

CITATION: Giacomodonato v. PearTree Securities Inc., 2023 ONSC 5628
COURT FILE NO.: CV-18-594959
DATE: 20231005

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
 Davide Giacomodonato)
)
) Plaintiff) Jonathan G. Bell, Nina Butz, and Marshall
) Torgov, for the plaintiff
)
)
 – and –)
)
 PearTree Securities Inc. and PearTree) Paul-Erik Veel and Aoife Quinn, for the
 Financial Services Ltd.) defendants
)
) Defendants)
)
)
 AND BETWEEN:)
)
 PearTree Securities Inc.)
)
) Plaintiff by counterclaim) Paul-Erik Veel and Aoife Quinn, for the
) plaintiff by counterclaim
)
)
 – and –)
)
 Davide Giacomodonato) Jonathan G. Bell, Nina Butz, and Marshall
) Torgov, for the defendant to the
) Defendant to the counterclaim) counterclaim
)
) **HEARD:** September 29, 2023 (in writing)
)

2023 ONSC 5628 (CanLII)

COSTS ENDORSEMENT

ROBERT CENTA J.

- [1] On May 29, 2023, I released my reasons for decision allowing the claim of the plaintiff, David Donato, and dismissing the counterclaim brought by his former employer, PearTree Securities.¹
- [2] The parties were not able to resolve the costs of the proceeding. I have received and reviewed their costs submissions, including reply submissions from Mr. Donato. These are my reasons for decision on the costs of the proceeding.

Background

- [3] To contextualize the costs submissions of the parties for this 10-day trial, I will set out a brief overview of the proceeding, which is taken from the overview of my reasons for judgment.²
- [4] In 2016, Mr. Donato was recruited to join the defendant PearTree, which worked with mining companies, among others, to arrange flow-through donation financing placements. PearTree hired Mr. Donato to serve as President and co-head of banking. In January 2018, PearTree terminated Mr. Donato's employment without cause.
- [5] Mr. Donato sued PearTree for wrongful dismissal and amounts that he claimed PearTree owed him. Depending on the methodology chosen and whether or not certain facts were established, Mr. Donato submitted that he was owed between \$3.194 million and \$3.927 million. PearTree admitted that it owed Mr. Donato somewhere between \$240,000 and \$627,516, depending on the methodology selected and my findings of fact.
- [6] PearTree counterclaimed against Mr. Donato for breaching restrictive covenants in his employment agreement when he went to work for a competitor, some nine months after PearTree terminated his employment. PearTree filed an expert report at trial claiming that it suffered \$1,599,000 million in damages. PearTree's counterclaim also sought \$1 million in punitive damages.
- [7] During PearTree's opening statement, three days before the end of the case, PearTree abandoned both of its claims for general and punitive damages. Instead, it asked that Mr. Donato be required to disgorge all of his employment income earned for the two years after PearTree terminated his employment without notice.
- [8] First, I found that Mr. Donato had been undercompensated. I also awarded Mr. Donato \$10,000 in punitive damages for PearTree's decision to suspend his salary continuation payments, to offset money it owed to him against money it had paid to him, and its attempt

¹ Mr. Donato's legal name is Davide Giacomodonato. I will follow the convention that he used at trial and refer to him as David Donato. The defendant PearTree Securities Inc. is a wholly owned subsidiary of the defendant PearTree Financial Services Ltd. I will refer to them collectively as PearTree unless it is necessary to refer to one or the other.

² *Giacomodonato v. PearTree Securities Inc.*, 2023 ONSC 3197, at paras. 5 to 10.

to get him to waive a claim to further amounts owed to him by accepting money that PearTree admitted that it owed to him.

- [9] The parties worked together to calculate the amount owing to Mr. Donato in light of my reasons for judgment. I then granted judgment to Mr. Donato for \$718,103.05, including prejudgment interest.
- [10] Second, I dismissed PearTree’s counterclaim in its entirety. I found the non-competition and non-solicitation clauses to be unenforceable. They were contrary to public policy and overly broad. There was also no evidence Mr. Donato ever misused confidential information or competed unfairly. Even if Mr. Donato was a fiduciary, there was no evidence that he breached the duties that survived PearTree’s decision to terminate his employment.

Submissions of the parties

- [11] Mr. Donato asks the court to award him his costs of the proceeding on a partial indemnity scale fixed in the amount of \$538,726.37 for legal fees and \$247,035.38 in disbursements, both amounts inclusive of HST.
- [12] Mr. Donato submits that he was the successful party in the proceeding, which was necessitated by PearTree terminating his employment and refusing to pay him even the amounts that it admitted it owed him. He notes that he was awarded \$10,000 in punitive damages because PearTree abused its power in this way.
- [13] Mr. Donato points out that PearTree abandoned its own claim for \$1 million in punitive damages mid-way through trial and that the court dismissed PearTree’s counterclaim for, first, \$1,599,000, and later, disgorgement. He correctly notes that I indicated in my reasons for decision that these elements of the proceeding would be considered when addressing costs. He submits that PearTree’s counterclaim significantly increased his costs, in part by significantly expanding the scope of documentary and oral discoveries.
- [14] Mr. Donato also highlights the late disclosure of documents that he had requested and submits that PearTree only produced relevant documents when it changed its mind and concluded that they were helpful to it.
- [15] PearTree submits that this is an appropriate case for each party to bear its own costs. It submits that it achieved a better result than the Rule 49 offer it delivered on April 3, 2023. In the alternative, it submits that Mr. Donato showed no willingness to compromise and that this should affect the costs award PearTree also submits that although Mr. Donato was successful on his action and PearTree’s counterclaim was dismissed, “success was divided.” PearTree also submits that Mr. Donato’s costs are excessive.

Legal Principles

- [16] In *Apotex Inc. v. Eli Lilly Canada Inc.*, the Court of Appeal for Ontario restated the general principles to be applied when the court exercises its discretion to award costs.³ Fixing costs is a discretionary decision under section 131 of the *Courts of Justice Act*.⁴ In exercising my discretion, I may consider the factors listed in rule 57.01 of the *Rules of Civil Procedure*.⁵ These factors include the result achieved, the amounts claimed and recovered, the complexity and importance of the issues in the proceeding, the principle of indemnity, the reasonable expectations of the unsuccessful party, as well as any other matter relevant to costs.
- [17] There are five purposes served by modern costs rules:
- a. to indemnify successful litigants for the costs of litigation, although not necessarily completely;
 - b. to facilitate access to justice, including access for impecunious litigants;
 - c. to discourage frivolous claims and defences;
 - d. to discourage inappropriate behaviour by litigants in their conduct of the proceedings; and
 - e. to encourage settlements.⁶
- [18] A proper costs assessment requires the court to undertake a critical examination of the relevant factors as applied to the costs claimed and then “step back and consider the result produced and question whether, in all the circumstances, the result is fair and reasonable.”⁷
- [19] The overarching objective is to fix an amount of costs that is objectively reasonable, fair, and proportionate for the unsuccessful party to pay in the circumstances of the case, rather than to fix an amount based on the actual costs incurred by the successful litigant.⁸
- [20] While the reasonable expectation of the parties concerning the amount of a costs award is a relevant factor that informs the determination of what is fair and reasonable, it is not the

³ 2022 ONCA 587, at paras. 59 to 66.

⁴ R.S.O. 1990, c. C.43.

⁵ R.R.O. 1990, Reg 194.

⁶ *394 Lakeshore Oakville Holdings Inc. v. Misek*, 2010 ONSC 7238, at para. 10.

⁷ *Apotex*, at para. 60; *Restoule v. Canada (Attorney General)*, 2021 ONCA 779, 466 D.L.R. (4th) 2, at para. 356; citing *Boucher v. Public Accountants Council (Ontario)* (2004), 71 O.R. (3d) 291 (C.A.), at para. 24.

⁸ *Apotex*, at para. 61; *Boucher*, at para. 26.

only determinative factor and cannot be allowed to overwhelm the analysis of what is objectively reasonable in the circumstances of the case.⁹

- [21] Costs that are reasonable, fair, and proportionate for a party to pay in the circumstances of the case should reflect what is reasonably predictable and warranted for the type of activity undertaken in the circumstances of the case, rather than the amount of time that a party's lawyer is willing or permitted to expend.¹⁰ The party required to pay the successful party's costs "must not be faced with an award that does not reasonably reflect the amount of time and effort that was warranted by the proceedings."¹¹

Result

- [22] I award Mr. Donato the costs of this proceeding on a partial indemnity basis and in the amounts that he claimed.
- [23] First, I do not accept PearTree's submission that success was divided. It was not. Mr. Donato secured a judgment in his favour of over \$700,000. PearTree's counterclaim was dismissed and its claim for punitive damage was abandoned. That is not divided success.
- [24] Second, this action was of significant importance to Mr. Donato. Not only did he have to commence the proceeding to obtain money that PearTree admitted that it owed to him, he also needed to respond vigorously to the very serious allegations PearTree made against him in the counterclaim. Having made such serious allegations, PearTree must have realized that Mr. Donato would expend significant resources responding to its claim.
- [25] Third, PearTree submits that "there is [no] suggestion that PearTree did anything that unnecessarily increased the costs of this proceeding." I disagree. First, it abandoned a million-dollar punitive damages claim at trial. Second, it pursued a meritless counterclaim through to the end of trial. Third, as discussed below, it disclosed relevant documents very late in the proceeding. I find that PearTree unnecessarily increased the costs of this proceeding.
- [26] Fourth, I do not accept PearTree's submission that its Rule 49 offer triggers the cost consequences of that Rule. PearTree's offer was inclusive of costs, disbursements and prejudgment interest. I do not think that this offer has the certainty or precision required by Rule 49.¹²
- [27] I will, nevertheless, take PearTree's offer into account in assessing the costs of this proceeding. I do not give it much weight, however, as it is not clear to me that Mr. Donato

⁹ *Apotex*, at para. 62.

¹⁰ *Apotex*, at para. 65.

¹¹ *Gratton-Masuy Environmental Technologies Inc. v. Building Materials Evaluation Commission* (2003), 2003 CanLII 8279, 170 O.A.C. 388 (Div. Ct.), at para. 17.

¹² *London Eco-Roof Manufacturing Inc. v. Syson*, 2020 ONSC 3101, at para. 84; *Malik v. Sirois*, 2003 CanLII 29931 (Ont. C.A.); *Rooney v. Graham* (2001), 53 O.R. (3d) 685 (C.A.); *Mathur v. Commercial Union Assurance Co. of Canada*, [1988] O.J. No. 144 (Div. Ct.).

did not achieve a better result than this offer. PearTree made its offer on April 3, 2023, for \$1.25 million, inclusive of prejudgment interest, costs, disbursements, and taxes. The trial was heard for ten days starting on April 24, 2023. Mr. Donato was awarded \$718,103.05 in damages, including pre-judgment interest. At the commencement of trial, he had incurred partial indemnity costs of \$635,356.42. The total of those amounts, \$1.35 million, exceeds the value of PearTree's offer. At best, PearTree made an offer that was in the ballpark of what Mr. Donato achieved through trial.

- [28] Fifth, this is an appropriate case to award costs to discourage frivolous and strategic claims. In my view, PearTree's counterclaim, including its claim for punitive damages, was obviously meritless. Employers who owe money to employees should be discouraged from engaging in tactical litigation designed to discourage employees from pursuing their rights and entitlements.
- [29] Sixth, this is an appropriate case to award costs to sanction inappropriate behaviour by PearTree in its conduct of this proceeding. In addition to pursuing the counterclaim, PearTree disclosed relevant documents very late in this process. Mr. Donato's experts repeatedly requested that PearTree produce the "deal tracker" to them to assist them with their work. PearTree refused to produce this information on the basis of relevance. It appears that PearTree changed its mind and gave that information to its own expert when it concluded that it would be helpful to it. It then produced the deal tracker to Mr. Donato on March 24, 2023, about a month before the trial of this action that was commenced in 2018. Late disclosure is unacceptable. Relevance to the proceeding, not perceived helpfulness to one's own case, is the test for documentary production. PearTree's conduct merits sanctions.
- [30] Seventh, the hours claimed and the rates charged by counsel for the plaintiff are reasonable given the scale and scope of this litigation. PearTree does not take issue with any particular amount of time spent by counsel for Mr. Donato. It notes that its own partial indemnity costs are lower than those incurred by counsel for Mr. Donato. I accept that one measure of reasonableness of time spent is the amount of costs incurred by opposing counsel. Here, PearTree's partial indemnity costs were \$367,323 compared to \$583,726.37 for counsel for Mr. Donato. I do not think these amounts are so disproportionate as to require an adjustment given the circumstances of this case. This is particularly so because counsel for Mr. Donato would not have known that PearTree would abandon its \$1 million claim for punitive damages or its claim for damages mid-way through trial.
- [31] Eighth, I am not prepared to discount the amount claimed by the experts retained by Mr. Donato on the basis that I did not accept their approach to the quantification of damages, as PearTree suggests. PearTree provided me no authority for this proposition, and I decline to exercise my discretion on this basis. I do not find that the disbursements are excessive given the complexity of the work performed.
- [32] Finally, it is important to step back and consider what is objectively reasonable, fair, and proportionate for PearTree to pay in the circumstances of this case. Certainly, there are not many cases that would justify a costs award of this size.

- [33] Having presided over this ten-day trial, however, certain things are crystal clear to me. PearTree invited this litigation. PearTree conducted this litigation in an unforgiving, scorched earth, and bare-knuckle manner. It missed no opportunity to malign Mr. Donato. PearTree’s decision to pursue a counterclaim and punitive damages of so little merit leaves me to infer that those claims were advanced only for tactical reasons and in an attempt to dissuade Mr. Donato from pursuing the money PearTree owed to him. PearTree’s attempt to now claim that this action “was an unexceptional employment action” is entirely inconsistent with its own approach to this litigation. In my view, and in light of the choices it made in the conduct of this litigation, it should have reasonably expected to face a costs order of this magnitude.
- [34] I order that PearTree pay the costs of this proceeding to Mr. Donato on a partial indemnity scale fixed in the amount of \$830,761.75 inclusive of disbursements and HST within 30 days.

Robert Centa J.

Released: October 5, 2023

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BETWEEN:

Davide Giacomodonato

Plaintiff

– and –

PearTree Securities Inc. and PearTree Financial
Services Ltd.

Defendants

AND BETWEEN:

PearTree Securities Inc.

Plaintiff by counterclaim

– and –

Davide Giacomodonato

Defendant to the counterclaim

COSTS ENDORSMEMENT

Robert Centa J.

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