

CITATION: 7868073 Canada Ltd. v. 1841978 Ontario Inc. and Sugar v. Vacuum Metallizing Limited, 2023 ONSC 726

COURT FILE NOS.: CV-12-9795-00CL and CV-15-10971-00CL

DATE: 20230207

SUPERIOR COURT OF JUSTICE - ONTARIO

CV-12-9795-00CL

RE: 7868073 CANADA LTD., 1841979 ONTARIO LIMITED, 1636833 ONTARIO INC., ARCHITECTURAL COATINGS SOLUTIONS INC., TRANSREFLECT INC., and ITOLO MALLOZZI, Plaintiffs

AND:

1841978 ONTARIO INC., POWDER COATING SOLUTIONS INC., VACUUM METALLIZING LIMITED, ROBERT W. LANGLOIS carrying on business as REFLECTIONIGHT, CARRIE FERGUSON, carrying on business as REFLECTIONIGHT, ROBERT W. LANGLOIS, CARRIE FERGUSON, JEFFREY STEVEN SUGAR, GARY SUGAR, RJG LABS INC. and PULTRUCOATER INC., Defendants

AND BETWEEN:

POWDER COATING SOLUTIONS INC., ROBERT W. LANGLOIS, and 1841978 ONTARIO INC., Plaintiffs by Counterclaim

AND:

7868073 CANADA LTD., 1841979 ONTARIO LIMITED, 1636833 ONTARIO INC., ARCHITECTURAL COATINGS SOLUTIONS INC., TRANSREFLECT INC., ITOLO MALLOZZI, FRAM PROFESSIONAL CORPORATION, WADE KOSOWAN and LOW RISK LOGISTICS INC., Defendants to the Counterclaim

CV-15-10971-00CL

AND RE:

GARY SUGAR, Plaintiff

AND:

VACUUM METALLIZING LIMITED, POWDER COATING SOLUTIONS INC., RJG LABS INC., PULTRUCOATER INC., JEFFREY STEVEN SUGAR and ROBERT W. LANGLOIS, Defendants

AND BETWEEN:

VACUUM METALLIZING LIMITED, POWDER COATING SOLUTIONS INC., RJG LABS INC., PULTRUCOATER INC., JEFFREY STEVEN SUGAR and ROBERT W. LANGLOIS, Plaintiffs by Counterclaim

AND:

GARY SUGAR, Defendant to the Counterclaim

BEFORE: Dietrich J.

COUNSEL: *Maureen L. Whelton and Edward Hiutin*, for 7868073 Canada Ltd., 1841979 Ontario Limited, 1636833 Ontario Inc., Architectural Coatings Solutions Inc., Transreflect Inc., and Itolo Mallozzi

Gary Sugar, represented himself

Jeffrey Steven Sugar, represented himself and Vacuum Metallizing Limited

Robert W. Langlois, represented himself

HEARD: In writing

COSTS ENDORSEMENT

Overview of the Trials

[1] These two related actions were tried together, one after the other, over 20 days, followed by one day and part of another of closing submissions. Pursuant to my Reasons for Judgment, the parties made comprehensive written costs submissions.

[2] The trials were centered around the profits earned between 2013 and 2015 from powder coating work sourced and undertaken by Robert W. Langlois, and the sale of powder coating machines designed by him (the “Powder Coating Profits”). Mr. Langlois held himself out as an expert in powder coating substrates, especially plastic. Mr. Langlois was a defendant and a plaintiff by counterclaim in both trials.

[3] In the first trial (the “ACS Action”), the plaintiffs, including a corporation known as Architectural Coating Solutions Inc. (the “ACS Plaintiffs”), asserted that they were entitled to the Powder Coating Profits. The ACS Plaintiffs were part of a joint venture with Mr. Langlois. As part of that venture, Mr. Langlois had entered into an agreement with one of them, 7868073 Canada Ltd. (“7868073”), in which he granted an exclusive licence to certain intellectual property he said he owned, as well as his training, processes, manufacturing techniques and knowledge relating to powder coating. Mr. Langlois granted the licence in perpetuity, but the agreement provided that it could be terminated by the licensor under certain circumstances, including the insolvency of 7868073.

[4] Mr. Langlois did not generate any Powder Coating Profits for the ACS Plaintiffs, and the licence agreement was not terminated. However, Mr. Langlois proceeded to form a new business venture with new business partners, Jeffrey Steven Sugar (“Jeffrey Sugar”) and Gary Sugar. In my Reasons for Judgment, I found that Mr. Langlois entered into this second venture in breach of the licence agreement, and in breach his fiduciary duties to the ACS Plaintiffs. I also found that Jeffrey Sugar and Gary Sugar knowingly assisted Mr. Langlois in these breaches.

[5] Mr. Langlois, Jeffrey Sugar, and Gary Sugar established Powder Coating Solutions Inc., (“PCS”), which competed with the ACS Plaintiffs for the same type of powder coating work, from some of the same potential clients. Additionally, PCS relied on a virtually identical business plan to the plan that Mr. Langlois had prepared for the ACS Plaintiffs. PCS was successful in landing powder coating work, and sold three powder coating machines, which resulted in the Powder Coating Profits.

[6] In the first trial, the ACS Plaintiffs claimed that they were entitled to the Powder Coating Profits because the profits arose as a result of Mr. Langlois’ know-how, processes and techniques, which were still licensed to an ACS Plaintiff, and Mr. Langlois breached his fiduciary duties to them. The ACS Plaintiffs also claimed amounts owing by Mr. Langlois to the ACS Plaintiffs for funds lent to him and for his share of the expenses incurred in the failed joint venture.

[7] Mr. Langlois, Gary Sugar, Jeffrey Sugar, and Vacuum Metallizing Limited (“Vacuum Metallizing”) defended the ACS Action, and Mr. Langlois and other defendants brought a counterclaim against the ACS Plaintiffs, which they defended.

[8] In the second trial, Gary Sugar asserted that his partners and fellow shareholders in PCS, Mr. Langlois and Jeffrey Sugar, wrongly diverted the Powder Coating Profits from PCS to Jeffrey Sugar’s company, Vacuum Metallizing, with the result that Mr. Langlois and Jeffrey Sugar shared the Powder Coating Profits to the exclusion of Gary Sugar (the “PCS Action”).

[9] Mr. Langlois, Jeffrey Sugar and Vacuum Metallizing defended the PCS Action, and they brought a counterclaim against Gary Sugar, which he defended.

[10] The ACS Plaintiffs were successful in the first trial. I found Mr. Langlois, Jeffrey Sugar, PCS and Vacuum Metallizing, jointly and severally, liable to ACS Plaintiffs for damages of \$2,501,986, representing a prophylactic disgorgement of the Powder Coating Profits, and I capped the liability of Jeffrey Sugar and Vacuum Metallizing at \$1,250,000. I also found Mr. Langlois liable for a) repayment to the ACS Plaintiffs for \$65,750 in loans from ACS Plaintiffs; and b) \$69,369.22 for his share of expenses related to the ACS joint venture. The ACS Plaintiffs did not seek any damages against Gary Sugar because he did not share in any of the Powder Coating Profits. However, I granted the ACS Plaintiffs priority over Gary Sugar’s claim to the damages awarded as a prophylactic disgorgement of the Powder Coating Profits.

[11] I dismissed the counterclaim in the ACS Action.

[12] Having found that the ACS Plaintiffs were entitled to the Powder Coating Profits and that the ACS Plaintiffs had a priority claim over Gary Sugar’s claim to the same, the PCS Action became moot. I dismissed the PCS Action and the counterclaim.

Law Regarding Costs

[13] Rule 57 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, (the “Rules”) sets out the factors the court may consider when fixing costs between parties to the litigation. These factors include the complexity of the proceeding and the importance of the issues. Section 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, provides that the court may determine by whom and to what extent costs shall be paid.

[14] Rule 49.10(1) provides that where an offer is made pursuant to this section, and the plaintiff obtains a judgement as favourable or more favourable than the terms of the offer to settle, the plaintiff is entitled to partial indemnity costs to the date the offer to settle was served and substantial indemnity costs from that date, unless the court orders otherwise.

[15] The usual rule is that costs follow the event, and the successful party should be awarded its costs.

[16] In *Fong v. Chan* (1999), 46 O.R. (3d) 330 (C.A.), at para. 20, the Ontario Court of Appeal stated that the modern costs rules are designed to foster three fundamental principles: (1) to indemnify successful litigants for the cost of litigation; (2) to encourage settlements; and (3) to discourage and sanction inappropriate behaviour by litigants.

[17] The jurisprudence provides that substantial indemnity costs ought to be awarded where the successful party has beaten its offer to settle. In *Jarbeau v. McLean*, 2017 ONCA 115, at para. 82, the Court of Appeal emphasized that courts should not generally depart from the *prima facie* costs consequences set out in r. 49.10(1).

[18] Substantial indemnity costs will also be awarded where the losing party has engaged in behaviour worthy of sanction and where allegations of dishonesty are relentlessly and unsuccessfully pursued at trial.

[19] The court should also take into account the reasonable expectations of the parties when determining the quantum of costs: *Boucher v. Public Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.), at para. 38.

Costs Sought in the ACS Action

[20] Having succeeded in the ACS Action, the ACS Plaintiffs (and defendants to the counterclaim) seek costs as follows:

- Costs on a substantial indemnity basis, plus disbursements and HST, in the total amount of \$1,758,500.13 to be paid on a joint and several basis by each of PCS, Vacuum Metallizing, Mr. Langlois and Jeffrey Sugar (collectively, the “PCS Parties”), and Gary Sugar.
- Alternatively, costs from March 16, 2012 to March 13, 2020, on a partial indemnity basis, and from March 14, 2020 (being the date after their r. 49 offer) to September 20, 2022, on a substantial indemnity basis, plus disbursements and HST, in the total amount of \$1,586,877.88 to be paid on a joint and several basis by each of the PCS Parties and Gary Sugar.

- In the further alternative, costs on a partial indemnity basis, plus disbursements and HST, in the total amount of \$1,310,284.19, to be paid on a joint and several basis, by each of the PCS Parties and Gary Sugar.

Positions of the Parties

The ACS Plaintiffs

[21] The ACS Plaintiffs submit that the PCS Parties should reasonably expect the quantum of the costs sought by the ACS Plaintiffs because the PCS Parties served materials that would equate to more than 550 volumes of documents, each two inches thick, as compared to the ACS Plaintiffs' materials, which would have amounted to 29 similar volumes. The ACS Plaintiffs further submit that there were 21 days of examination and 20 full days of trial followed by substantial written closing submissions in addition to oral submissions over one day and part of another.

[22] The ACS Plaintiffs also submit that on a motion for security for costs brought by the PCS Parties and Gary Sugar, PCS disclosed that its costs as of January 9, 2019 were \$760,138.01, which related only to documents and the discovery process. PCS' estimated costs for post discovery and a 15-day (as opposed to a 20-day) trial were estimated to be \$375,273, for a total of approximately \$1,125,000.

[23] The ACS Plaintiffs further submit that given the volume of documents, the time spent to prepare and attend at examinations for discovery, case conferences and the trial, and considering the PCS Parties' estimates of their own costs, as sought on the motion for security, the ACS Plaintiffs' costs ought to be within the reasonable expectations of the PCS Parties and Gary Sugar.

[24] The ACS Plaintiffs further submit that the costs should be joint and several as among each of the PCS Parties and Gary Sugar. They submit that Gary Sugar mounted a very aggressive defence against the ACS Plaintiffs. He was motivated to do so, because unless the ACS Plaintiffs failed in their claim against the PCS Parties, Gary Sugar's claim could not succeed against the PCS Parties. Gary Sugar was unsuccessful in his efforts to cause the ACS Plaintiffs to lose their claim against the PCS Parties. In Gary Sugar's motion for security for costs, he estimated that 60 per cent of his total anticipated costs were attributable to the ACS Action. The ACS Plaintiffs assert that because the ACS Action and the PCS Action are intertwined and were ordered by Newbould J. to be heard together, joint and several liability is appropriate.

[25] The ACS Plaintiffs further submit that they tried to settle their claim on several occasions going back to their first offer on January 15, 2014. Subsequent offers were made on February 22, 2020, March 13, 2020, and September 14, 2020. The ACS Plaintiffs beat each of these offers at trial. Gary Sugar was a shareholder in PCS when each of these offers was made and rejected.

[26] The ACS Plaintiffs contend that based solely on their offers to settle, they should be entitled to substantial indemnity costs after January 15, 2014. Further, they contend that, in any event, substantial indemnity costs should be awarded against Gary Sugar and the PCS Parties for other reasons. Among these reasons, they cite Gary Sugar's decision to raise irrelevant facts for the sole purpose of embarrassing one of the ACS Plaintiffs, and because the PCS Parties were found, at the

trial, not to be honest. The ACS Plaintiffs assert that Gary Sugar also attempted to relitigate issues that had already been decided, which added to the length of the trial and the costs.

Mr. Langlois

[27] Mr. Langlois submits that the costs sought by the ACS Plaintiffs are excessive, should not be sought on a joint and several basis, and should not be awarded on a full indemnity basis.

[28] Mr. Langlois asserts that the fees charged by counsel to the ACS Plaintiffs were excessive, in part, because two senior counsel were engaged, when the trial could have proceeded with one senior counsel and an assistant. Mr. Langlois also asserts that the request for costs includes costs incurred for case conferences and motions that have already been assessed (e.g., costs of Gary Sugar's motion for an injunction in which the ACS Plaintiffs were not a party). Mr. Langlois also submits that he should not be responsible for costs related to case conferences and motions initiated by Gary Sugar since Gary Sugar's action was dismissed (e.g., Gary Sugar's motion for security for costs and his motion to stay the action of 7868073, one of the ACS Plaintiffs). Mr. Langlois also submits that the PCS Parties cannot be held responsible for the volume of production because the ACS Plaintiffs demanded such production as part of their "fishing expedition" for evidence.

[29] Mr. Langlois also submits that the costs sought by the ACS Plaintiffs in no way reflect the reasonable expectation of the parties. He notes that the ACS Plaintiffs claim an expenditure of fees of \$2,209,404.26, including HST, whereas the jointly retained expert, Ephraim Stulberg, concluded that the PCS defendants expended \$842,000 on pre-trial legal. Mr. Langlois submits that fees of a similar amount should be attributed to the ACS Plaintiffs, plus \$200,000 for the trial, for a total of \$1,042,000. Mr. Langlois contends that it is unreasonable to think that the ACS Plaintiffs would risk spending more than \$2,200,000 in legal fees to obtain a judgment of \$2,500,000. Mr. Langlois further submits that his estimate of \$1,042,000 should be divided equally between the two actions, and Gary Sugar should bear two-thirds of the costs in respect of each action. Mr. Langlois also submits that the proper scale of costs is partial indemnity costs, which would reduce the \$1,042,000 amount by 50 per cent. In the result, Mr. Langlois submits that he would be responsible for costs of \$43,417 (i.e. $\$1,042,000 \times \frac{1}{2}$ (for the ACS Action) $\times \frac{1}{3}$ (owing by the PCS defendants not including Gary Sugar) $\times \frac{1}{2}$ (calculated on a partial indemnity rate) $\times \frac{1}{2}$ (being the share to be paid by each of Mr. Langlois and Jeffrey Sugar)).

[30] Mr. Langlois asserts that the fact that the ACS Plaintiffs did not pursue their claim against Gary Sugar should not excuse him from liability for costs. Mr. Langlois submits that Gary Sugar was significantly involved in defending the ACS Action and was found to have provided knowing assistance to Mr. Langlois and to have ignored his conflicts of interest. Mr. Langlois submits that Gary Sugar should bear the majority of the costs because he did not discharge his professional obligations in providing legal advice to PCS, Mr. Langlois, and Jeffrey Sugar. He ignored conflicts of interest, and he aggressively defended the ACS Action causing all of the defendants to incur significant costs. Mr. Langlois further submits that Gary Sugar caused the PCS Action defendants to participate in the failed action against them. Mr. Langlois submits that Gary Sugar acted as counsel to Mr. Langlois and Jeffrey Sugar in respect of the ACS Action and advised them that it was without merit; and Gary Sugar refused to settle with the ACS Plaintiffs and refused to settle with Mr. Langlois and Jeffrey Sugar, forcing them to litigate both the ACS Action and the PCS Action. In other words, it was Gary Sugar's conduct that caused the trials to be complicated and

prolonged. Mr. Langlois therefore submits that it is appropriate that Gary share in the liability for the costs.

Jeffrey Sugar and Vacuum Metallizing

[31] Jeffrey Sugar and Vacuum Metallizing raise many of the same arguments as Mr. Langlois, including that the fees charged by counsel to the ACS Plaintiffs are excessive, owing in part, to engaging two senior counsel throughout. They also allege that the PCS Plaintiffs include in their fees amounts previously assessed, amounts that relate to motions and case conferences brought by Gary Sugar in the PCS Action, and amounts for voluminous production that they demanded. Like Mr. Langlois, Jeffrey Sugar and Vacuum Metallizing also submit that Gary Sugar should bear responsibility for a portion of the costs because it was his conduct in the ACS Action that caused the litigation to be complicated and prolonged. They make the same arguments regarding their attempts at settlement, and Gary Sugar's refusals.

[32] Jeffrey Sugar and Vacuum Metallizing oppose "full indemnity" costs against them. They contend that none of their conduct rose to the level of "reprehensible, scandalous or outrageous."

[33] Jeffrey Sugar and Vacuum Metallizing submit that their liability for costs be capped in the same way that their liability for damages was capped. They also submit that the award of costs be split between the two actions with the costs of each being allocated among the three defendants on a several basis because allocating the costs between the two actions would not be a simple matter.

[34] Jeffrey Sugar and Vacuum Metallizing submit that as a defendant in the ACS Action, Gary Sugar consumed considerably more time in cross-examinations and should therefore bear a larger share of the costs in the ACS Action. Jeffrey Sugar and Vacuum Metallizing use the same formula as Mr. Langlois to arrive at a costs amount they consider reasonable, starting with an overall costs award of \$1,042,000, divided between the two actions and divided among the defendants such that Gary Sugar would be responsible for $\frac{2}{3}$ of the costs, and Mr. Langlois and Jeffrey Sugar would be responsible for $\frac{1}{3}$ of the costs, on a partial indemnity basis, divided equally between them.

Gary Sugar

[35] Gary Sugar submits that because the ACS Plaintiffs did not pursue their claim for damages as against him, and they obtained no judgment against him, he should not be responsible for any of the costs in the ACS Action. Gary Sugar also submits that his reasonable expectation regarding costs was that because no damages were claimed against him, similarly, no costs would be claimed against him.

[36] Gary Sugar submits that the conduct of Jeffrey Sugar and Mr. Langlois should give rise to costs consequences to them. Gary Sugar contends that Jeffrey Sugar and Mr. Langlois engaged in litigation misconduct by swearing false affidavits and by suppressing the disclosure and production of damaging emails and tax credits for scientific research and experimental development, all of which led to longer, more complex and costly litigation.

[37] Gary Sugar also submits that Jeffrey Sugar and Mr. Langlois knew that their conduct at PCS, while already defendants in the ACS Action, would re-ignite and greatly complicate the ACS

Action. Accordingly, he asserts that they should be fully accountable for their litigation misconduct and solely responsible for all costs.

[38] Gary Sugar also submits that his conduct did not rise to the level of reprehensible, scandalous or outrageous, such that full indemnity costs against him would be appropriate. Gary Sugar contends that the issue regarding the continuation of the action by 7868073, which was “re-litigated”, took very little time and does not warrant any consideration in the costs analysis.

[39] Gary Sugar’s costs outline includes his costs (other than his personal time spent) for both the ACS Action and the PCS Action combined. The total of his full indemnity costs on both actions is \$526,432.50. Partial indemnity costs would be \$263,216 for both actions. Gary Sugar submits that because the ACS Plaintiffs ultimately conceded that there was no patent infringement by PCS regarding the intellectual property that Mr. Langlois licensed to an ACS Plaintiff, after having spent considerable time exploring that legal issue in discoveries and at trial, the allocation of his costs ought to be 40 per cent to the ACS Action and 60 per cent to the PCS Action. This would result in full indemnity costs of the ACS Action of \$210,573 and partial indemnity costs of \$105,286.50. Gary Sugar submits that these costs should be payable by the PCS Parties (and not him) in the ACS Action. However, he submits that if a costs award against him is found to be appropriate, an award of costs in the range of \$50,000 to \$75,000 would have been within his reasonable expectation.

[40] Gary Sugar also submits that the costs sought by the ACS Plaintiffs are excessive (including 1,629.4 hours/\$348,334 for discoveries), and it is not realistic to think that the ACS Plaintiffs, most of which had little in the way of income or assets, would have had a budget of more than \$2,000,000 for the ACS Action. He further submits that it was not within his reasonable contemplation that he would be responsible for costs since the ACS Plaintiffs did not specifically seek relief against him for knowing assistance. Gary Sugar further submits that ACS was not a party to the PCS Action, and it should not be seeking any costs, or awarded any costs, regarding the PCS Action, for example, Gary Sugar’s motion for an injunction against the PCS Parties.

[41] Gary Sugar submits that when the defendants in the ACS Action brought a motion for security for costs in 2019, the late Hainey J. found that the “almost \$600,000” in the bank account of one of the ACS Plaintiffs was, in His Honour’s view, “more than adequate to satisfy any costs award that may be made in favour of the defendants.” Hainey J. found that the defendants’ request for close to \$1 million in security for costs was “excessive.” Accordingly, Gary Sugar asserts that \$600,000 in costs was accepted by the late Hainey J. as reasonable.

[42] Gary Sugar supports the argument made by the PCS Parties that their true, full indemnity costs for both actions would be approximately \$1,042,000. Gary Sugar argues that 40 per cent of this total (\$416,800) would represent the full indemnity costs in the ACS Action, and the partial indemnity rate would be one-half (\$208,400). Gary Sugar submits that this is the amount that ought to be borne entirely by the PCS Parties.

[43] Gary Sugar also submits that it is untrue that he conducted the entire defence of the PCS Parties in the ACS Action. He admits that while their interests were aligned, his counsel represented his interests only.

Costs Submissions in the PCS Action

[44] The PCS Action and counterclaim were both dismissed.

[45] The ACS Plaintiffs were not a party to the PCS Action. As such, they did not make costs submissions in the PCS Action. They confirm in their costs submissions that they are only seeking costs of the ACS Action.

[46] As noted by Gary Sugar in his costs submissions in the PCS Action, the PCS Parties did not deliver separate costs submissions regarding the PCS Action.

[47] Gary Sugar submits that given the misconduct found to have been committed by Mr. Langlois and Jeffrey Sugar, including their breaches of fiduciary duties owed to PCS, their oppressive conduct, and their failure to produce important and relevant documentary evidence materially adverse to their case, no order as to costs ought to issue in the PCS Action or counterclaim.

[48] Further, Gary Sugar denies having received any settlement offer from Jeffrey Sugar, and he submits that no settlement agreement was reached at the mediation conducted by Mesbur J.

[49] Jeffrey Sugar and Vacuum Metallizing did not make separate costs submissions regarding the PCS Action. They submit that the award of costs “be allocated between the two actions and that the costs associated with each be allocated between the three defendants on a several basis. Considering that many (if not most) issues that were litigated were the joint concern of both actions, allocating costs between the two actions is not a simple matter and likely comes down to picking a reasonable percentage split.”

[50] Mr. Langlois also suggests that costs be allocated between the two actions and that costs associated with each action be allocated among the three defendants on a several basis.

Analysis

The ACS Action

[51] For the reasons that follow, I find that in the ACS Action, the ACS Plaintiffs are entitled to their costs, which I fix at \$1,000,000, inclusive of disbursements and HST. Liability for such costs shall be joint and several as among the PCS Parties and Gary Sugar, provided that the liability for costs of Jeffrey Sugar and Vacuum Metallizing, together, shall be capped at \$334,000, and Gary Sugar’s liability for costs shall be capped at \$334,000.

[52] I find that it is appropriate that Gary Sugar should bear some responsibility for the costs in the ACS Action notwithstanding that there was no judgment against him. The issues decided in the ACS Action included whether Gary Sugar had knowingly assisted Mr. Langlois in his breaches of the licence agreement and fiduciary duties, and whether Gary Sugar had defences to the ACS claims. In addition to claims made against him, Gary Sugar strongly defended issues central to the ACS Action, namely, whether the licence agreement was enforceable, whether Mr. Langlois breached his contractual or fiduciary duties, and whether Mr. Langlois breached a duty of confidence. Gary Sugar fully defended the ACS Action. It was in his interest to do so. Had the

ACS Action failed, the PCS Action and Gary's claim for the Powder Coating Profits would have proceeded. Having fully defended the ACS Action, without success, it is fair that Gary Sugar share in the liability for the costs. I agree with the ACS Plaintiffs' submission that Gary Sugar was not a bystander in the ACS Action. He was actively involved in the defence of the ACS Action from productions to discoveries to trial.

[53] Regarding the quantum of the costs awarded, I have considered that the ACS Plaintiffs made a series of offers, each of which was beaten in the judgment they obtained. This result should entitle them to substantial indemnity costs from the date of their first r. 49 offer. I find, however, that their substantial indemnity costs do not align with the reasonable expectation of the PCS Parties and Gary Sugar. It was reasonable for the PCS Parties and Gary Sugar to give some weight to the late Hainey J.'s view, on the motion for security for costs, that \$600,000 would be "more than adequate to" to satisfy costs incurred by them, and that security for costs close to \$1 million was "excessive." Admittedly, the late Hainey J. made that decision in 2019, based on the materials then available to His Honour. And he was referring to the defendants' costs as opposed to the ACS Plaintiffs' costs; however, it was reasonable for the PCS Parties and Gary Sugar to expect that the ACS Plaintiffs' costs and their own costs would not be dramatically different.

[54] The fees referred to in Mr. Stulberg's report provide some guidance as well. In his report, he noted that the PCS Parties had incurred pre-trial legal fees of \$842,000 that they had already paid their former counsel. Adding to that amount \$200,000 in fees for the trial of the ACS Action would bring the total costs amount to \$1,042,000.

[55] In their respective costs submissions, each of Mr. Langlois, Jeffrey Sugar and Vacuum Metallizing, submits that a reasonable amount of costs for the ACS Plaintiffs would be that amount, \$1,042,000, on a full indemnity scale. Although, they also submit that the costs should be awarded on a partial indemnity scale, being 50 percent of \$1,042,000, and Gary Sugar should be required to pay a higher percentage of these costs.

[56] Regarding this calculation, the ACS Plaintiffs submit that these PCS Parties have failed to add the ACS Plaintiffs' disbursements and HST to the \$1,042,000 amount, which would bring the total to \$1,281,576.51. The ACS Plaintiffs further submit that this calculation does not include any adjustment for inflation over the more than ten years since the ACS Plaintiffs commenced their action. The ACS Plaintiffs contend that they are entitled to an adjustment for inflation per *First Capital (CAN Holdings) Corporation v. North American Property Group*, 2012 ONSC 1359. These are valid arguments.

[57] Further, I note that the calculation disregards the ACS Plaintiffs' eligibility for substantial indemnity costs based on their offers.

[58] I decline to reduce the ACS Plaintiffs' costs to take into account any duplication of fees regarding case conferences on which no cost orders were made or costs were assessed at that time. The ACS Plaintiffs bring to the court's attention the endorsement of the late Hainey J., dated September 21, 2018, in which His Honour stated that costs of all motions and case conferences were reserved to the trial judge. In their reply to the written costs submissions, the ACS Plaintiffs confirm that their Bill of Costs does not include any fees in respect of Gary Sugar's motion for an

injunction in the PCS Action. I accept that their review of affidavits used in support of that motion was limited to the purpose of witness impeachment at the trial.

Disposition

[59] For all of these reasons and having considered the relevant factors as set out in r. 57 of the *Rules*, including the reasonable expectations of the parties when determining the quantum of costs, I am satisfied that an award of costs of \$1,000,000, all-inclusive, to the ACS Plaintiffs is fair and reasonable in the circumstances of the ACS Action. The award accords with the fundamental principles underpinning the rules regarding costs, including indemnity for the successful party and encouragement of settlement.

[60] As noted, the costs are payable to the ACS Plaintiffs by the PCS Parties and Gary Sugar, on a joint and several basis, provided that the liability for costs of Jeffrey Sugar and Vacuum Metallizing, together, shall be capped at \$334,000, and Gary Sugar's liability for costs shall also be capped at \$334,000.

The PCS Action

[61] As noted, none of the PCS Parties made separate costs submissions regarding the PCS Action.

[62] Both the PCS Action and the counterclaim were dismissed.

[63] I agree with Gary Sugar's submission that no costs should be awarded in the PCS Action.



Dietrich J.

Date: February 7, 2023