

COURT OF APPEAL FOR ONTARIO

CITATION: Ernst & Young Inc. v. Essar Global Fund Limited, 2018 ONCA 405

DATE: 20180427

DOCKET: C63581/C63588

Blair*, Pepall and van Rensburg JJ.A.

BETWEEN

Ernst & Young Inc. in its capacity as Monitor of all of the
following: Essar Steel Algoma Inc., Essar Tech Algoma Inc.,
Algoma Holdings B.V., Essar Steel Algoma (Alberta) ULC,
Cannelton Iron Ore Company and Essar Steel Algoma Inc. USA

Plaintiff (Respondent)

and

Essar Global Fund Limited, Essar Power Canada Ltd.,
New Trinity Coal, Inc., Essar Ports Algoma Holding Inc.,
Algoma Port Holding Company Inc., Port of Algoma Inc.,
Essar Steel Limited and Essar Steel Algoma Inc.

Defendants (Appellants/Respondent)

Patricia D.S. Jackson, Andrew Gray, Jeremy R. Opolsky, Alexandra Shelley and
Davida Shiff, for the appellants Essar Global Fund Limited, New Trinity Coal,
Inc., Essar Ports Algoma Holding Inc., Algoma Port Holding Company Inc., Port
of Algoma Inc., and Essar Steel Limited

Clifton P. Prophet, Nicholas Kluge and Delna Contractor, for the respondent
Ernst & Young Inc. in its capacity as Monitor of Essar Steel Algoma Inc. et al.

Eliot Kolers and Patrick Corney, for the respondent Essar Steel Algoma Inc.

Peter H. Griffin, Monique Jilesen, Robert Trenker and Kim Nusbaum, for the
appellants GIP Primus, L.P. and Brightwood Loan Services LLC

* Blair J.A. took no part in this costs endorsement.

Heard: In writing

On appeal from the judgment of Justice Frank Newbould of the Superior Court of Justice, dated March 15, 2017, with reasons reported at 2017 ONSC 1366, 137 O.R. (3d) 438 and from the costs order, dated June 29, 2017, with reasons reported at 2017 ONSC 4017, 50 C.B.R. (6th) 148.

COSTS ENDORSEMENT

[1] On consent, the parties fixed the quantum of the costs of the appeal. Being the unsuccessful parties, Essar Global Fund Limited, New Trinity Coal, Inc., Essar Ports Algoma Holding Inc., Algoma Port Holding Company Inc., Port of Algoma Inc., and Essar Steel Limited (collectively, “Essar”) and GIP Primus L.P. and Brightwood Loan Services LLC (collectively, “GIP”) are to pay Ernst & Young Inc. in its capacity as monitor of Essar Steel Algoma Inc., Essar Tech Algoma Inc., Algoma Holdings B.V., Essar Steel Algoma (Alberta) ULC, Cannelton Iron Ore Company, and Essar Steel Algoma Inc. USA (the “Monitor”) \$100,000 and Essar Steel Algoma Inc. (“Algoma”) \$60,000 in costs on a partial indemnity scale, inclusive of disbursements and applicable tax. However, the parties were unable to agree on whether liability for the costs should be several or joint and several.

[2] GIP submits that the costs payable by GIP and Essar should be paid on a several basis with a maximum of 20% of the costs award being apportioned to GIP and the remainder to Essar. Essar is unopposed to this submission.

[3] GIP submits that it would be unfair and disproportionate to award costs on a joint and several basis against GIP and Essar given that: GIP only appealed two discrete issues; was allocated only one-quarter of the time for argument that Essar was given; its interests differed from those of Essar; and it felt it had to act to protect its own interests.

[4] The respondents both submit that the costs should be payable on a joint and several basis. They argue that GIP did not confine itself to discrete issues on appeal but instead supported the broader position advanced by Essar. In addition, they state that GIP would have no difficulty paying the entire amount of the costs award and that the total costs award is a tiny fraction of the amount in issue on this appeal.

[5] Alternatively, they argue that the costs should be apportioned on a 75/25% basis as between Essar and GIP, in accordance with the time allocated for oral argument.

[6] We agree with GIP that the costs award should be proportional to its involvement. It had a more limited role than Essar and focused on different issues. The time allocated to GIP for oral argument reflected this reality. A joint and several award would be an unfair and disproportionate burden on GIP.

[7] In the circumstances, costs of the appeal of \$100,000 in favour of the Monitor and \$60,000 in favour of Algoma are awarded on a several basis with 25% being allocated to GIP and 75% to Essar.

“S.E. Pepall J.A.”

“K. van Rensburg J.A.”