

**CITATION:** The Matter Corporation v. Southside Construction Management Limited,  
2025 ONSC 590

**COURT FILE NO.:** CV-23-00710981-00CL

**DATE:** 20250128

**SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)**

**RE:** THE MATTER CORPORATION, Plaintiff

**AND:**

SOUTHSIDE CONSTRUCTION MANAGEMENT LIMITED, VITO FRIJIA and  
WONDERLAND POWER CENTRE INC., Defendants

**BEFORE:** KIMMEL J.

**COUNSEL:** *Mark Dunn/Mark Leonard*, for the Plaintiff

*John Downing/ Brian Whitwham* for the Defendants

**HEARD:** January 23, 2025

**COSTS ENDORSEMENT**  
**(INJUNCTION MOTION)**

**Outcome of Injunction Motion**

[1] The plaintiff ("Matter Corp.") brought a motion for an interlocutory injunction to enforce certain of its rights as a 50% Owner of a Joint Venture that is managed by the other co-owner, Southside Construction Management Limited ("Southside"), including notice, consultation and approval rights relating to new development, working capital commitments and future borrowing. Matter Corp. also sought disclosure of information and documents it had requested about the existing business and future plans of the Joint Venture.

[2] The motion was heard on July 23, 2024, and was decided by reasons released on September 5, 2024: see *The Matter Corporation v. Southside Construction Management Limited*, 2024 ONSC 4879 (the "Injunction Decision"). Capitalized terms not otherwise defined in this endorsement shall have the meanings ascribed to them in the Injunction Decision.

[3] Matter Corp. sought the following three specific interlocutory orders on the Injunction Motion:

- a. To compel production of information about the Joint Venture, including about new development plans, budgets, borrowing and other essential matters (the "Production Order").

- b. To prevent further development without its consent (the "New Development Order").
- c. To prevent further borrowing without its consent (the "Borrowing Order").

[4] Some of the relief sought on the injunction motion was granted. Specifically:

- a. Within the Production Order, Southside was ordered to produce existing information about and records of the Joint Venture, including about any new development plans, budgets, borrowing and other business. The Production Order was granted with respect to known information and such existing books of account and records and draft financial statements of the Joint Venture/Trustee Corporation as the plaintiff may reasonably request. Southside was directed to respond in a timely manner to the specific requests, and any future ones, to identify those for which there are no documents and there is no information to provide by way of response, and to otherwise provide the requested disclosure.
- b. Within the New Development Order, Southside was ordered to consult with Matter Corp. and seek its consent regarding any future development of new commercial and residential space on the Joint Venture Properties.

[5] Other aspects of the relief sought on the injunction motion were not granted, specifically:

- a. The Borrowing Order was not granted.
- b. The remaining aspects of the Production Order were not granted (documents that do not exist and that would have to be created were not ordered produced).
- c. The remaining aspects of the New Development Order were not granted (dealing with the working capital commitments for the leasing of existing space).

[6] After the injunction motion was brought, the parties had agreed to a without prejudice disclosure arrangement ("Disclosure Arrangement") pending the outcome of the injunction motion. The Disclosure Agreement provides as follows:

The Defendants' counsel shall provide a list to the Plaintiff's counsel of any agreement to lease, lease, lease extensions or other contracts involving Wonderland Power Centre Inc. ("WPC") that are expected to be finalized over the next 90 days, and that include construction or development costs, inducements, or capital expenditures on the part of WPC of more than \$750,000. Defendants' counsel will continually update this list while the Plaintiff's motion is pending. The list will include the expected expenditure by WPC.

WPC has agreed not to commit to any contract referenced above without giving the Plaintiff 14 days' notice of its intention to do so. Such

notice will be provided by the Defendants' counsel to the Plaintiff's counsel.

The above agreement is without prejudice to the rights of either party and any positions that they may take, or any arguments that they may advance, in respect of the Plaintiff's motion or in the civil action. Further, this agreement is only to remain in place until a decision on the Plaintiff's motion is rendered, or until the motion is otherwise withdrawn or settled.

[7] At the hearing of the injunction motion the defendants indicated they would agree to keep the Disclosure Agreement in place until a trial decision or other disposition of this action. The court ordered the continuation of the Disclosure Agreement on an unopposed basis as part of the Injunction Decision.

[8] At the conclusion of the Injunction Decision that court stated as follows with respect to costs:

In accordance with the court's direction at the conclusion of the hearing, costs outlines for this motion were exchanged and uploaded onto Case Center. The parties were asked to try to reach an agreement on costs, but have not been able to do so. While the plaintiff was successful in certain respects, it was not in others. Its costs outline indicates all-inclusive costs on a partial indemnity scale of \$198,507.01 and on a substantial indemnity scale of \$293,563.29. The costs outline of the defendants indicates all-inclusive costs on a partial indemnity scale of \$180,448.68 and on a substantial indemnity scale of \$266,857.64.

The court encourages the parties to try to reach an agreement on costs now that the outcome is known and given that their costs outlines disclose similar amounts claimed. If they are unable to do so, a case conference may be scheduled before me for further directions regarding costs. If the parties wish to exchange written submissions regarding costs, to be supplemented by oral submissions at the case conference, those should be limited to a maximum of five pages double spaced for each side. Any case conference to address the matter of costs shall be scheduled for a minimum of one hour.

[9] The parties were unable to agree on costs. Following a case conference, written cost submissions were exchanged (plaintiff's dated November 22, 2024 and Defendants' dated December 20, 2024). The parties arranged to attend to make further oral submissions regarding costs on January 23, 2025.

#### *The Plaintiff's Position*

[10] The plaintiff maintains that it was mostly successful. In particular, it points to the fact that

it succeeded with what it describes to be the core issues on its motion (for production and consultation regarding new development), and did so having met the higher merits standard of a strong *prima facie* case. Matter Corp. seeks an award of partial indemnity costs of \$198,507.01. It contends that the amount it claims is reasonable given the complexity and importance of the issues and having regard to the fact that it is almost the same as the partial indemnity costs detailed in Southside's costs outline.

[11] The plaintiff argues that the motion was necessary because of the position taken by Mr. Frijia that he would continue operating as he had been (without responding to all document requests and without consulting about capital commitments for new development), unless the court ordered him to do otherwise. In the latter regard, the plaintiff relies on the court's finding (at para. 64 of the Injunction Reasons) that his conduct "fundamentally disregards [Matter Corporation's] right to be consulted about future development that ties up funds that would otherwise be available for distribution, potentially for a number of years".

[12] The plaintiff further points to some examples of the defendants' conduct in the context of the injunction motion, where steps were taken in the face of outstanding requests, that rendered the requests moot and put the plaintiff to unnecessary expense in preparing materials.

[13] The plaintiff further submits that, in this case, the motion judge is in a better position to fix the costs of the motion than the trial judge will be because the motion judge is best placed to identify the core issues on the motion and determine the relative success of the parties. A task that could be more difficult for a trial judge unfamiliar with the motion: see *Fodzai v. Koukia*, 2024 ONSC 1121, at para. 16.

#### *The Defendants' Position*

[14] The defendants say there was divided success, and that they did not oppose some of the relief that was ordered. They maintain that the costs of the injunction motion should be ordered payable in the cause. Where litigated outcomes reflect partial or divided success - whether it is with respect to a motion, trial, or appeal - the courts will often deny or greatly restrict cost recovery: see *Luckevich v. Ivany*, 2018 ONCA 254, at para. 3; *Brough v. Lebeznick*, 2017 ONSC 1392, at para. 8.

[15] The defendants further contend that the courts have recognized that there are unique considerations with respect to costs on interim and interlocutory injunctions. They say that ordering costs to be payable in the cause is the norm for injunction motions such as this, where there is likely to be a trial (so this will not be the end of the case) and it is likely that the work on the injunction can be used in the case going forward (for example the production and the evidence from the affidavits and cross-examinations that the parties have agreed will form part of the discovery process): see *Earhart v. Bath Institution (Warden)*, 2017 ONSC 6489, at para. 4; *Wang v. Kesarwani*, 2017 ONSC 6821, at para. 129; *CDW Canada Inc. v. Ali*, 2022 ONSC 4907, at paras. 2-12 and 15-19; and *Capital SCL v. Spotless Consultancy*, 2022 ONSC 4192.

[16] The underlying rationale to this approach is explained in: Robert Sharpe: *Injunctions and Specific Performance*, 2nd ed. (looseleaf), at p. 2-91, which was cited with approval by this court in *Quizno's Canada Restaurant Corp. v. 1450987 Ontario Corp.*, 2009 CanLII 31599 (ON SC), at para. 9:

Where the defendant successfully resists the plaintiff's motion for an interlocutory injunction, costs may be awarded forthwith. It has been held that where the motion was groundless and based upon unfounded allegations of fraud, deceit, and conspiracy, it may be appropriate for the court to fix the costs on a solicitor and client scale and require that they be paid forthwith. On the other hand, it would be unusual to award costs of an interlocutory injunction motion of the successful plaintiff prior to trial. As there has been no final determination of the rights of the parties, but rather an order to protect the plaintiff's position pending trial, the preferable course is to reserve the question of costs to the trial judge.

[17] In the alternative to their position that costs of the injunction motion should be ordered payable in the cause, if there is to be any award of costs, the defendants maintain that the partial indemnity costs claimed should be reduced to discount for the costs of the examinations which the parties have agreed will serve as discovery, which are estimated to comprise approximately one-third of the claimed \$198,507, and then should be reduced further to reflect the divided success on the motion.

### **Analysis and Decision on Costs**

[18] The scale of costs is not in dispute, since the plaintiff's claim is only for their partial indemnity costs. Nor do the defendants suggest that the amount of partial indemnity costs incurred by the plaintiff is unreasonable, having regard to the complexity and importance of the issues and the work that was done, and given that claimed is approximately the same as the partial indemnity costs the defendants' themselves claimed in their costs outline for this motion. What is in dispute is whether any costs should be awarded at this time and, if so, whether they should be reduced or offset.

[19] The parties acknowledge that costs are discretionary under s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

[20] There is some merit to the plaintiff's position that the motion was required because of positions that the defendants were taking. While the plaintiff was not entirely successful, it did achieve some measure of success in obtaining some disclosure and some consultation regarding new development commitments that the defendants were not prepared to afford the plaintiff absent a court order. Even the Interim Disclosure Agreement and the defendants' willingness to allow that to continue until trial were a byproduct of the plaintiff's injunction motion.

[21] Overall, the plaintiff was successful in obtaining some measure of relief on two of the three injunction orders it sought, the Production Order and the New Development Order. It was not successful in obtaining the Borrowing Order. The defendants are right that the outcome of the trial is not certain; however, the court did find there was a strong *prima facie* case in favour of the production and consultation that was ordered which are of particular importance pending the trial.

[22] That said, there is a strong line of cases to support the defendants' position that costs of a successful interim injunction motion should be left for the trial judge to deal with in hindsight, when the result is known, including cases in which the injunction was granted on the same higher standard of a strong *prima facie* case: see, for example, *CDW*, *Quiznos* and *Capital SCL*.

[23] In the specific circumstances of this case, it is important that what was ordered was compliance with what the court determined to be basic disclosure and consultation obligations of the defendants pending the trial. The much broader relief to be considered at trial, regarding the request for a winding up order, was not the subject of the injunction motion. In the exercise of my discretion, I find this to be one of the cases where some award of costs is justified in favour of the successful plaintiff on this injunction motion.

[24] However, I agree with the defendants that if the court is going to deal with costs now, then the costs of the Borrowing Order should not be awarded, since the plaintiff did not succeed on that aspect of the injunction relief sought. I also agree that an amount should be discounted to reflect the costs of preparing for, attending and following up on the examinations that will be applied towards discoveries in the action.

[25] It is not possible to break down the costs attributable to the Borrowing Order with any precision. This will necessarily be an arbitrary exercise. Based on my knowledge of the issues and the evidence and the time devoted to the various issues, I am allocating one quarter of the plaintiff's claimed costs (\$49,626.25, which is 25% of \$198,507) to the Borrowing Order. I am also deducting the estimated \$67,805.40 for the preparation and attendance on examinations and follow-up, which will be applied towards the discoveries in the action.

[26] According to that math, \$117,432.15 is to be deducted from the partial indemnity costs claimed by the plaintiff. The plaintiff is awarded its partial indemnity costs of the injunction motion fixed in the amount of \$81,074.85. This is the all-inclusive amount of partial indemnity costs that the plaintiff shall be permitted to claim in the cause.

[27] I have determined that it is appropriate to make the award and fix the amount of the plaintiff's costs for the injunction motion now, out of respect for Rule 57.03 that requires a motion judge to do so in circumstances such as this where the familiarity with the issues argued on the motion has informed the assessment. However, I have decided that it would be more fair and just to order these costs to be payable to the plaintiff in the cause, rather than within thirty days, because this was an injunction motion and the plaintiff may not ultimately succeed at trial.

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KIMMEL J.

**Date:** January 28, 2025