

CITATION: Wong v. 10658987 Canada Inc, et al. 2024 ONSC 4659
COURT FILE NO.: CV-19-81726
DATE: 2024 08 21

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: CHASE WONG, Plaintiff

AND:

10658987 CANADA INC., GUO JIE MA aka SAM MA AND MIN ZHOU aka ANN ZHOU, Defendants

BEFORE: C. MacLeod RSJ

COUNSEL: Joshua Nutt, for the Plaintiff

Ryan Flewelling, for the Defendants

HEARD: August 19, 2024

COSTS AWARD

[1] This was a hearing to fix the costs payable following the trial of an issue in this matter (See 2024 ONSC 2795). Having reviewed the Bills of Costs, the written submissions, an Offer to Settle and the oral submissions made by counsel at the hearing, I fixed the costs payable by the Plaintiff to the Defendants at \$180,000.00 inclusive of fees, disbursements and HST. I have declined to set off the costs against any amounts found due to the Plaintiff on the reference but I have suspended enforcement for 60 days.

[2] I indicated I would provide brief written reasons. I will not summarize the principles involved in making an award of costs. Counsel do not disagree. The factors are set out in *Rule* 57.01 and those factors guide the Court in its exercise of discretion. Fixing of costs, in contrast to assessment, is intended to be a summary procedure by the presiding Judge.

[3] It is important to recall that this proceeding was originally launched as an Application. On November 9, 2021, the Applications Judge (Justice Hackland) converted it to an action, ordered a summary trial of specific issues, and ordered a reference in respect of amounts due to the Plaintiff if the Plaintiff was found not to be a shareholder at trial. That Order provided that the costs of the Application would be costs “in the cause”. There was also a Motion for injunctive relief. The Motions Judge (Justice Corthorn) awarded costs “to the Plaintiff in the cause”. Those Orders must be taken into account in dealing with the costs of the trial.

[4] The trial itself was not overly complicated. The evidence consisted of the original and supplementary affidavits and the transcripts of cross-examinations which were treated as discoveries. I heard oral evidence over five days with the occasional assistance of a Mandarin interpreter. Finally, there were submissions in writing and a follow up videoconference.

[5] My finding that the Plaintiff was not a shareholder and not entitled to various oppression remedies based on that theory means that the Defendants were the successful parties at the trial and are presumptively entitled to costs.

[6] To summarize briefly,

- a. The Defendants were the successful parties at trial.
- b. The issues were not overly complex and the evidence was only complicated because there were text messages and other communications in Chinese.
- c. The Defendants had served a *Rule 49* Offer to Settle but as it was an offer to settle the entire proceeding and not just the issues being tried, they did not beat the offer. They are not entitled to the enhanced costs available under *Rule 49*.
- d. While the Plaintiff did not disclose certain emails until just before the trial, the Defendants were also guilty of failing to disclose relevant evidence. In particular they had not disclosed the subsequent creation and backdating of corporate registers and certain documents provided to the bank. There is nothing in the conduct of the parties that would justify substantial indemnity or full indemnity costs.
- e. Partial indemnity is the appropriate measure of costs.
- f. The Defendants Bill of Costs shows that the Defendants incurred costs of more than \$350,000 plus disbursements of almost \$12,000 (inclusive of HST). The Plaintiff's Bill of Costs indicates that he incurred costs of roughly \$140,000 and disbursements of just under \$15,000 (inclusive of HST). The Defendants claim for partial indemnity costs is \$210,944.37. By contrast, the Plaintiff's calculation of his partial indemnity costs is \$113,177.84.
- g. These amounts are higher than they would ordinarily be for a five day trial because the matter started as an Application and was converted to a Summary Trial and because both parties changed counsel. The latter involves a certain unavoidable duplication of costs.
- h. Justice Corthorn ordered costs to the "Plaintiff in the cause". This means that the Plaintiff would get those costs only if successful at trial but the Defendants are not entitled to costs of the motion in any event. As noted in her Endorsement, both parties had incurred costs of approximately \$50,000. Costs incurred by the Defendants associated with the motion should be deducted from the Defendants' Bill of Costs.

- i. \$300,000 is still an extremely high amount for an Application leading to a relatively short trial. That would generate a partial indemnity award of approximately \$198,000. Applying the principles of proportionality and reasonable expectations, I would apply a modest reduction. The Defendants are also entitled to recovery of assessable disbursements.
- j. The Defendants only list \$804.25 and \$4.36 in receipted disbursements (the Plaintiffs paid the translation and interpretation costs) and then a category of “flat 5% disbursement fee”.
- k. Whether or not the latter is an appropriate way of charging their own client, it is not an appropriate way of seeking recovery of disbursements in party and party costs. Amounts properly forming part of law firm overhead are not recoverable as costs. (See *1188710 Ontario Ltd. v. Gartner*, 2013 ONSC 2008 @ paras. 43 – 49 as an example). Thus, the Defendants receipted disbursements only total \$808.66 although it is evident there would have been photocopy and duplication expenses.

[7] I have therefore allowed costs of \$179,000 and rounded up the disbursement amount to \$1,000. As a result, I fixed the partial indemnity costs in the all inclusive amount of \$180,000 inclusive of fees, disbursements and HST.

[8] The Plaintiff asked that the obligation to pay costs be suspended pending the determination of the amounts that may be owing to him for work done or expenses incurred. Those amounts (if any) will be determined on a reference in accordance with Justice Hackland’s Order, unless the parties settle the remaining issues.

[9] Against the background of the payments which changed hands between the parties during the events in question, there is no basis for assuming the Plaintiff is impoverished or requires special relief from the a costs award. The assertion that the Defendants will owe the Plaintiff more than the costs at the end of the reference is speculative at this point in time.

[10] I am therefore unwilling to suspend enforcement of the costs award until after the reference. I will suspend enforcement for 60 days. Possibly the parties might use that time to negotiate a settlement so that the reference is not necessary.

[11] In summary, the Plaintiff shall pay \$180,000 to the Defendants for the costs of this Application and the summary trial. Those costs are to be paid within the next 60 days. If the reference proceeds, the costs of the reference will be dealt with separately by the referee.

Mr. Justice C. MacLeod

Date: August 22, 2024

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Regional Senior Justice C. MacLeod

Released: August 22, 2024