

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: DOUGLAS BELFORD, Plaintiff

AND:

THE ESTATE OF RYAN A. ADAMEK, deceased, by its Litigation
Administrator, PAUL BARRAFATO, Defendant

BEFORE: D. Fitzpatrick J.

COUNSEL: Gordon Marsden, Counsel for the Plaintiff

Chris T.J. Blom, Counsel for the Defendant

COSTS ENDORSEMENT

[1] I have reviewed the submissions from both counsel on the costs issue for this trial.

[2] The seminal issue is whether the defendant's Offer (the "Offer") represented a better result than achieved by the plaintiff following trial thereby engaging the Rule 49 consequences.

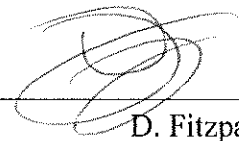
[3] I am directed by the decision of the Ontario Court of Appeal in *Rooney (Litigation Guardian of) v. Graham*, [2001] O.J. No. 1055 to conclude that the plaintiff realized a better return after trial than what he would have received pursuant to the Offer. The costs term in the Offer is what generates this conclusion. In other words, the global quantum favours the plaintiff's result following trial once I consider the matter of costs.

[4] The Offer provided for a total damages payment of \$100,000, which, obviously, exceeds the \$81,658.83 net the plaintiff received from the jury. However the Offer provided for partial indemnity costs to the plaintiff to March 15, 2017 and the same scale to the defendant from that date forward. *Rooney* directs me to compare the jury's award to the Offer at the date of judgment. *Rooney* also directs me to presume partial indemnity costs payable to the successful plaintiff for the purposes of determining the overall quantum of the judgment versus the Offer.

[5] This was a two-plus week jury trial. I do not have any Bill of Costs but I have no difficulty in presuming the partial indemnity costs of the defendant forward from March 15th (i.e. preparation leading up to and for conducting a two-plus week trial) would dwarf the \$18,341.17 difference between the total damages payable by the Offer compared to the net judgment. Once the costs terms of the Offer are factored into the overall quantum it is apparent that the judgment achieved was more favourable than the Offer. As such, Rule 49 is not engaged. The plaintiff should have his costs of the action on a partial indemnity basis.

[6] I am also bound by and agree with the Court of Appeal decision in *Konig v. Hobza*, 2015 ONCA 885 where the Court noted the mandatory timing prescribed by Rule 49 (i.e. an Offer must be served at least seven days before commencement of the hearing). The defendant's Offer did not satisfy that mandatory timing. Again, Rule 49 is not engaged with the result that the plaintiff should have his partial indemnity costs throughout.

[7] As stated above I do not have any Bill of Costs. I trust that counsel can resolve the costs quantum flowing from this ruling. If not then either counsel should contact me for further directions.



D. Fitzpatrick J.

Date: October 16, 2017