

Case Name:

Roach v. Saito

Between

Charles C. Roach, plaintiff, and
Robert K. Saito, defendant

[2004] O.J. No. 3867

Court File No. 99-CV-179166

**Ontario Superior Court of Justice
Somers J.**

Heard: June 15, 2004.

Judgment: September 22, 2004.

(6 paras.)

Practice — Costs — Party and party costs.

Motion by Saito for costs. Saito, the successful party, submitted a bill of costs claiming the total amount of \$72,483 on a substantial indemnity basis, and \$51,313 on a partial indemnity basis. He based his claim for costs on a substantial indemnity basis on the ground that the case had been frivolous and vexatious. The case had turned upon an unusual though not difficult set of facts. Despite this, the trial had gone on far longer than necessary. There had been no specific unnecessary steps taken by either side. At issue had been the recovery of a \$300 sculpture.

HELD: Motion allowed in part. The matter should be assessed, but on a partial indemnity basis only. Costs were assessed in the amount of \$20,000 together with disbursements of \$2,484. There was a disproportionate relationship between the value of the item in question in the action and the time spent and therefore not all the time spent should be compensated.

Counsel:

Kikelola Roach, for the plaintiff.

Ryan M. Naimark, for the defendant.

REASONS FOR JUDGMENT - COSTS

¶ 1 **SOMERS J.** (endorsement):— At the conclusion of my reasons for judgment in this trial, I sought submissions from counsel on the question of costs. Both agreed that they would like to have time to consider their respective positions, and to make written submissions thereafter. These have now

been received. The successful defendant has submitted a bill of costs claiming the total amount of \$72,483.44 on a substantial indemnity basis, and \$51,312.94 on a partial indemnity basis. In both instances these include the assessable disbursements.

¶ 2 To begin with, it is well to recall the value of the piece of sculpture, which was the subject of this trial. The sculpture was crafted by Jozeph Reibesteisn. He really had no idea what it was worth, but when Mr. Hadjor, a convicted swindler and confidence man, said very grandly that he would pay \$27,000.00 for it, and give a down payment cheque of \$4,000.00, the sculptor quickly agreed. Later, Mr. Hadjor was able to persuade two different people that this piece of sculpture may have some value, if not as high as \$27,000.00, at least enough to secure a debt of some \$14,000.00. The expert witness called by the defence, William Kime, based on his considerable experience as a an auctioneer of fine art, gave the opinion that even in its unbroken condition, the piece was probably worth no more than about \$300.00. With all of this in mind, I am particularly concerned to see the costs escalating to a figure substantially larger than the amount at stake in the trial.

¶ 3 That said, while I confess that the trial went on far longer than necessary, I am unable to point to any unnecessary steps taken by either side which contributed to this.

¶ 4 Counsel for the successful defendant bases his claim for the costs on a substantial indemnity basis on the grounds that the case was frivolous and vexatious. I do not agree with this characterization. It is true the facts surrounding the claim were bizarre, but I am inclined of the view that the matter proceeded on a misconception of the law of assignments and on any rights, which would arise from this. Mr. Roach's considerable fee was jeopardized, I regret to say he is another victim of the wiles of Mr. Hadjor. Mr. Hadjor gave him reason to hope that recovery of the statue might see him paid, at least in part. As it developed, there was a very faint hope indeed, but the claim was never, in my view, frivolous. I am accordingly of the view that the matter should be assessed, but on a partial indemnity basis only.

¶ 5 As to the bill of costs itself, I have some concern about the claim for the time spent on the file by both a junior counsel and a student-at-law at the trial. Neither, in my view, was required. The case really turned upon an unusual set of facts, but they were not too difficult to follow.

¶ 6 More important to me is the disproportionate relationship between the value of the item in question in the action and the time spent. I am not at all satisfied that there should be compensation for all of the time spent regardless of the pettiness of the amount involved. To a certain extent, counsel should be encouraged to limit the time spent to bear some passing resemblance to what is genuinely at stake. In the exercise of my discretion, I assess the costs of the successful defendant in the amount of \$20,000.00, together with disbursements of \$2,484.44.

SOMERS J.

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