

**CITATION:** Dewan et al. v. Burdet et al., 2023 ONSC 2639  
**COURT FILE NO.:** CV-01-18977  
**DATE:** 2023/04/28

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Patrick Dewan, Domicile Developments Inc., 1436984 Ontario Ltd., Amira Gabriel, 1496055 Ontario Inc., 117490 Canada Ltd., the Estate of Sheila Eberts, 2201894 Ontario Inc., BBG Equity Management Corporation and the Estate of Powell Griffiths, Plaintiffs

**AND**

Claude Alain Burdet in Trust, Claude Alain Burdet, Carleton Condominium Corporation No. 396, 1443957 Ontario Inc., and Enterprises Ted Rubac Enterprises Inc.. Defendants

**BEFORE:** Justice Robert Smith

**COUNSEL:** John Melia and Kara Takagi, counsel for the Plaintiffs, Domicile Developments Inc., 1496055 Ontario Inc., and the Estate of Powell Griffiths

Jonathan Collings, counsel for the Plaintiffs, Amira Gabriel and BBG Equity Management Corporation

Claude Alain Burdet, self-represented and representing Claude Alain Burdet, in Trust

Gary Boyd, counsel for the Defendant, Carleton Condominium Corporation No. 396

Percy Ostroff, counsel for the Receiver, MNP Ltd.

**HEARD:** March 23, 2023

**REASONS FOR DECISION**

[1] The court-appointed Receiver and Manager, MNP Ltd., (the “Receiver”) has brought a motion for directions to interpret Kane J.’s Costs Order dated February 2, 2017, to decide whether CCC 396 is jointly and severally liable with the other Defendants, Claude Alain Burdet in Trust, Claude Alain Burdet, 1443957 Ontario Inc. and Enterprise Ted Ruback Enterprises Inc. (the “Burdet Group”). The Receiver takes no position on the interpretation of Kane J.’s Cost Order on this motion.

[2] Domicile Developments Inc., 1496055 Ontario Inc. and the Estate of Powell Griffiths (“Domicile”) have also brought a motion asking me to interpret Kane J.’s Costs Order to exclude CCC 396 as a Defendant to make it consistent with his intention expressed in his Costs Decision, also dated February 2, 2017. Alternatively, Domicile asks me to amend the Costs Order to define “Defendants” in paragraphs 1 and 3 of his Costs Order to exclude CCC 396 from any responsibility to pay costs to the Plaintiffs.

[3] On February 2, 2017, Kane J. released his Costs Decision related to a lengthy and complex trial with multiple parties. In the style of cause used for his cost decision, Kane J. separated CCC 396 as a Defendant distinct from the Burdet group of Defendants. This style of cause is different from the style of cause used in the statement of claim and in the costs order, which included CCC 396 as a Defendant along with the Burdet group.

[4] Domicile submits that the costs order was not consistent with the intention of Justice Kane and is ambiguous because the style of cause included CCC 396 as a Defendant along with the Burdet group.

[5] At paragraph 1 of Kane J.’s cost order, he awarded costs of \$410,000 to the Plaintiffs against the Defendants jointly and severally, which included CCC 396. Paragraph 1 of his decision reads as follows:

THIS COURT ORDERS that the Plaintiffs are entitled to costs on a scale of partial indemnity in the amount of \$410,000, including disbursements and tax, against the Defendants who are jointly and severally liable, including Mr. Burdet, personally.

[6] In paragraph 2 of the costs order, he awarded substantial indemnity costs to CCC 396 in the amount of \$220,000 payable by the Plaintiffs.

[7] In paragraph 3 of the costs order, he did not award any costs to the Defendants. This paragraph indicates that Justice Kane intended the description of “Defendants” in his cost order to only apply to the Burdet group, because in paragraph 2 he awarded costs of \$220,000 to CCC 396.

[8] Interpreting a judge's order is analogous to interpreting a contract, albeit with only one person drafting the document. A contract must be interpreted in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective; by determining the intention of the parties, in this situation the judge, in accordance with the language used in the written document based on the cardinal presumption that they he intended what he said. Objective evidence of the context underlying the granting of the cost order, in this case Justice Kane's cost decision, may be considered to resolve any ambiguity in his cost order.

[9] The Burdet Group argues that from a plain reading of paragraph 1 of Kane J.'s cost order, he intended CCC 396 to be included as a Defendant and to share responsibility for the payment of legal costs of \$410,000 to the Plaintiffs on a joint and several basis with the Burdet Group. However, the terms of Kane J's cost order are contradictory and ambiguous if it is interpreted in the manner suggested by the Burdet Group. In paragraph 2 of the cost order, CCC 396 is awarded costs of \$220,000 on a substantial indemnity basis payable by the Plaintiffs. This is inconsistent with the suggested interpretation of paragraph 1 as including CCC 396 as a Defendant that was also required to pay costs to the Plaintiffs.

[10] The interpretation proposed by the Burdet Group is also inconsistent with the intention expressed by Kane J. in his cost decision. As a result, I find, based on the ambiguity and inconsistency within the costs order, that Kane J's cost decision must be considered to assist with determining Kane J.'s intention when signing the costs order.

[11] The Burdet Group also argued that a judge of the Superior Court lacked jurisdiction to amend the order of Kane J. to correct an unintentional omission because his decision had been appealed to the Court of Appeal and leave had been denied by the Supreme Court of Canada. I do not agree with this submission because the interpretation of the cost order was never argued by any party before the Court of Appeal for Ontario. As result, I find that a Superior Court Judge does have jurisdiction to an amend an order to correct an unintentional omission pursuant to Rule 59.06 of the *Rules of Civil Procedure*.

[12] I find that from reading Kane J.'s cost decision, it is clear that he did not intend to include CCC 396 as a Defendant that was liable to pay any costs to the Plaintiff for the following reasons:

- I. At paragraph 81 of his cost decision, Kane J. awarded costs on a substantial indemnity scale to CCC 396, which were payable by the Plaintiffs. This paragraph is inconsistent with an intention to include CCC 396 as a Defendant with the Burdet Group that would have to pay costs to the Plaintiffs on a joint and several basis;
- II. At paragraph 87 of his cost decision, Kane J. stated that the Plaintiffs had enjoyed a superior level of success in the legal proceedings and awarded them \$410,000 in costs on a partial indemnity scale. He stated that these costs were payable by the “Defendants” on a joint and several basis, including Alain Burdet personally. The style of cause of Kane J’s cost decision referred to the Burdet Group as the “Defendants and Plaintiffs by Counterclaim” and referred to CCC 396 as a separate Defendant;
- III. In paragraph [88] of Kane J’s cost decision, he awarded CCC 396 costs on a substantial indemnity basis of \$220,000 payable by the Plaintiffs for recovering judgment on consent for common expense arrears plus interest, and for its successful challenge to the much greater portion of the indebtedness claimed by ETRE and Alain Burdet. In other words, CCC 396 was awarded costs in part because it was successful in challenging the amounts claimed by ETRE and Alain Burdet.
- IV. These findings by Kane J are inconsistent with an intention for his cost order to require CCC 396 to pay costs to the Plaintiffs and it would be consistent with Kane J.’s intention that only the Burdet Group, as the unsuccessful party, was required to pay costs to the Plaintiffs;
- V. If Paragraph 1 of Kane J’s cost order was be amended to add “other than CCC 396” after the word Defendants, it would be consistent with Kane J.’s intentions as expressed in his cost decision; and
- VI. Also Paragraph 3 of the cost order, which states that the Defendants are not entitled to any costs, is inconsistent with paragraph 2 if the word “Defendants” is interpreted to include CCC 396. If the cost order is amended to exclude CCC 396 as a Defendant in paragraphs 1 and 3, then the amended cost order would be consistent with Kane J.’s intentions as expressed in his cost decision.

[13] Rule 59.06 of the *Rules of Civil Procedure* allows the court to amend an order that contains an accidental slip or omission. I accept Mr. Boyd’s affidavit evidence that the approval of the cost order in its current form contained an omission, namely a failure to add the words “except for CCC 396” after Defendants in paragraphs 1 and 3 of Kane J.’s cost order.

[14] Justice Kane’s cost decision makes it clear that he intended CCC 396 to receive costs of 220,000 on a substantial indemnity basis from the Plaintiff’s and that he intended the Defendants “except for CCC 396” to pay costs on a partial indemnity scale in the amount of \$410,000 to the Plaintiffs.

### **Disposition**

[15] The Receiver is directed to distribute funds held by him with regard to the payment of \$410,000 in costs, where the term Defendants in paragraphs 1 and 3 of Kane J.’s cost order is interpreted to exclude CCC 396. In addition, Kane J.’s cost order dated February 2, 2017 is amended to correct an omission by adding the words “except for Carleton Condominium Corporation 396” after the word Defendants in paragraphs 1 and 3 of Kane J.’s cost order.

### **Costs**

[16] There shall be no order for costs of this motion

Date: April 28, 2023

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Justice Robert Smith

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**REASONS FOR DECISION**

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Robert Smith J.

Date: April 28, 2023