

October 22, 2013

Young vs. Fogarty Costs

At the commencement of this trial on May 1, 2013, counsel for the Plaintiff, Mr. Murphy, notified the court that he was amending his client's claim to seek only the return of monies paid under the contract and incidental expenses and was dropping his claim for compensation for monies subsequently paid under an alternate rental contract and gasoline expenses. The reduction in the quantum of claim amounted to some 40%. The number is not so interesting as in the fact that a claim was made at all for the full amount of Mr. Young's alternate rental. It is difficult to quantify how much waste was entailed in this part of the claim. Mr. Philbert impressed me as knowledgeable counsel and although I hope he spent only the minimal amount of time on this issue as it deserved, I nevertheless must consider that he prepared to meet the whole claim.

There was further time spent at the commencement of trial in a discussion about the propriety of Mr. Philbert's correspondence to the witnesses proposed by Mr. Murphy. Essentially Mr. Murphy took exception to Mr. Philbert's pointing out to the witnesses that they needed to be mindful of the potential for their testimony to become a matter of public record and possibly material to be reported back to their governing bodies. Mr. Murphy was of the opinion that Mr. Philbert's behaviour was threatening and, indeed, I see a history of Mr. Murphy having taken this stance in correspondence directed to this court on September 28, 2012 (Mr. Murphy attaches a copy of this correspondence to his cost submissions).

It would appear that Mr. Murphy confuses the prohibition against threatening criminal proceedings with merely pointing out very real possibilities of outcomes to witnesses. It became even more difficult as Mr. Murphy effectively thwarted Mr. Philbert's ability to test the witnesses evidence (they refused to speak with him after Mr. Murphy challenged "the conduct of the defendant's counsel towards the... witnesses") and to further complicate things, Mr. Murphy then chose to not call these same witnesses and merely sought to enter their letters of opinion as

evidence by simply handing them to me in their absence. Unlike the claim for the alternate rental, Mr. Philbert clearly had a difficult situation on his hands going into the trial not having had an opportunity to speak to these witnesses.

In fact, Mr. Murphy appears to have objected to every request Mr. Philbert made at each step of the process. He objected to the Settlement Conference proceeding by teleconference but did so on the grounds of Mr. Philbert's conduct towards his witnesses. It seemed to me that such concerns should have been allayed by distancing Mr. Philbert to the other end of a telephone line. In short, I could not see the logic in Mr. Murphy's position except to incur time and expense in forcing Mr. Philbert and his client to travel to Owen Sound from Mississauga for the Conference.

Mr. Murphy objected to Mr. Philbert's request to set the trial date beyond a period he was already heavily scheduled for. Mr. Philbert was forced to bring a motion to obtain a date originally requested in correspondence; costs of that motion were left to trial.

I find the quantum of the original claim was unreasonable and leaving it to the commencement of the trial to reduce it did not remedy the problem. I find Mr. Murphy's impugning of Mr. Philbert's conduct towards witnesses to be unreasonable and further that he then caused a delay in the trial while he attempted to get around the gap that he created in his evidence. Mr. Murphy's objections to Mr. Philbert's reasonable requests for teleconference and a later trial date are simply more of the same. Mr. Young's lack of credibility is a further factor to be considered in assessing costs.

In all I am very concerned for the resources expended in this case. I have reviewed the Bill of Costs of the Defendant and note that on a full indemnity scale it practically amounts to almost the entire amount of the original claim. Even at partial indemnity it practically amounts to the "adjusted at trial" claim. It seems to me that Mr. Fogarty will simply have to absorb some costs as a price of doing business and Mr. Young will pay costs as a result of his actions. While Mr.

Philbert's Offer to Settle was not served in accordance with the timing requirements of Rule 14.07 (Small Claims Court Rules) I, nevertheless, find for the reasons given with respect to unreasonableness and as per Rule 19.06 that the Defendant shall have his costs paid by the Plaintiff in the amount of \$4,823.80 plus HST being twice the costs awardable to the Plaintiff on the original claim. The Defendant shall also have his disbursements paid by the Plaintiff in the amount of \$697.15 inclusive of HST.