them.

## **ISSUE #2: SHOULD AMPHENOL BE ORDERED TO PAY MTECH'S COSTS ON A SUBSTANTIAL INDMENITY BASIS?**

[15] MTech seeks its substantial indemnity costs of \$32,101.25 from the Plaintiff for responding to the continuation motion. The Plaintiff submits that it is fair and reasonable to award MTech partial indemnity costs of \$11,000.00.

[16] Elevated costs may be awarded when a party has engaged in conduct worthy of sanction. An unsuccessful attempt to prove fraud or dishonesty on a balance of probabilities does not lead inexorably to the conclusion that an unsuccessful party should be held liable for elevated costs, since not all such attempts will be correctly considered to amount to reprehensible, scandalous or outrageous conduct: *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9 (CanLII), [2004] 1 S.C.R. 303, para. 26.

[17] Although the Plaintiff did not prove MTech's alleged fraud to the standard of a strong *prima facie* case, it is my view that the Plaintiff's conduct was not "reprehensible, scandalous or outrageous" in advancing this claim given the evidence adduced.

[18] Further, I note that MTech's claim for partial indemnity costs of \$24,880.27 exceeds the Plaintiff's partial indemnity costs of \$21,784.58, in responding to the motions to set aside brought by both Devappa and MTech.

[19] I find that it is fair and reasonable for the Plaintiff to pay MTech's partial indemnity costs of \$16,000.00, inclusive of HST and disbursements, within 30 days.