Superior Court of Justice
Judges' Chambers

Cour supérieure de justice
Cabinet des juges

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Pages: 13 including cover sheet

Date: October 3, 2011

Re: Costs Decision in Lobo v. Carleton University, 11-50693

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CITATION: Lobo v. Carleton University, 2011 ONSC 5798
COURT FILE NO.: 11-50693

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
RUTH LOBO AND JOHN MCLEOD	Albertos Polizogopoulos, for the Plaintiffs
Plaintiffs	
- and -	
CARLETON UNIVERSITY, DR. ROSEANNE RUNTE, DAVID STERRITT, RYAN FLANNAGAN AND ALLAN BURNS	Richard G. Dearden/Ryan W.Kennedy, for the Defendants
Defendants	
	HEARD: Written Submissions

DECISION ON COSTS

Madam Justice Toscano Roccamo

Nature of Proceedings

[1] On July 12 and 13, 2011, I heard argument in a motion brought by the Defendants, Carleton University (CU) and other named Defendants to have the Statement of Claim of the Plaintiffs, Lobo and McLeod, struck out on the grounds that it disclosed no reasonable cause of action; and/or was scandalous, frivolous or vexatious; and /or an abuse of the court process.

[2] The action arises out of CU's refusal to allow Carleton Life Line (CLL) to display the Genocide Awareness Project (GAP) in the Tory Quad, an outdoor area on CU's campus.

[3] The Statement of Claim sought a declaration that CU violated the rights of the Plaintiffs under s. 2, 9, and 15 of the *Canadian Charter of Rights and Freedoms* (*Charter*). The Plaintiffs also sought a declaration that the Defendants breached several sections of CU's *Human Rights Policies and Procedures* (*HRPP*) and the *Student Rights and Responsibilities Policy* (*SRRP*) and an order that the Defendants comply with these policies. The Statement of Claim further sought general damages in the amount of $225,000 based on alleged causes of action in:

(i) Breach of fiduciary duties;

(ii) Wrongful arrest;

(iii) Pain and suffering and damages to reputation;

(iv) Breach of contract; and

(v) Negligence

Result on the Motion

[4] In my Decision released on August 5, 2011, I made the following orders in respect of the causes of actions, as advanced:

1. Allegations of infringements of the *Canadian Charter of Rights and Freedoms* – Statement of Claim, paras. 2(1), 2(b), 76-78 – Struck with leave to amend.

   Paragraph 32 reads as follows:

   > The Plaintiffs' Statement of Claim does not plead the material facts to establish government control or influence. That is not to say that the deficiencies in the Claim may not be cured by leave to amend; however, the tenuous nexus related to me in argument would alone be insufficient.

2. Declaration that the Defendants breached Carleton University Policies – Statement of Claim, paras. 1(a), 1(b), 14-17 – Struck with leave to amend.

   Paragraph 29 reads as follows:

I find that the provisions from the policies cited express internal administrative policies. In my opinion, alone they offer no binding legal force, effect or cause of action.

3. Claim for breach of fiduciary duty – Statement of Claim, paras. 1(c), 48-53 – Struck without leave to amend.

Paragraph 50 reads as follows:

In my opinion and taking all facts in the claim before me as true, the pleading of a breach of fiduciary duty fails to disclose a supportable cause of action. ...

4. Claim for damage to reputation – Statement of Claim, paras. 1(e), 53, 74 – Struck with leave to amend.

Paragraph 55 reads as follows:

If the Plaintiffs seek to establish a separate and discrete cause of action for damage to reputation, the Plaintiffs have failed to plead the material facts in relation to this cause of action and these paragraphs shall be struck. The noted deficiencies, however, may be cured by inclusion of the subject paragraphs among allegations of negligence or wrongful arrest. ...

5. Claim for alleged wrongful arrest – Statement of Claim, paras. 1(d), 28-31, 66-75 – Motion to strike claim dismissed.

Paragraph 58 reads as follows:

Those facts taken as true cannot lead to a conclusion that it is plain and obvious the claim will not succeed.

6. Claim for breach of contract – Statement of Claim, paras. 1(f), 58-65 – Struck with leave to amend.

Paragraph 72 reads as follows:

On the other hand, the Statement of Claim as presently drafted is seriously flawed for the reasons advanced by the Defendants. The Plaintiffs failed to specifically distinguish between express terms of the contract and the implied terms of the contract by laying out the material facts by which an inference might be made as to any implied term. ...

7. The Claim for negligence – Statement of Claim, paras. 1(g), 54-57 – Struck with leave to amend.

Paragraphs 81-82 read as follows:

> I note that the Plaintiffs did not take issue with the Defendants' contention that a claim in negligence cannot be founded upon a breach of *Charter* rights.
>
> While I am unconvinced that it is plain and obvious a claim in negligence could not reasonably be advanced against CU, the claim in negligence as presently drafted reflects the same frailties that are noted in respect of the claim based on breach of contract: the pleadings fail to plead the material facts on the basis of which a duty of care is said to be owed. It is insufficient to allege a duty, and then to make conclusory statements that it was then breached.

8. Claims against the individual Defendants – Statement of Claim, paras. 6-10 – Struck with leave to amend.

Paragraphs 85-86 read as follows:

> It is apparent that there are no material facts pleaded to support a claim that the individual Defendants were acting outside their capacity as employees of CU.
>
> Therefore, as presently drafted, paragraphs 6 to 10 cannot stand. That said, in the unlikely event that material facts may be pleaded alleging the manner by which they acted outside their capacity as employees of CU, there is some potential that all or some of the personal claims may succeed. ...

[5] In addressing the matter of costs in my Decision, I directed the parties as follows:

> In preparing submissions on costs the parties should, in addition to the factors contained in Rule 57 and any offers to settle, consider the divided success on this motion; the Plaintiffs' concession at the outset of the motion as to the need for some amendment of its pleading, described at the time of hearing as a "work in progress"; as well as the Plaintiffs' preparedness to abandon some of the personal claims advanced against the named Defendants.

Position of the Parties

Defendants' Position

[6] The Defendants submit that they are entitled to an award of costs in that every claim challenged by the Defendants' motion was struck except the wrongful arrest claim. The Plaintiffs were ordered to amend every claim that was struck except the fiduciary duty claim which was struck without leave to amend. In addition, the Defendants note that only after the Defendants filed their Factum on the motion did the Plaintiffs respond with a Factum that

abandoned all of the claims against the individual named Defendants, except the negligence claim. The Defendants also refer to my Decision which reflects that the Plaintiffs conceded at the outset of the motion that there was a need for some amendment of its pleading described at the time of hearing as a "work in progress."

[7] The Defendants refer me to various costs decisions on motions to strike in support of a costs award in their favor on a partial indemnity basis. These include the decision of Nordheimer, J. in J.G. Young and Sons Ltd v. Tec Park Ltd. (1999), 48 C.P.C. (4th) 67 (Ont. S.C.J.) at para. 76 where the Plaintiffs' claim, based on intentional interference with contractual relations, was struck without leave to amend. At the same time, claims based on conspiracy and fraud, were struck with leave to amend. Finally, claims under the *Fraudulent Conveyances Act* and the *Assignments and Preferences Act* were held to be sufficiently pleaded. Having concluded in that case that the Defendants were largely successful in their motions, Justice Nordheimer awarded costs to the Defendants.

[8] I have also been asked to consider the result in *Beaucage v. Grand & Toy Ltd.*, 2002 CarswellOnt 49 (S.C.J.) at para. 1, where the Plaintiffs' claims in negligence, negligent misrepresentation, breach of fiduciary duty, wrongful dismissal and breach of contract were struck with leave to amend. Justice Campbell characterized the outcome of the motion as "successful" for the Defendants and awarded costs accordingly.

[9] Finally, I am referred to the decision of Justice Morawetz in *Li v. Lund*, 2009 CarswellOnt 8451 (S.C.J.) at para. 26. In that case, of ten distinct causes of actions, one cause of action was struck by the Court without leave to amend, and the remaining nine claims were struck with leave to amend. Justice Morawetz concluded that the moving parties had been successful and were entitled to their costs.

[10] In exercising my discretion to award costs, the Defendants further invite me to consider the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed, in accordance with Rule 57.10 (1)(0.b). The Defendants note that the Plaintiffs provided the Court with a Bill of Costs at the hearing of the motion in the total amount $23,596.53. This amount is $2,128.85 more than the $21, 467.68

claimed by the Defendants in the Costs Outline provided to the Court at the hearing of the motion. However, I note that the Plaintiffs have now provided a more complete Bill of Costs as well as a Costs Outline as directed in my Decision. Partial indemnity costs pursuant to the Plaintiffs' Costs Outline are in the total amount of $19,142.29.

Plaintiffs' Position

[11] The Plaintiffs submit that the Defendants' goal in moving to strike out the Plaintiffs' entire Statement of Claim was to "stop the Plaintiffs' claim dead in its tracks." The Plaintiffs emphasize that, pursuant to my Decision, they have leave to cure the defects in their pleading with respect to the claims alleged for breach of the *Charter*, breach of contract, wrongful arrest and in negligence. They resist any assertion on the part of the Defendants that they pursued a cause of action for breach of Carleton University's policies, or a cause of action for defamation, noting the claims for damage to reputation were in the context of the negligence and wrongful arrest claims. The Plaintiffs further submit that the Defendants did not establish, at law, that the Plaintiffs could not sue the Defendants for breach of *Charter*, wrongful arrest and in negligence. They stress that the Defendants' only success in striking a portion of the Statement of Claim without leave to amend, was in relation to the claim for breach of fiduciary duty.

[12] Given the outcome of the motion, the Plaintiffs submit that they are entitled to partial indemnity costs in the amount of $19,142.29 or, alternatively, that each party should bear their own costs.

[13] The Plaintiffs refer me to the Supreme Court's decision in *British Columbia (Minister of Forest) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371 para. 28, in support of the proposition that *Charter* litigation ought not to be beyond the reach of the ordinary citizen, and that a costs award in the Plaintiffs' favour may be used as an instrument of policy for making *Charter* litigation accessible to the ordinary citizen. The Plaintiffs observe that a court's discretion to award costs against a successful party in cases of national significance is codified under Rule 57.01(2).

[14] The Plaintiffs also refer me to *Harris v. Canada (TD)*, [1999] 2 F.C. 392 at para. 222 for a review of those criteria considered in public interest litigation when deciding if costs should not be awarded against an unsuccessful public litigant:

(a) The proceeding involves issues the importance of which extend beyond the immediate interest of the parties involved.
(b) The person has no personal, proprietary or pecuniary interest in the outcome of the proceeding, or, if he or she has an interest, it clearly does not justify the proceedings economically.
(c) The issues have not been previously determined by a court in a proceeding against the same Defendant.
(d) The Defendant has a clearly superior capacity to bear the costs of the proceeding.
(e) The Plaintiff has not engaged in vexatious, frivolous or abusive conduct.

[15] The Plaintiffs argue that although they have a pecuniary interest in the outcome of the litigation, they meet the other criteria discussed in *Harris*, *supra*, and the Defendants' motion to strike went to the root of the Plaintiffs' ability to advance all causes of action, including the one founded on breach of *Charter* rights.

[16] Finally, the Plaintiffs submit that no costs should be awarded to the Defendants because the issues involved were novel, involve a matter of public interest and were brought in good faith for the genuine purpose of having a point of law of general public interest resolved: see *Mahar v. Rogers Cable Systems Ltd*, [1995] 2 S.C.R 739, at para. 7.

Factors considered under Rule 57.01

[17] In respect of the **amount claimed and the disposition of the claims** advanced in these interim proceedings, the Plaintiffs clearly sought damages in the amount of $225,000 based on multiple causes of action, all of which as presently drafted were challenged by the Defendants. Except as relates to the claim for wrongful arrest, the Defendants were successful in persuading me that the Plaintiffs' pleading fails to survive initial attack in large part for failure to establish the material facts underpinning the alleged causes of action. The fact that the Plaintiffs were afforded an opportunity to cure the defects in pleading by delivery of a fresh amended Statement of Claim, save and except with respect to the claim for breach of fiduciary duty, does not establish the merits of the claims advanced, nor that the claims are permitted to proceed, as the

Plaintiffs intimate. Furthermore, I am not able, as invited by the Plaintiffs, to ascribe any motive on the part of the Defendants to "stop the action in its tracks." The Defendants are entitled to respond to a pleading that observes the Rules and reflects the necessary ingredients in support of the causes of action alleged, as well as proper joinder of parties.

[18] In regards to the Plaintiffs' submissions that no cause of action for a breach of Carleton University's policies was asserted, and further that no cause of action for defamation was asserted, I agree with the Defendants' observation that at paragraphs 1(a) and 1(b) of the Statement of Claim, the Plaintiffs sought a declaration that the Defendants breached Carleton University's policies as well as an order requiring them to comply with these policies. While paragraphs 14 and 15 deal with the policies of the university, the claim for breach of contract is separately dealt with in paragraphs 58-65 with no cross-reference to the policies.

[19] The Defendants also correctly observe that paragraph 1(e) of the Plaintiffs' Statement of Claim sought damages in respect to damages to reputation with no reference at all to the claim based in negligence.

[20] In respect of the **complexity of the proceedings**, there is no question that preparation of the present motion required extensive research, drafting of a comprehensive Motion Record and Factum, application of numerous legal tests to the facts as pleaded, and preparation for a two day oral hearing of the motion.

[21] With respect to the **importance of the issues** raised, the parties are at idem that the motion potentially disposed of the action in its entirety. The motion also raised important issues regarding the application of the *Canadian Charter of Rights and Freedoms* to the legal relationship between a university and its students, and as relates to students' freedom of expression.

[22] Although I conclude that this litigation raises matters of particular interest to these parties which may result in the evolution of jurisprudence having broad application to universities and students across the country, I cannot conclude that this case involves "rare and exceptional circumstances" of the kind considered in *British Columbia (Minister of Forest) v. Okanagan*

Indian Band, supra, where the court's inherent jurisdiction to grant costs of an interim proceeding in any event of the cause to the losing party was applied to the question of constitutionally protected aboriginal rights.

[23] In the case before me, but one of seven causes of action relates to a question of constitutional significance and public interest. The rest relate to personal claims for which damages are sought in the amount of $225,000. Moreover, only the claim in wrongful arrest withstood challenge on the basis that I could not conclude that it was plain and obvious the claim will not succeed. In my opinion, this claim, therefore, fails to meet to the criteria developed in *Harris v. Canada (TD), supra.*

[24] That said, there is merit to ensuring that adjudication of the novel issue related to *Charter* rights not be potentially foreclosed by the likely financial constraints of the student body collectively known in these proceedings as Carleton Life Line. Such financial constraints might well preclude payment of costs within 30 days as required under Rule 57.03(1)(a) on a contested motion. That is not to say that impecuniosity is a determinative factor, particularly in the absence of an evidentiary foundation, but one which I consider when balancing the interests of the parties to obtain clarification on the application of *Charter* rights in the circumstances before me. In my opinion, the appropriate balance may be struck by making an award of cost to the Defendants in the cause fixed on a partial indemnity basis. In arriving at this conclusion, I have considered the parallels between the case before me and those before Justice Perrell in *Speers (Trustee of) v. Readers Digest A.S.S.N. (Canada) U.L.C.*, [2009] O.J. 3106.

[25] With respect to the **conduct of the parties**, I am not persuaded by the Plaintiffs' submissions that there was any conduct on the part of the Defendants which unnecessarily lengthened the duration of the motion. As previously noted, the Defendants are entitled to respond to a pleading that meets the basic threshold for all of the causes of actions asserted, and I have clearly found the Plaintiffs' pleading did not meet that threshold. On the other hand, I do take note of the concessions made by the Plaintiffs with respect to the need to amend the pleading, and to abandon all causes of actions save the one in negligence against the individual named Defendants. However, these concessions were made at the outset of the hearing of the

motion and far too late to avert preparation of the Motion Record, Factum and oral argument. Notwithstanding the abandonment of all but one cause of action against the individual Defendants, the matter still required argument on the threshold issue related to whether or not the individuals named acted beyond their ostensible authority as principals or employees of Carleton University. In my opinion, argument with respect to the multiple causes of action was in no way curtailed by the concessions made by the Plaintiffs, Plaintiffs' counsel having acknowledged at the outset that the Court was required to consider the pleading as put before it, in relation to the arguments made by both parties.

[26] In reference to the Plaintiffs' argument that the Defendants should somehow be sanctioned for **denial or refusal to admit** that a contract exists between the parties, I accept the Defendants' submissions that the dispute between the parties arose with respect to the existence of terms of the contract, not the contract itself.

[27] In relation to **the experience of** the parties' **counsel,** I conclude that Mr. Deardon's experience in excess of three decades at the Bar, was appropriately employed in the handling of the complex and multiple issues on the motion, and that his associate, Mr. Kennedy, was appropriately employed to prepare material and assist at the hearing of the motion, all of which served to cost effectively advance the motion.

[28] I note that the Plaintiffs raise no issue with respect to the **hours spent and the rate sought** for partial indemnity costs by the Defendants in the total amount of $21,467.68. Indeed, the costs of the Plaintiffs very nearly approach those of the Defendants who bore a proportionately greater burden for advancing the motion. Moreover, the Plaintiffs were ably but largely served by Mr. Polizogopoulo, whose hourly rate is more modest having regard for his years at the Bar. In arriving at a fixed amount in costs, however, I have applied my jurisdiction under Rule 57.01(4)(b) to award a proportion of the partial indemnity costs incurred by the Defendants, that being, 6/7 of their claim for costs, in consideration of the Defendants' failure to succeed to strike the claim based on wrongful arrest. Therefore, I arrive at partial indemnity costs of $18,400.87.

Conclusion

[29] In the result, the Plaintiffs are ordered to pay the Defendants their costs in the cause fixed on a partial indemnity basis in the amount of $18,400.87 plus applicable taxes.

M. Toscano Roccamo J.
Madam Justice Toscano Roccamo

RELEASED: October 3, 2011

CITATION: Lobo v. Carleton University, 2011 ONSC 5798
COURT FILE NO.: 11-50693

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

RUTH LOBO AND JOHN MCLEOD

Plaintiffs

- and –

CARLETON UNIVERSITY, DR. ROSEANNE RUNTE, DAVID STERRITT, RYAN FLANNAGAN AND ALLAN BURNS

Defendants

DECISION ON COSTS

Madam Justice Toscano Roccamo

RELEASED: October 3, 2011