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COURT OF APPEAL FOR ONTARIO

LABROSSE, ABELLA and CRONK JJ.A.

B E T W E E N:	)	
	)	
EDMOND MURPHY	)	R. Donald Rollo,
	)	for the respondent (plaintiff)
	)	(appellant on cross-appeal)
Plaintiff (Respondent, Appellant on cross-appeal)	)	
	)	
- and -	)	
	)	
PAM ALEXANDER, STEVEN MORRIS, RE/MAX PROFESSIONALS INC., FRANK POLZLER and RE/MAX ONTARIO-ATLANTIC CANADA INC.	)	John D. Campbell,
	)	for the appellants (defendants)
	)	(respondents on cross-appeal),
	)	RE/MAX Professionals Inc. and
	)	RE/MAX Ontario-Atlantic Canada Inc.
	)	
Defendants (Appellants, Respondents on cross-appeal)	)	
	)	
	)	
	)	Heard: September 5, 2003

On appeal from the judgment of Justice John R. Belleghem of the Superior Court of Justice dated December 31, 2001.

CRONK J.A.:

[1] These proceedings arise from the wrongful dismissal and subsequent defamation of a real estate agent by one of the principals of his former employer, a real estate brokerage firm in Ontario.

[2] Three questions require determination by this court. First, where a plaintiff is slandered by the same person on two separate occasions and an action concerning the first slander is statute-barred due to the expiry of a limitation period, is it permissible in assessing damages for the second slander to have regard to the consequences of the first slander? Second, where a plaintiff prosecutes separate causes of action against two

defendants in a single action and is unsuccessful against one defendant but is successful against the other defendant, is it a wrongful exercise of a trial judge's discretion to deny costs to the successful defendant and to require the unsuccessful defendant to pay the plaintiff's entire costs of the litigation? Third, on the facts of this case, did the trial judge err in declining to require reimbursement to the plaintiff of contributions made by him under his employment contract to a group advertising fund?

I. BACKGROUND

(1) The Parties, the Ad Fund and the Events

(a) Parties

[3] In about 1980, Frank Polzler obtained the rights to operate "RE/MAX" real estate brokerage firms in Ontario and Eastern Canada from RE/MAX of America, Inc., subsequently known as RE/MAX International, Inc. ("RE/MAX International"). Polzler's company, RE/MAX Ontario-Atlantic Canada Inc. ("RE/MAX Ontario") granted a RE/MAX franchise to RE/MAX Professionals Inc. ("Professionals"). Various other RE/MAX franchises were created over time, including RE/MAX Supreme Realty Limited ("Supreme"), which was owned by Leo Latini.

[4] Initially, Professionals was owned by Polzler. By 1989, Pam Alexander, Polzler's daughter, and Steven Morris, Professionals' office manager, had acquired ownership of Professionals.

(b) Ad Fund

[5] Under RE/MAX International's business model, RE/MAX offices pooled marketing and advertising costs, subscribed to a common business organization and practices, and marketed their real estate agents to the public as "RE/MAX" agents. Each agent contributed to a group advertising fund established by regional RE/MAX brokerage firms to finance the collective business promotion efforts of participating RE/MAX agents (the "Ad Fund"). In Ontario, the Ad Fund was initially administered by RE/MAX Ontario. Subsequently, RE/MAX Promotions Inc. ("Promotions"), was created to administer the Ad Fund.

[6] In July 1982, RE/MAX International issued a directive ("Directive 801") concerning institutional advertising fund administration. As relevant to these proceedings, Directive 801 detailed those expenditures properly to be made from regional institutional advertising funds and those expenditures which were unauthorized. Such items as recruiting and awards banquet expenses fell within the latter category.

[7] Directive 801 was revised in March 1988 by RE/MAX International. The revised version also provided that expenditures from regional group advertising funds should not

be made on such items as recruiting and awards banquets. The revised version also stipulated: "All monies paid into the Regional Group Advertising Fund become the property of the Fund" and "Once paid, there will be no refunds of Regional Group Advertising Fees."

(c) Events

[8] Edmond Murphy was employed by Professionals as a real estate agent from August 1983 until September 1989. His written contract of employment with Professionals, dated December 18, 1986, stated:

> The Employee shall pay such regional institutional advertising levy as is from time to time set by [RE/MAX Ontario] to be payable by RE/MAX sales person[s] generally. Such payments will be used only in respect of advertising costs incurred by [RE/MAX Ontario].

During his employment with Professionals, Murphy contributed $4,875 to the Ad Fund.

[9] Murphy and Morris had a troubled working relationship. At a meeting of Professionals' agents in early September 1989, Murphy and Morris exchanged angry words concerning Professionals' policy for the allocation among agents of "cold calls" from prospective clients. The argument continued after the meeting, shifting to complaints by Murphy regarding the administration of the Ad Fund. Later the same day, Morris informed Murphy that he was to leave Professionals' employ immediately. The next day, Morris met with Murphy and again indicated that Murphy was to leave Professionals. Murphy refused to do so, insisting on the notice period for termination of his employment that he felt was provided for under his employment contract. Ultimately, Morris prevailed and Murphy left the employ of Professionals on September 13, 1989. Murphy claimed that he was wrongfully dismissed. Professionals maintained that he had voluntarily submitted his resignation. Shortly after his departure from Professionals, Murphy began to work as a RE/MAX agent with Supreme.

[10] About six months later, on Friday, March 23, 1990, Murphy went to Professionals' office to speak with Morris because he believed that Professionals was not forwarding his business calls to him at Supreme, resulting in a loss to Murphy of prospective business. Murphy was told that Morris was not in the office. After visiting with various of the agents and staff of Professionals, Murphy left without speaking to Morris.

[11] On the following Monday, March 26, 1990, Morris telephoned Latini at Supreme. According to Latini, Morris was irate. Morris told Latini that Murphy had gone to Professionals' office with a gun and had threatened people, including Morris. He said that the police had been called. Morris also told Latini that he should get Murphy "out of

the system", and that Murphy was "a dangerous man" (collectively, the "March Statements"). Latini promised to investigate the matter.

[12] Latini then arranged for one of Supreme's assistant managers to seek a report from Murphy, with instructions that Murphy provide a copy of the report to RE/MAX Ontario and to the police. Murphy provided the report in the form of a letter to Latini dated March 27, 1990. In his letter, Murphy denied the allegations made by Morris and stated, in part: "I can only infer that the response made by Management at [Professionals] was a premeditated and deliberate attempt to character assassination [*sic*] and to destroy my reputation." Murphy also requested an explanation for Morris' allegations.

[13] Latini accepted Murphy's letter, but warned him that if any future difficulties arose, he would be fired. Although Latini also forwarded a copy of Murphy's letter, containing Murphy's request for an explanation, to Professionals and to RE/MAX Ontario, no response was forthcoming from either company. Nonetheless, Murphy's employment with Supreme continued.

[14] One of Murphy's former co-workers at Professionals later telephoned him to warn him that Professionals had called the police and that he should stay away from Professionals' office. According to Murphy, although he was never contacted by the police, he was required frequently to respond to people in the industry who asked him if he had really gone to Professionals' office with a gun. According to Latini, Murphy became known in the real estate community as "the madman". He was the target of numerous jokes concerning "guns" and "bombs", and rumours flourished concerning his alleged conduct.

[15] In late August 1990, Morris met Latini for lunch at a restaurant to discuss various business matters. No one else was present at the lunch. When the subject of Murphy came up, Morris again told Latini that Murphy "had a gun" and reiterated that Murphy was "a dangerous man". Morris also inquired if Murphy was still working with Latini and said: "We [need] to get him out of the system" (collectively, the "August Statements").

[16] Supreme's business failed in October 1990. Thereafter, Murphy worked for several different RE/MAX brokerage firms in Ontario.

[17] Morris left Professionals in November 1990. Upon his departure, Alexander acquired his interest in the company. Morris subsequently filed an assignment in bankruptcy.

(2) The Litigation

(a) Proceedings Before the Trial Judge

[18] On August 20, 1992, Murphy sued Alexander, Morris, Professionals, RE/MAX Ontario and Polzler, seeking damages as against all of the defendants, save for RE/MAX Ontario, for breach of fiduciary duty, breach of contract, wrongful dismissal, unlawful interference in economic relations and injurious falsehoods, together with pre- and post-judgment interest and costs.

[19] Murphy's claims as against RE/MAX Ontario concerned the administration of the Ad Fund and the propriety of certain expenditures made from it. Murphy asserted that his contributions and those of other RE/MAX agents to the Ad Fund were used for unauthorized purposes. He sought a declaration that RE/MAX Ontario owed him a fiduciary duty, an accounting of all contributions made to and all disbursements made from the Ad Fund for the period January 1, 1983 to September 30, 1989, damages in an amount equivalent to the amount of his own contributions to the Ad Fund that were not spent on advertising, damages for injurious falsehoods, general and punitive damages, pre- and post-judgment interest, and costs.

[20] Murphy's action as against Alexander and Polzler was dismissed in November 1992. Morris did not defend Murphy's action and was noted in default. Murphy's action against the remaining defendants was tried before Belleghem J. of the Superior Court of Justice over 11 days in February and April 2001. Morris did not testify at trial and, hence, did not deny the March and August Statements.

[21] In his reasons for judgment dated December 31, 2001, the trial judge held that:

> (i) Murphy was wrongfully dismissed by Professionals, in breach of his employment contract;
>
> (ii) the March and August Statements by Morris were defamatory and motivated by malice;
>
> (iii) Professionals was vicariously liable for Morris' defamation of Murphy;
>
> (iv) Murphy's cause of action regarding the March Statements was statute-barred by virtue of the expiry of the two year limitation period established under s. 45(1)(i) of the *Limitations Act*, R.S.O. 1990, c. L. 15 (the "Act");

(v) Murphy's action as against Morris should be stayed because Murphy failed to obtain court authorization permitting him to continue the action against Morris after Morris' bankruptcy; and

(vi) Murphy was not entitled to an accounting concerning the Ad Fund or to the return of his own contributions to the Ad Fund.

[22] The trial judge awarded Murphy the total amount of $90,000 as against Professionals on account of damages for defamation, plus the amount of $15,000, also as against Professionals, on account of damages for wrongful dismissal. Murphy's claims against RE/MAX Ontario were dismissed. By supplementary reasons dated August 29, 2002, the trial judge awarded Murphy pre-judgment interest and his costs of the litigation on a partial indemnity basis as against Professionals, including his costs of prosecuting his unsuccessful claims against RE/MAX Ontario. He declined to award costs in favour of RE/MAX Ontario.

(b) Appeal and Cross-appeal

[23] Professionals and RE/MAX Ontario do not challenge the trial judge's liability findings. Rather, Professionals seeks to vary the trial judgment by restricting the damages awarded for defamation to only those damages flowing solely from the August Statements. As well, both companies seek leave to appeal the costs disposition of the trial judge and, if leave be granted, appeal his costs award, seeking to vary it: (i) by directing that Professionals is not liable to pay any costs incurred by Murphy in advancing his unsuccessful claims against RE/MAX Ontario; and (ii) by awarding RE/MAX Ontario its costs of the action on a partial indemnity scale.

[24] Murphy, in turn, cross-appeals from the trial judge's finding that he is not entitled to reimbursement of his own contributions to the Ad Fund. He does not challenge the trial judge's holding that he is not entitled to a general accounting of the contributions made to and the disbursements made from the Ad Fund.

[25] For the reasons that follow, I would allow the appeal, in part, by setting aside the award of damages for defamation and the associated award of pre-judgment interest, substituting in their stead orders requiring Professionals to pay Murphy general damages for defamation in the sum of $10,000, together with pre-judgment interest calculated in accordance with the trial judge's pre-judgment interest ruling, varied as necessary to conform with these reasons. I would also grant leave to appeal costs and dismiss the balance of the appeal and the cross-appeal.

II. ISSUES

[26] Professionals and RE/MAX Ontario assert that the trial judge erred:

> (i) in his assessment of damages for defamation, by confusing the damages arising from the March Statements with the damages flowing from the August Statements, thereby awarding damages in respect of the cause of action in defamation that was statute-barred; and
>
> (ii) in his assessment of costs, by declining to award costs to RE/MAX Ontario and by ordering Professionals to pay Murphy's entire costs of the action.

As well, Murphy asserts in his cross-appeal that the trial judge erred in failing to require reimbursement to him of his personal contributions to the Ad Fund. As the Ad Fund claims are relevant to the trial judge's assessment of costs, I will address the issues in these proceedings in the following order: (1) the assessment of damages for defamation; (2) the Ad Fund claims; and (3) the assessment of costs.

III. ANALYSIS

(1) The Assessment of Damages for Defamation

[27] The trial judge's award of damages to Murphy for defamation consisted of: (i) $45,000 for special damages concerning ongoing loss of income from 1990 to 1994; (ii) $30,000 for general damages; and (iii) $15,000 for aggravated damages. The trial judge declined to award punitive damages.

[28] Professionals argues that in his assessment of these damages, the trial judge confused the damages arising from the March Statements with the damages flowing from the August Statements, thereby improperly awarding compensation for injuries arising from the March Statements notwithstanding that Murphy's claims concerning them were not actionable. I agree that in assessing damages for defamation, the trial judge was obliged to distinguish the damages flowing from the March Statements, in respect of which an action was barred due to the expiry of a limitation period, from the damages flowing from the August Statements, in respect of which the prescription period was not engaged. I also agree that the trail judge failed to draw this distinction in this case and that this failure constitutes reversible error.

[29] An award of general or aggravated damages for defamation is intended to compensate the injured plaintiff for the harm occasioned by the defamatory statement. General damages in defamation cases are presumed from the fact of the slander or of the

publication of the false statement. The law presumes that some damage will flow in the ordinary course from the invasion of the plaintiff's rights: see *Ratcliffe v. Evans*, [1892] 2 Q.B. 524 at 528 (C.A.) and *Hill v. Church of Scientology of Toronto* (1995), 126 D.L.R. (4th) 129 at 176 (S.C.C.). In such cases, general damages are said to be "at large", in the sense that an award of damages may include elements for reputational loss, injured feelings, bad or good conduct by either party, or punishment. In essence, such an award is not limited to the pecuniary loss that has been specifically established: see *Cassell & Co. v. Broome*, [1972] A.C. 1027 at 1071 and 1073 (H.L.), *per* Lord Hailsham. The presumption of damages, however, may be rebutted.

[30] In this case, Latini, Murphy's employer at the time of both the March and the August Statements, testified that the March Statements made him "pretty nervous" and "quite terrified" because he was uncertain of what action Murphy might be capable in the circumstances. He also said that the rumours concerning Murphy were rampant in the real estate community and that the circle of realtors involved with Supreme all knew who the "madman" was after the March 1990 incident.

[31] In connection with the August Statements, Latini testified that he did not repeat the August Statements to anyone else and that they did not cause him to further investigate Murphy's conduct. He also said, however, that to the date of the trial, he was still being asked whether he had "talked to the madman lately".

[32] Murphy testified at trial that he continued to be asked about the alleged gun incident consistently, "even to the present day". However, he made no mention in his testimony of the August Statements or of events flowing therefrom.

[33] Thus, as asserted by Professionals, there was evidence before the trial judge which, if accepted by him, would support the conclusion that most, and arguably all, of the damages sustained by Murphy flowed from the March Statements.

[34] Murphy does not cross-appeal from the trial judge's holding that his claims concerning the March Statements were statute-barred. In addition, Murphy does not dispute that each occasion of slander is a separate delict, giving rise to a separate cause of action and a separate head of damages. Consequently, Murphy is not entitled to recover damages for those injuries and losses arising from the March Statements, although he is entitled to recover damages for defamation in relation to the August Statements.

[35] Given these circumstances, it was incumbent on the trial judge to distinguish between the damages flowing from the August Statements in comparison to the damages flowing from the March Statements, to the extent that the evidence permitted him to do so. Read as a whole, in my view, the trial judge's reasons for judgment indicate that he failed to do so. I reach this conclusion for the following reasons.

[36] The trial judge began his assessment of damages for defamation by stating:

> Moving on to damages then, I am satisfied that Murphy's reputation in the real estate community was damaged as a result of the defamation by Morris.
>
> …
>
> I am satisfied it is more likely than not Murphy lost some real estate deals because of his tarnished reputation.

In making those findings, the trial judge made no reference to the fact that Murphy's action concerning the March Statements and, hence, his claim for relief regarding the March 1990 slander, was statute-barred.

[37] The trial judge next considered Murphy's claim for special damages. He observed that it was "difficult, if not impossible" to separate the special damages sustained by Murphy in consequence of "Morris' defamation of him" from the special damages occasioned by Morris' wrongful termination of Murphy's employment. He made no mention, however, of the need to separate the damages sustained by Murphy as a result of the March Statements from those damages arising from the August Statements. As well, in quantifying the special damages to be awarded to Murphy on account of lost income for the years 1990 to 1994, no differentiation was made by the trial judge between the damages attributable to the March Statements and those flowing from the August Statements; nor was an analysis undertaken as to whether, given Latini's evidence at trial regarding the August Statements, the August Statements in fact caused Murphy to lose income in those years.

[38] In addition, no such distinction was drawn by the trial judge in assessing the general and aggravated damages to be awarded to Murphy. To the contrary, the trial judge's reasons indicate that he focused on the August Statements as aggravating the damages occasioned by the March Statements. The trial judge wrote in that regard:

> Morris displayed actual malice. He knew the allegations were false or was reckless as to their veracity.
>
> The nature of the words used border on vicious…*The fact that Murphy repeated those words demonstrates ongoing hostility and malice towards Murphy.*
>
> The use of the words about getting Murphy "out of the system" strikes at the heart of his vocation as a real estate agent. Murphy's reputation in the real estate community as being "the mad man" testified to by witnesses demonstrates that the story "caught on". It is impossible to determine how widespread it became. There can be no doubt whatever that

> Mr. Murphy was personally wounded by this vicious attack by his superior during the ongoing course of trying to "remove him from the (Re/Max) system". *His former boss continued to press these allegations to those vocationally closest to Murphy, undoubtedly much to Murphy's chagrin* [emphasis added].

[39] As well, in commenting earlier in his reasons on the August Statements, the trial judge indicated that they were "part and parcel of the ongoing tarnishment of Murphy's reputation in the real estate community and, as a result, *contributed to the damages sustained by Murphy as a result of this particular defamation* [emphasis added]". This statement again indicates that the trial judge regarded the August Statements as aggravating the damages sustained by Murphy in consequence of the earlier slander in March 1990.

[40] Murphy argues that in assessing damages for defamation, particularly where, as here, malice is demonstrated, it is permissible to have regard to additional defamatory remarks made by the defendant, both before and after the defamation sued upon, to show surrounding circumstances and a history of animus between the parties. It is true that in assessing damages for defamation, particularly aggravated damages, the court is entitled to consider the entire conduct of the defendant, both before and after an action is commenced, as well as in court during the trial: see for example, *Cassell & Co., supra*, at 1071-72 and *Hill v. Church of Scientology*, *supra*, at paras. 182-83 and 189. Thus, R.E. Brown, in *The Law of Defamation in Canada*, 2d ed. (Toronto: Carswell, 1994) states at 1500: "The reiteration of the defamatory charge at different times and at different places by the defendant may be taken into consideration in fixing the damages."

[41] In the same text, however, Brown also states at 1501: [W]hile the evidence is admissible in aggravation of damages, *no damages may be directly awarded for any defamatory remarks that are not the subject-matter of the cause of action*" [emphasis added]. Similarly, in *McElroy v. Cowper-Smith*, [1967] S.C.R. 425 at 429, *per* Spence J. dissenting on other grounds, the following passage from *Pearson v. Lemaitre* (1843), 5 Man. & G. 700 at 719-20 is quoted with approval:

> And this appears to us to be the correct rule, viz. that either party may, with a view to the damages, give evidence to prove or disprove the existence of a malicious motive in the mind of the publisher of defamatory matter; *but that, if the evidence given for the purpose, establishes another cause of action, the jury should be cautioned against giving any damages in respect of it* [emphasis added].

[42] In this case, no issue arises concerning the admissibility at trial of evidence concerning the March and the August Statements. What is at issue is whether the trial

judge's assessment of damages properly ensured that no damages were awarded for the March Statements and granted relief for only those damages attributable to the August Statements. I am unable to conclude on the basis of the trial judge's reasons that the damages assessment here satisfied those requirements.

[43] In my view, read as a whole, the trial judge's reasons indicate that he undertook a global assessment of damages for defamation concerning both the March and the August Statements and that he did not determine the damages arising solely from the August Statements. That approach to the assessment of damages for defamation gave no meaningful effect to the expiry of the applicable limitation period concerning the March Statements.

[44] Accordingly, I would allow the appeal, in part, by setting aside the award of damages for defamation. I agree with Professionals that it is appropriate in this case for this court to fix the damages to which Murphy is entitled as a result of the proven defamation occasioned by the August Statements.

[45] In that connection, Professionals submits that Murphy is entitled to nominal damages only concerning the August Statements. Since Latini testified that he did not repeat the August Statements and that he was alone with Morris when they were made, and because there was no evidence that Murphy was aware of the August Statements, Professionals contends that the presumption of damages arising from the August Statements was rebutted. It argues that on this evidence, the reputational damage that the trial judge found had been suffered by Murphy could not have been caused by the August Statements.

[46] I agree that the evidence of damages arising from the August Statements is weak. Nonetheless, several witnesses at trial indicated that the tarnishing of Murphy's reputation continued to the date of the trial. As well, as I have said, Murphy confirmed that he was still being questioned about the alleged gun incident long after the utterance of the August Statements. Latini testified that he was still being asked at the time of the trial whether he had "talked to the madman lately". Although Latini also said that the August Statements did not cause him to undertake further investigation of Murphy's alleged conduct, he did not indicate that the August Statements had *no* effect on his view of Murphy.

[47] I agree with Professionals that the evidence does not support an award of special or aggravated damages with respect to the August Statements. However, in my view, there is some evidence in this case to ground an award of general damages. The August Statements were made to Murphy's employer. They cast serious doubt upon Murphy's behaviour and integrity. The trial judge found that they exacerbated the injuries previously caused to Murphy by the earlier, statute-barred slander. Murphy's defamatory actions, for which Professionals is liable, were motivated by malice. Proof of actual damage is not required. On the evidence, the presumption of damages was not fully

rebutted. Accordingly, Murphy is entitled to be compensated for the wrong inflicted upon him by the August Statements. In all of the circumstances, I conclude that an award of general damages in the sum of $10,000 is appropriate in connection with the defamation occasioned by the August Statements.

(2) The Ad Fund Claims

[48] At trial, Murphy argued that the terms of his employment contract with Professionals required that his contributions to the Ad Fund be used only for advertising, that RE/MAX Ontario owed him a fiduciary duty with respect to the Ad Fund, and that his monthly contributions for advertising were held in trust by RE/MAX Ontario. He further argued that the Ad Fund was mismanaged by the expenditure of contributions on activities such as awards dinners and recruiting in contravention of Directive 801. Murphy sought an accounting of all of the contributions made to the Ad Fund by RE/MAX agents and the reimbursement of his own contributions.

[49] In his reasons, the trial judge remarked that "RE/MAX", the organization, kept relatively poor financial records as they related to RE/MAX agents. However, in the end, he held that Murphy did not have status to claim an accounting of all contributions to and expenditures from the Ad Fund. As I have said, Murphy does not challenge that holding.

[50] The trial judge also rejected Murphy's claim for reimbursement of his own contributions to the Ad Fund. In doing so, the trial judge concluded that, in reality, this claim was *de minimus*, for two reasons.

[51] First, the trial judge held that any reimbursement claim concerning most of Murphy's contributions to the Ad Fund was statute-barred. The reimbursement claim was not advanced until August 1994. Accordingly, the claim for reimbursement of contributions made prior to August 1988 was barred by virtue of the expiry of a six year limitation period established under the Act. Murphy does not contest that holding in these proceedings. In addition, as also held by the trial judge, the value of the remainder of Murphy's contributions, that is, those contributions made during the period August 1988 to September 1989, was minimal. The trial judge commented: "[T]he only amount contributed which is not statute-barred would be something less than $1,000."

[52] Second, Murphy's reimbursement claim concerned only those expenditures from the Ad Fund that were alleged by him to be unrelated to advertising and unauthorized by Directive 801. As the trial judge noted, when only these expenditures were considered in the context of that part of Murphy's reimbursement claim that was not statute-barred, something less than $1,000 was in issue.

[53] In view of these factors, the trial judge concluded that Murphy's reimbursement claim was reduced from about $1,000 to a "relatively insignificant" amount. He also

concluded that Murphy had not demonstrated any improper use of the monies in the Ad Fund. There was ample evidence before the trial judge to support those conclusions.

[54] For these reasons, in my view, the trial judge's decision to dismiss Murphy's claim for reimbursement of his contributions to the Ad Fund is unassailable.

(3) The Assessment of Costs

[55] A trial judge has a broad discretion regarding the awarding of costs in civil proceedings. Appellate courts are loathe to interfere with a trial judge's exercise of discretion concerning costs save in very limited circumstances: see *Bell Canada v. Olympia & York Developments Ltd.* (1994), 17 O.R. (3d) 135 at 141-42 (C.A.); *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3 at 32; and *Mete v. Guardian Insurance Co. of Canada* (1998), 165 D.L.R. (4th) 457 at paras. 15-16 (Ont. C.A.). Accordingly, absent an error in principle, an appellate court will not interfere with a trial judge's costs disposition even if it concludes that it would have exercised discretion concerning costs in a different way.

[56] In this case, it is useful to observe at the outset that the trial judge's costs disposition constituted neither a "Bullock" order, nor a "Sanderson" order. These types of costs orders are described by M.M. Orkin in *The Law of Costs*, 2d ed. (Aurora: Canada Law Book Inc., 2003) at 2-77 as follows:

> Where a plaintiff recovers judgment against one of several defendants and the action is dismissed against the others, in the normal course the plaintiff will be entitled to costs against the unsuccessful defendant, and the successful defendant will be entitled to costs against the plaintiff. However, where the allocation of responsibility between defendants is uncertain, usually because of interwoven facts, it is often reasonable for a plaintiff to proceed through trial in order to establish liability. In this situation the courts have devised two alternatives known respectively as a Bullock order and a Sanderson order. Simply put, a Bullock order directs an unsuccessful defendant to reimburse the plaintiff for the costs of the successful defendant; a Sanderson order directs that the payment go directly to the successful defendant.

[57] Thus, under both a Bullock and a Sanderson order, a successful defendant recovers its costs and the issue for determination by the court concerns which party, as between the plaintiff and the unsuccessful defendant, should bear responsibility for the payment of those costs. That is not this case. Here, the successful defendant was denied its costs and the unsuccessful defendant was obliged to pay the plaintiff's costs of proceeding both as

against it and as against the successful defendant. In my view, for the reasons that follow, there is no basis upon which to interfere with this costs disposition.

(a) Denial of Costs to RE/MAX Ontario

[58] The trial judge rejected RE/MAX Ontario's claim for its costs of the action, notwithstanding its success at trial, on three grounds. First, in his view, both prior to and during the trial, RE/MAX Ontario and Professionals improperly resisted their documentary production obligations relating to the Ad Fund. Second, RE/MAX Ontario and Professionals were represented throughout the litigation by the same legal counsel. Third, the interests of RE/MAX Ontario and Professionals in the litigation were similar and interwoven such that they should not be entitled to separate costs considerations.

[59] The general costs recovery rule, namely, that costs follow the event, supports RE/MAX Ontario's claim for its costs of the action. However, this is not an absolute rule; nor is success in an action the only relevant factor to be considered in determining an appropriate and just costs disposition.

[60] The trial judge based his denial of costs to RE/MAX Ontario, in part, on its conduct in the litigation. That is a relevant consideration in the decision whether to award or deny costs and in deciding an appropriate quantum of costs if they are to be awarded: see for example, rule 57.01(1)(e) of the *Rules of Civil Procedure*.

[61] The trial judge concluded that RE/MAX Ontario and Professionals failed to make timely disclosure of documents relevant to the determination of the issues concerning the Ad Fund. In his ruling on costs, he said:

> More importantly, however, is the fact that much of the pretrial proceedings related to the "ad fund" issue. In fact, *the efforts taken by the defendants to resist producing documentation relating to the use of the ad fund continued even throughout the trial. It was not until late in the trial that much of the evidence that could have been, and ought to have been produced far earlier was eventually produced*. The evidence in this regard was characterized by plaintiff's counsel as an "ambush" by the defendant [RE/MAX] Ontario. He points out that [RE/MAX] Ontario had steadfastly resisted making efforts to obtain the material that the plaintiff was requesting in order to prosecute his "ad fund" complaint [underlined emphasis in original; other emphasis added].

[62] Although RE/MAX Ontario asserts that it was relieved from any obligation to produce much of this documentation under various pre-trial court orders, it does not dispute that a letter dated January 31, 2001 from RE/MAX International to RE/MAX

Ontario was not produced to Murphy or his counsel until six days before trial. This letter dealt with the administration of the Ad Fund, the application of Directive 801 to RE/MAX Ontario and the propriety of certain expenditures from the Ad Fund, including expenditures to subsidize Ontario awards dinners for agents.

[63] Thus, the January 31, 2001 letter was directly relevant to several of the claims advanced by Murphy concerning the Ad Fund. Moreover, on its face, the letter appeared to contradict a written statement made by RE/MAX International in an earlier letter to Murphy dated November 23, 1994 in which the author of the letter stated on behalf of RE/MAX International: "[W]e have no knowledge or information regarding how RE/MAX Ontario expended its ad fund money." For these reasons, the letter was potentially a key document at trial.

[64] The January 31, 2001 letter was tendered as an exhibit at trial by counsel for RE/MAX Ontario and Professionals when he was cross-examining Murphy. Although it was not tendered for the proof of the truth of its contents, it was relied upon by RE/MAX Ontario and Professionals on the issue of Murphy's knowledge of RE/MAX International's position concerning expenditures from the Ad Fund. The author of the letter was not called as a witness at trial.

[65] In his ruling on costs, the trial judge stated in connection with the January 31, 2001 letter:

> It is true that the "ad fund" issue turned out, in my judgment, to be a "red herring". It is also true that as the plaintiff's counsel argues in his factum:
>
> > …were it not for the defendants' campaign of attrition on the "ad fund" issue, culminating in the ambush shortly before trial in the form of the [January 31, 2001] letter, Mr. Murphy may have been able to reassess his position many years ago.
> >
> > ….
> >
> > They both demonstrated resistance to producing material required under the *Rules of Practice*.

[66] These comments weighed heavily in the trial judge's reasoning for his costs disposition concerning both RE/MAX Ontario and Professionals.

[67] In connection with RE/MAX Ontario, it was clearly open to the trial judge to conclude that the late disclosure of the information contained in the January 31, 2001

letter evidenced an unwillingness or failure by RE/MAX Ontario to disclose information on a timely basis that may have clarified the issues in dispute regarding the Ad Fund at an earlier stage of the litigation.

[68] In addition, the pre-trial history of this action is characterized by numerous productions and refusals motions. The record indicates that Murphy repeatedly attempted to obtain production of information and documents concerning the Ad Fund issues from RE/MAX Ontario and, in some instances, from Professionals. While I accept RE/MAX Ontario's assertion that it was relieved by some pre-trial court orders from the obligation to produce many of the documents or information sought by Murphy, several pre-trial orders required it to produce documents, or to answer questions asked of it, concerning the Ad Fund. During the course of the trial, RE/MAX Ontario and Professionals produced various working papers of PriceWaterhouse through a witness from that firm. Murphy alleged, and in my view the trial judge implicitly accepted, that these materials included at least some documents concerning the Ad Fund that should have been produced prior to trial.

[69] Thus, the facts found by the trial judge concerning RE/MAX Ontario's conduct in the action support his decision to deny RE/MAX Ontario its costs of the litigation notwithstanding its success at trial and the normal costs recovery rule. There was evidence to support those factual findings. Consequently, I am not persuaded that there is any basis for interfering with the trial judge's exercise of discretion in denying costs to RE/MAX Ontario. As I will discuss next, I reach a similar conclusion concerning the scope of the costs award made by the trial judge against Professionals.

(b) Scope of the Costs Award Against Professionals

[70] Professionals argues that it is fundamentally unjust for it to be held liable for Murphy's costs incurred in unsuccessfully suing RE/MAX Ontario. In addition to his comments concerning Professionals' compliance with its documentary production obligations, which I have earlier reproduced, in his costs ruling the trial judge stated as follows regarding Professionals:

> The secondary issue, that is whether there should be a discount in the plaintiff's costs against [Professionals], on the basis that the bulk of the trial time (and for that matter a very large portion of the pre-trial litigation [and] preparation), related to the "ad fund" issue, is more readily disposed of. Even the defendants concede that a "distributive" approach to costs is inappropriate and forms the basis of its claim of costs on behalf of RE/MAX Ontario against the plaintiff.

> Utilizing the same principle, I am satisfied that there was sufficient overlapping of the interests and evidence of all of the defendants, that not only should the plaintiff not be required to pay the costs of the "successful" defendant RE/MAX Ontario, but he should not be deprived of his costs against the unsuccessful defendants, [Professionals] and Morris.

[71] As well, earlier in his costs ruling, the trial judge observed: "[B]oth companies were either owned or substantially controlled by the co-defendants Alexander and Polzler. Mr. Polzler is Ms. Alexander's father. It was very much in the interest of both corporate defendants to resist all aspects of the plaintiff's claims. This could effectively be done through one solicitor. They should not be entitled to two separate costs considerations."

[72] The trial judge appears to have regarded the proposition that Professionals not be held liable for Murphy's costs of prosecuting his claims against RE/MAX Ontario as an invitation to make a distributive costs order. Under that approach to the allocation of costs, the major issues at trial are identified and the party who is successful on each issue is awarded costs for the time and expense attributable to that issue. In *Armak Chemicals Ltd. v. Canadian National Railway Co.* (1991), 5 O.R. (3d) 1 (C.A.), leave to appeal to S.C.C. refused [1992] 1 S.C.R. vi, this court generally rejected the appropriateness of distributive cost orders in litigation involving multiple issues where success is divided, on the basis that such orders are inconsistent with the rules of procedure concerning offers to settle. Although the possibility of a distributive costs order is not completely foreclosed in a proper case, such an order will be appropriate only in rare circumstances, if at all: *Skye v. Matthews*, [1996] O.J. No. 44 at paras. 15 and 19 (C.A.).

[73] In my view, the allocation of costs in this case is not controlled by the principles applicable to distributive costs orders. The relevant costs issue here does not concern multiple issues between the same parties, where success is divided. Rather, it involves the costs associated with unsuccessfully prosecuting a cause of action against one defendant in the same action in which separate and distinct causes of action are successfully prosecuted against another defendant.

[74] Nonetheless, on the facts here, I am not persuaded that the trial judge's costs disposition against Professionals was a wrongful exercise of discretion.

[75] Murphy's claims concerning the Ad Fund, as framed by him in his amended, amended statement of claim, implicated both RE/MAX Ontario and Professionals. For example, he alleged that Professionals breached its written employment contract with him in respect of the Ad Fund. Murphy's pleading, therefore, triggered Professionals' production obligations under the *Rules of Civil Procedure* concerning the Ad Fund. In

addition, as I have previously indicated, several of the pre-trial productions motions concerned Professionals' obligations in respect of both the Ad Fund and other issues. The trial judge concluded on the evidence, as he was entitled to do, that Professionals did not satisfy its production obligations in a timely fashion. Accordingly, Professionals' own conduct in the litigation grounded the costs award made against it.

[76] As well, I do not agree with Professionals' assertion that the trial judge erred in taking into account the relationship between the principals of Professionals and RE/MAX Ontario when arriving at his costs disposition. The interests of both companies were similar in the litigation at least with respect to the Ad Fund. They co-operated in their defences to Murphy's claims including, in particular, in their response to the Ad Fund issues, and they were represented throughout the litigation by the same counsel. These factors are legitimate considerations in assessing the scope of the costs award to be made against Professionals.

[77] It is important to remember that this trial lasted 11 days and that in his costs ruling, the trial judge expressly indicated that Murphy's claims concerning the Ad Fund occupied more than 50% of the time expended at trial and "a very large portion of the pre-trial litigation [and] preparation". Both the length of the trial and the costs of the litigation, therefore, were driven in significant measure by the Ad Fund issues – the very issues in respect of which the trial judge held that both Professionals and RE/MAX Ontario had not fully met their obligations under the *Rules of Civil Procedure*.

[78] I conclude, therefore, that there is no basis upon which to interfere with the trial judge's discretionary decision to hold Professionals responsible for Murphy's litigation costs incurred in prosecuting his claims against RE/MAX Ontario.

IV. DISPOSITION

[79] For the reasons given, I would allow the appeal, in part, by setting aside paragraph one of the trial judgment and substituting in its stead an order requiring Professionals to pay Murphy the total sum of $25,000 for damages, comprised of $15,000 on account of the damages awarded by the trial judge for Murphy's wrongful dismissal and the additional sum of $10,000 as damages for defamation occasioned by the August Statements. I would also set aside paragraph two of the trial judgment, which concerns pre-judgment interest, and substitute in its stead an order directing that Professionals pay Murphy pre-judgment interest calculated in accordance with the trial judge's pre-judgment interest ruling, varied as necessary to conform with these reasons. Finally, I would grant leave to appeal costs and dismiss the balance of the appeal and the cross appeal.

[80] Professionals sought leave of this court to make further submissions on other aspects of the costs of the trial if it was successful on its challenge of the trial judge's assessment of damages for defamation. As I have concluded that the appeal should be

allowed on the issue of the damages assessment, Professionals, if so advised, may deliver its additional written submissions concerning the costs of the trial to the Registrar of this court within 10 days from the date hereof. Murphy shall deliver his written responding submissions, if any, to the Registrar within 10 days from the date of his receipt of Professionals' submissions.

[81] Viewed as a whole, success in these proceedings has been divided. Accordingly, this is not an appropriate case for an award of costs with respect to the appeal or the cross-appeal.

RELEASED:

"FEB 27 2004" "E.A.Cronk J.A."

"EAC" "I agree J.M. Labrosse J.A."

"I agree R.S. Abella J.A."