

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** STEPHEN SHANE AND DONALD SHANE, Plaintiffs/Respondents  
and  
JCB BELGIUM N.V., Defendant/Applicant

**BEFORE:** Justice Robert J. Smith

**COUNSEL:** Stephen J. Kelly, for the Plaintiffs/Respondents  
Antonin I. Pribetic, for the Defendant/Applicant

**ENDORSEMENT ON COSTS**

[1] The costs are to be fixed having regard to the hourly rates permitted under the Costs Grid and the factors set out in Rule 57 of the *Rules of Civil Procedure*. Those factors set out in Rule 57 are the result achieved, the complexity of the matter, the importance of the matter, the amount involved and any other relevant matters, which would include an offer to settle made by either party.

**Results**

[2] The Plaintiffs were completely successful as the Defendant sought a stay of the claim made in Ontario and argued that Belgium was the *forum conveniens*. The Defendant was successful on its argument that the *International Sales of Goods Act* applied, however, it was not successful on the main issue, which was the *forum conveniens*.

**Complexity**

[3] The matter was quite complex. Both parties filed affidavits, the Defendant cross-examined on those affidavits and extensive books of authorities were filed by both parties. The issues initially involved jurisdiction of the court, although this was subsequently abandoned by the Defendant. The motion also involved the application of the *International Sales of Goods Act*, and the application of the United Nations Convention on the International Sale of Goods, a consideration of the legal system in Belgium as well as factors in deciding the *forum conveniens* between two countries.

**Importance**

[4] The matter was important to both parties, but particularly important to the Plaintiffs who would have otherwise had to commence their action in Belgium.

**Amount**

[5] The amount involved was approximately \$130,000 of damages, which is not an excessively large amount.

**Offer to Settle**

[6] On December 11, 2002, the Plaintiffs made an offer to settle this matter by consenting to a dismissal of the motion without costs, if the offer was accepted before December 16, 2002. If the offer was not accepted before December 16, 2002, then, the Plaintiffs would be seeking costs, on a substantial indemnity basis, after the date of the offer. The Plaintiffs obtained a result as good as the terms of their offer, and therefore, I find that the Plaintiffs are entitled to costs, on a substantial indemnity basis, from the date the offer was made.

**Novel Issues**

[7] The Defendant argues that the issues involving the *International Sale of Goods Act* were novel and, as a result, the court should reduce the amount of costs it would otherwise order. While the issues were complex, I do not find that the issues were so novel that the successful party should be deprived of their costs.

**Details**

[8] I am satisfied that adequate details have been provided of the hours spent, and the steps undertaken and the rates charged in order to allow the court to adequately fix the costs of this motion. The hourly rates for each lawyer are set out, and divided into categories of preparation, research, cross-examination, and attendance at motion. It would have been helpful to have identified the work each counsel performed.

[9] The amount of \$200 per hour claimed, on a substantial indemnity basis, by Mr. Kelly, who is a lawyer with 20 years experience, is quite reasonable. The maximum rates should only be reserved for maximum cases, but the rate sought is much less than the maximum rate of \$400 per hour and so is less than the maximum rates allowed on a partial indemnity basis. Mr. Pribetic is a lawyer with 10 years experience and he has claimed the amount of \$160 per hour for 37.96 hours. The maximum counsel fee for a one-half day motion is up to \$2,400. Approximately eleven hours were spent at cross-examination, which were carried out by the Defendant.

[10] I find the hourly rates charged by the lawyers and staff involved to be reasonable. However, counsel have not used the counsel fee for half-day motions set out in the Costs

Grid as a basis for their calculation. I also find the amount of time spent on a complex motion to be reasonable. The Plaintiffs have achieved a result as equal to the offer to settle and this is a factor supporting an award of costs to the successful party.

**Disposition**

[11] Therefore, I award costs to the Plaintiffs, on a substantial indemnity basis, based on the Plaintiffs offer to settle, in the amount allowed of \$12,000 plus disbursements of \$670.50 inclusive of GST for a total of fees plus disbursements and GST of \$12,670.50. The said amount shall be payable within 30 days.

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SMITH J.

**Released:** January 8, 2004

**COURT FILE NO.: 02-CV-19871**

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