CITATION: Lee v. Chang, 2024 ONSC 2982
COURT FILE NO.: CV-18-00590295-0000
DATE: 20240826

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SUPERIOR COURT OF JUSTICE - ONTARIO

RE: KYOUNG HWA LEE and YOUNG SEA GUAK

AND:

MYOUNG JA CHANG a.k.a. MYOUNGJA CHANG a.k.a. MYOUNG-JA CHANG a.k.a. MYOUNG JA YOON a.k.a. MYOUNGJA YOON a.k.a. MYOUNG-JA YOON and KWANG EUI CHANG a.k.a. KWANGEUI CHANG a.k.a. KWANG-EUI CHANG and JI YOUNG CHANG a.k.a. JENNY CHANG a.k.a. JENNY JI YOUNG CHANG a.k.a. JI-YOUNG CHANG and BO YOUNG CHANG a.k.a. BONNIE CHANG a.k.a. BONNIE BO YOUNG CHANG a.k.a. BO-YOUNG CHANG

BEFORE: Justice A.P. Ramsay

COUNSEL: *Sang Joon Bae*, for the Plaintiffs

Jimmie Z. Chen and Steven Hong, for the Defendants

HEARD: In Writing

COSTS ENDORSEMENT

I. Introduction

[1] The defendants were successful in this action. In Reasons for Judgment reported at *Lee v. Chang*, 2024 ONSC 580, the plaintiffs' action against them was dismissed, and, in the result, there was no need for the court to address the defense of legal and equitable set-off. The action was based on breach of contract, unjust enrichment, fraud, and fraudulent misrepresentation.

II. Position of the parties

[2] The defendants submit that the plaintiffs made serious allegations based on alleged significant debts, investments, equitable mortgage, and fraud. They argue that the parties were not fluent in English caused significant challenge and considerable expenditure on translators for both oral and written evidence.

[3] The defendants say they were completely successful at trial and seek partial indemnity costs to the date of their offer to settle and substantial indemnity costs thereafter in the amount of $250,465.97, consisting of legal fees totaling $210,426.30 on a partial indemnity scale up to the date of the defendants' August 2019 offer to settle. They seek substantial indemnity thereafter,

plus HST on legal fees of $27,355.42, disbursements of $11,225, and HST of $1,459.25. In the alternative, the defendants seek their costs on a partial indemnity scale in the amount of $204,959.06, which includes legal fees of $171,284.70, plus HST of $22,267.01, disbursements of $10,095, and HST of $1,312.35. I have not considered the costs amount in the defendants' Costs Outline which differs from the amounts in the Bill of Costs. The former was only delivered at the request of the court and would not have been required had the Costs Submissions addressed the factors in r. 57 of the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 [the *Rules*]. The plaintiffs were afforded an opportunity to make submissions on the Costs Outline.

[4] The plaintiffs say that "the action was mainly a clash of two different sets of contracts or mutual conferral of benefits within [*sic*] unjust enrichment." The plaintiffs submit that there should be no costs, as success was divided with the "contract claim" of the parties being dismissed. The plaintiffs also submit that they should not be liable for costs as they are impecunious.

[5] Throughout their submissions, the plaintiffs make assertations that are inaccurate or misleading to the court, which will be addressed below, to the extent that they bear on the court's determination.

III. **Disposition**

[6] For the reasons below, the plaintiffs are jointly and severally liable to the defendants for costs in the amount of $147,897.55, plus HST of $19,226.68, and disbursements in the amount of $10,000, or totaling $177,123.68.

IV. **Analysis**

[7] Section 131(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, governs the court's jurisdiction to award costs and provides that:

> Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

[8] In exercising its discretion with respect to costs, the court must consider the factors in r. 57.01(1) of the *Rules* to achieve a just and reasonable determination: *Wasserman, Arsenault Ltd.* v. *Sone,* 164 O.A.C. 195 (Ont. C.A.), at para. 5; *Geographic Resources Integrated Data Solutions Ltd. v. Peterson*, 2013 ONSC 1041, [2013] O.J. No. 717, 226 (Div. Ct.), at para. 15.

[9] A successful party has no right to costs. However, in the absence of misconduct, a successful litigant has a reasonable expectation of recovering costs from the unsuccessful party: *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, at p. 404; *Bell Canada v. Olympia & York Developments Ltd*. 1994 ONCA 239, 17 O.R. (3d) 135 at p. 14. The general rule is of long standing and should not be departed from except for very good reasons: *Macfie v. Cater* [1920] 57 D.L.R. 736 (Ont. S.C.) at p. 739, aff'd, 64 D.L.R. 511 (App. Div.).

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i. Success was not divided

[10] The plaintiffs submit that success was divided and rely on the decision of Granger J. (as he then was), in *Gregoric v. Gregoric* (1991), 4 O.R. (3d) 604 (Ont. Gen. Div.). This general statement is not supported by either the pleadings or the evidence adduced by the parties at trial.

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[11] The plaintiffs claim that "neither party's alleged contract was upheld." The defendants did not counterclaim against the plaintiffs, nor did the defendants advance any claim against the plaintiffs based on contract. Rather, the defendants sought, as part of their statements of defence, "legal and equitable set-off of the accommodation Expenses against the Plaintiffs' claim in this litigation." The evidence related to the relief sought was inextricably tied to the defendants' defence that payments received by the plaintiffs were on behalf of their daughter who was participating in a homestay program.

[12] In their closing submissions, the plaintiffs argued that equitable set-off was not available to the defendants, as they came to the court with "unclean hands" and were fraudulent. The plaintiffs urged the court to accept their version of events over that of the defendants. In the result, *Gregoric*, which involves a family law proceeding in which each party prevailed on certain claims advanced in the proceedings, has no application. Here, since the plaintiffs' claims were entirely dismissed, the issue of equitable set-off was essentially moot.

[13] At paragraph two of their submissions, the plaintiffs state:

> The plaintiffs' contract claims have been dismissed by Her Honour and so was the defendants' contract claim. The success was divided.

[14] The plaintiffs have not delineated where the court made a finding that the defendants did not establish a contract between the parties. In fact, the court accepted the defendants' version of events. At paragraph 102 of my reasons, I wrote, in part:

> On the evidence, I find that the parties agreed that the plaintiffs' daughter, Yoojin, would participate in a homestay program, study in Canada, and board with the defendants. Though the details are not entirely clear, there was some agreement between the parties that the plaintiffs would pay for her room and board as well as her living expenses and tuition.

[15] At paragraph 119, I wrote, in part:

> There is one final reason to accept the defendants' position as being more plausible of the two. Aside from the $6,000 and $7,000 for her daughter's room and board and tuition sent to the defendants in 2000, Mrs. Lee does not point to any other actual funds advanced to the defendants for her daughter's homestay, art lessons, tuition, expenses, among other things.

[16] In my decision, I concluded that given my finding, there was "no basis to consider the relief sought by the defendants." The plaintiffs have therefore not accurately set out the issues that were

to be determined in the trial, and indeed this argument is belied by not only by the pleadings but also the disposition made at the conclusion of the trial which only refers to the claims advanced by the plaintiffs . At paragraph 222 of the judgment, I concluded:

> In the result, for the reasons above, I make the following disposition:
>
> **i.** The plaintiffs' action in its entirety is dismissed:
>
> a) The plaintiffs' claims on the alleged debts stemming from funds transferred to the defendants, or any of them, in 1999, 2002, 2004 (the venture), 2007 and 2010 are barred by statute.
>
> b) The plaintiffs' action for breach of contract against all defendants is dismissed.
>
> c) The plaintiffs' action for fraudulent misrepresentation, deceit, unjust enrichment, money had and received, breach of fiduciary duty and fraudulent conveyance, as against all defendants, are dismissed.
>
> d) The plaintiffs' claim for an equitable tracing order of the sale proceeds of the property municipally known as 206 Cummer Avenue, is dismissed.

[17] The plaintiffs also say that the fact that some of the loan contracts were barred by a limitation period "is due to the defence [*sic*] of technical nature and not in substance." First, it is not clear what "technical nature" means, as a limitation period bars a party's substantive rights. Second, the plaintiffs' argument ignores the fact that the court found that the plaintiffs' action could not succeed on the merits. Third, the only potential claim which the court viewed as maintainable against the defendants was the 2010 Hyundai Capital Loan. However, the defendants had not disputed the credit card debt and instead raised several defences: that the that the claim was statute barred; that the claim was stayed pursuant to the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B.3; and that approximately $23,259.00 of the Loan had been repaid.

[18] In the result, since the defendants succeeded in having the plaintiffs' action dismissed in its entirety against them, there is no basis to depart from the general rule that a successful party is *prima facie* entitled to their costs.

ii. <u>Scale of Costs</u>

[19] The defendants seek substantial indemnity as part of the award. For the reasons below, I conclude that the defendants are only entitled to costs on a partial indemnity scale.

a) Allegation of fraud

[20] The defendants referred throughout the materials filed to the claim of fraud. However, they did not seek elevated costs based on the allegations of fraud raised in the pleadings and the

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evidence at trial, but solely on their "undated" offer to settle. The plaintiffs also made no submissions on this issue. The jurisprudence establishes that substantial indemnity may be justified where the unsuccessful party engaged in unreasonable conduct which may involve unproven allegations of fraud, or unnecessarily prolonging or complicating proceedings: *Bank of Nova Scotia v. 8405751 Canada Corp.*, 2018 CarswellOnt 13959 (Ont. S.C.) at para. 51; *Bank of Montreal v. Cardinal*, 2016 ONSC 5211, 40 C.B.R. (6th) 145 at para. 35; and *Business Development Bank v. Oplynx Inc.*, 2023 ONSC 5706 at para. 36. As neither party addressed this factor as a basis for elevated costs, fraud, in this case, cannot be a basis for substantial indemnity costs.

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b) Offer to Settle

[21] The defendants contend that they delivered an offer to settle in August 2019. The offer contemplated paying the amount of a credit card debt and accrued interest, plus interest and costs. On the face of it, the defendants made an offer to settle and obtained a result that was more favourable than the terms of their offer. For the reasons below, I do not accept that the offer to settle attracts the costs consequences under r. 49 of the *Rules*.

[22] The version of the offer to settle does not have the complete date. There is no affidavit of service. Aside from these technical issues, I do not find that the offer to settle would attract the costs consequences under r. 49.10 of the *Rules*, as the language is uncertain and ambiguous on key terms of the offer to settle. An agreement to settle a claim is a contract and, once accepted, is enforceable and binding on the parties: see *G.M. v. Alter*, 2006 CanLII 34995 (Ont. S.C.) at para. 20; *Cellular Rental Systems Inc. v. Bell Mobility Cellular Inc.* [1995] O.J. No. 721 (Ont. C.J. Gen. Div.) at para. 17, aff'd [1995] O.J. No. 3773; and *Pukec v. Durham Regional Police Service*, [2001] O.J. No. 1587 (Ont. S.C.) at para. 32.

[23] To attract the costs consequences under r. 49 of the *Rules*, the offer must be "crystal clear": *Rooney (Litigation Guardian of) v. Graham* (2001), 53 O.R. (3d) 685 (Ont. C.A.) at paras. 43, 44, and 51; *Malik* v. *Sirois* (2003), 176 O.A.C. 348 at para. 2; and *Davies v. The Corporation of the Municipality of Clarington*, 2019 ONSC 2292 at para. 100. Offers to settle must be clear, definite, and unequivocal as to what is being offered so the other side is aware of what is being accepted: *Bifolchi v. Sherar (Litigation Administrator of)* (1995), 25 O.R. (3d) 637 (Ont. C.J. Gen. Div.) at para. 23, aff'd on other grounds, *Bifolchi v. Sherar (Litigation Administrator of)* (1998), 38 O.R. (3d) 772 (Ont. C.A.); *Yepremian v. Weisz* (1993), 16 O.R. (3d) 121 (Ont. C.J. Gen. Div.) at paras. 9, 13.

[24] In this case, the amount of the debt invites speculation, is subject to interpretation, and is a moving target. The principal amount for the debt is unclear. The amount of the "accrued interest" is unknown. It is not clear whether the 1.3 percent interest rate is also to be used as the basis for calculating the "accrued interest" on the credit card debt, nor is it clear what amount will settle the action "in full" or "partial satisfaction," among other things. For example, the first two paragraphs read as follows:

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OFFER TO SETTLE

The Defendants offer to settle this proceeding on the following terms:

1. The Defendants will pay the Plaintiffs the sum of money which they paid to Hyundai Capital Corporation, including principal and interest, to satisfy the debt created by the cash advance which one or more of the Defendants allegedly effected, as described in paragraphs 27-30 of the Statement of Claim (the “Hyundai Capital Loan”). For greater certainty, the Defendants will pay the Plaintiffs the difference between (a) the sum of the principal amount which was advanced and all accrued interest on that amount, and (b) any amount paid by the Defendants, or any of them, to the Plaintiffs or anyone else, in full or partial satisfaction of that debt. The Plaintiffs have alleged, at paragraph 30 of the Statement of Claim, that the Defendants paid 23,259.418 Won (approximately CAD$23,259); and they have alleged, at paragraph 39(g) of the Statement of Claim, that the difference, which was paid by the Plaintiffs, is $25,000. This is Offer to Settle contemplate of the Statement of Claim, that the difference, which was paid by the Plaintiffs, is $25,000. This Offer to Settle contemplates that the Defendants will pay the Plaintiffs the actual difference, if that amount differs from the amount pleaded.

2. The Defendants will pay interest on the amount in paragraph 1, above, at the rate of 1.3 percent per annum from the date the Plaintiffs paid the Hyundai Capital Loan in full or January18, 2018, whichever is earlier, to the date this Offer to Settle is accepted.

[25] While the defendants’ offer did not attract the costs consequence under r. 49 of the *Rules*, the court has taken it into account in assessing the defendants’ willingness to compromise. The action commenced in 2018. The offer was served in 2019 (the plaintiffs do not dispute that the offer was served). The offer demonstrates the defendants’ attempt to resolve the case at an early stage.

iii. <u>Amount claimed and amount recovered in the proceeding – R. 57.01(1)(a)</u>

[26] The statement of claim seeks damages in the sum of over $533,454 for unjust enrichment, breach of fiduciary duty, breach of contract, and fraudulent misrepresentation.

[27] Costs should not be disproportionate to the amount claimed, and should be consistent with the objectives of fairness, reasonableness, and the need for proportionality: *Elbakhiet v. Palmer*,

2014 ONCA 544, 121 O.R. (3d) 616, at paras. 37, 38; *Muskoka Fuels v. Hassan Steel Fabricators Limited*, 2011 ONCA 495, at para. 6.

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[28] The plaintiffs recovered nothing. The claims were dismissed. The amounts being claimed by the defendants are fair and proportionate given the amounts involved and the nature of the claims, including fraud.

iv. Complexity of the proceeding – R. 57.01(1)(c)

[29] The defendants submit that the issues were complicated and, the action involved multiple motions including Mareva injunction and security for costs motion. The defendants say that the plaintiffs raised legal issues including, but not limited to, fraud, unjust enrichment, equitable mortgage, and fraudulent conveyance. The plaintiffs made no submission about the complexity of the action.

[30] The plaintiffs' Costs Outline indicates under the relevant heading, the following:

> **The complexity of the proceeding**
>
> The motion is simple.

[31] In my view, the case was of moderate complexity,

v. Conduct tending to lengthen proceeding unnecessarily - R. 57.01(1)(e)

[32] Neither party has identified any steps made by the adverse party which unnecessarily lengthened the proceedings, and which have not already been compensated for. The defendants say the plaintiffs failed to accept their offer or provide any reasonable offers to settle. A party's failure to accept an offer to settle is usually addressed by the costs consequences under the *Rules*. A party is not obliged to make an offer to settle. The defendants say the plaintiffs brought numerous expensive motions, including a motion for a Mareva injunction, a motion to prolong the injunction, and a motion to strike, which increased the legal fees.

[33] The plaintiffs' submissions on this factor focused on the defendants' breach of orders of the Mareva injunction, which was already the subject of a motion which attracted an award of costs. While the court accepts that the motions brought by the plaintiffs likely lengthened the proceedings, the defendants do not clarify the time involved, nor do they indicate whether those interlocutory steps have not been compensated for by way of costs.

vi. Rates charged, hours spent by the party's lawyer(s) – R. 57.01(1)(0.a)

[34] The defendants changed lawyers three times. There were five lawyers as timekeepers ranging in year of call between 1986 to 2020, and three of them were former counsel. The plaintiffs do not challenge the hourly rate or the years of call of the defendants' lawyers. The hourly rates appear reasonable having regard to the years of call for the various timekeepers.

vii. <u>Reasonable expectation of the parties – R. 57.01(1)(0.b)</u>

[35] The overarching consideration for awarding costs is whether the costs award is reasonable, fair, and proportionate in the circumstances of the case, having regard to the factors set out in r. 57.01 of the *Rules* and the reasonable expectations of the party: *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (Ont. C.A.) at para. 26.

[36] Costs are not simply a mathematical calculation; rather, costs should reflect what is fair and reasonable and should be determined in accordance with what the losing party would reasonably expect to pay: *Zesta Engineering Ltd. v. Cloutier*, [2002] O.J. No. 4495 (Q.L.) (Ont. C.A.) at para. 4.

[37] The defendants say that the plaintiffs took unnecessary and excessive measures, including multiple interlocutory motions (e.g., the Mareva injunction and motion to strike). The plaintiffs' Costs Outline only shows 108 hours, which appears artificially low. This view is supported by amounts awarded by judicial officers for various motions. As the plaintiffs acknowledged, there were eight motions. The plaintiffs assert that the fees and disbursements of these motions totaled over $250,000, which is not supported by the materials before the court. Again, this submission is not supported by the materials before the court. The plaintiffs submit, at paragraph 10 of their Submissions the plaintiffs also contend as follows:

> All these motions attracted no costs or costs on a partial indemnity scale except Master Jolley's costs endorsement dated April 1, 2020.

[38] Again, the plaintiffs' position is contradicted by the various orders and endorsements filed as part of the submission. Although the plaintiffs contend that in Dow J.'s order dated January 18, 2018, which related to lifting the bankruptcy and for an injunction, "there was no costs awarded", Dow J. indicated that the costs were reserved to the return of the motion. While the plaintiffs indicate that Associate Justice Abrams' endorsement dated March 12, 2018, regarding the defendants' first security for costs motion, awarded costs of $1,000, they did not indicate who was awarded costs nor was any transcription provided of the endorsement. The defendants did not address this costs award.

[39] In addition to the costs awards mentioned above, Associate Justice Jolley made a costs award on April 1, 2019, in the amount of $24,000, payable by the plaintiffs to the defendants following a motion to strike. The endorsement is silent as to the time frame within which costs should be paid, and it is not addressed by either party. On May 21, 2019, the plaintiffs were also ordered to pay costs in the amount of $15,000 to the defendants, within 60 days, after continuing the injunction against Myoung Ja Chang and dismissing the motion to continue against the defendants Ji Young and Bo Young.

[40] As for the reference to the endorsement of Associate Justice Jolley, she awarded substantial indemnity costs in the amount of $29,605, payable by the defendants to the plaintiffs within 30 days. Indeed, of the eight motions, costs were awarded in six of those proceedings, with the

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plaintiffs recovering $45,697.83 and the defendants recovering $39,000, for a total of $84,697.83, based on the court's calculation. In all but one case where an award of costs was made, the judicial officer stipulated a deadline date for the payment of costs by the unsuccessful party.[i]

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[41] The plaintiffs also suggests that only Associate Judge's Jolley's order of April 1, 2020, did not attract partial indemnity costs. In fact, this was only one of two motions which attracted substantial indemnity costs based on the endorsements filed by the plaintiffs. The endorsement of Associate Justice Jolley dated December 5, 2018, dealt with the plaintiffs brought a motion for breach, by the defendants, of the order of Grant J. and a timeline for completing examinations for discovery. The plaintiffs were successful. Associate Justice Jolley awarded costs on a substantial indemnity basis. She indicated:

> As a result of this position the plaintiffs seek substantial indemnity costs of $9,746.91 in light of the continuing breach, particularly by Kwang and the position of the defendants on the security for costs motion timing, I order the defendants to pay the plaintiffs costs of this motion in the all-inclusive amount of $9,000 within 30 days of this order.

[42] The defendants filed an affidavit of one of the defendants filed on an interlocutory motion with respect to the reasonable expectation of the defendants. It is not clear to the court how the affidavit is to assist the court. That said, the amounts awarded to the parties on various interlocutory motions, above, ought to have signaled to the parties' the potential costs that would be involved. The plaintiffs have not pointed to any specific duplication of timekeepers.

[43] Save for certain amounts, addressed below, the amount being sought by the plaintiffs on a partial indemnity scale is overall fair and reasonable especially for case that involved eight days of trial. I have reduced, where warranted, time for certain items where multiple timekeepers is involved, or where there is an implication of the new lawyers getting up to speed with the file. In *Kaymar Rehabilitation Inc* v. *Champlain Community Care Access Centre*, 2018 ONCA 76, the Court of Appeal has commented, at para. 29:

> Determining a fair and reasonable amount for the costs of an action following a trial requires a holistic consideration of the factors set out in rule 57.01(1), together with the history of the action".

viii. Importance of the issues – R. 57.01(1)(d)

[44] The defendants say the issues are "very important," as the plaintiffs were claiming "excessive financial damage," alleged fraud, and the defendants were "at risk of significant reputational risk in both the church and Korean community". On the other hand, despite the dismissal of the action, the following appeared in the plaintiffs' Costs Outline:

> **The importance of the issues**
> The plaintiffs need to have their investments and loans repaid to them.

[45] The court is satisfied that the issues were of utmost importance to the parties given the amounts involved and the serious allegations of fraud against the defendants. The defendants also point to the freezing of assets of the defendants because of the Mareva injunction.

ix. Time Spent

[46] Both sides agree that this case proceeded through the usual stages of litigation, including pleadings, discovery, mediation, pretrial conference, and trial.

[47] The plaintiffs contend that this matter should not have required two counsel and note that most of the time on the file was expended on motions, primarily motions for injunctive relief.

[48] The plaintiffs say that the defendants "are seeking partial indemnity costs on exaggerated costs of preparation for trial and conducting the trial." The plaintiffs do not point to which hours are exaggerated, save for the mediation and their challenge to the need for two lawyers at trial.

[49] The plaintiffs submit that the defendants did not provide any docket or bill of costs "detailing the work completed by the defendants" but rather have only provided a costs outline. The court is satisfied that the defendants have submitted both a Bill of Costs and Costs Outline. The defendants have also provided computer generated accounts sent to their clients, which are detailed, both from their previous lawyers or agents, and their current lawyers. The statements detail the work undertaken by various timekeepers, and belatedly, a Costs Outline with a statements/payment transactions summary from their current lawyers, detailing the work undertaken by different timekeepers, the hours expended, the rate charged, and the total billed to the client.

[50] The plaintiffs have chosen to ignore the information and have not pointed to any duplication or overworking demonstrated from the information provided to them. The onus is on them to do so, in the absence of any specific complaint, or any specific identification of items which are "exaggerated," save for those items above. There is no obvious indication in the defendants' Bill of Costs that the time associated with the various motions form part of the legal fees claimed on this assessment.

[51] The plaintiffs have only delivered a Costs Outline (which appears to speak to a motion). They have not delivered a Bill of Costs or any dockets or statements of account. Where a party wishes to challenge the quantum of costs of the opposing party, there must be "more than an attack in the air": see *United States of America v. Yemec* (2007), 85 O.R. (3d) 751(Ont. S.C. Div. Ct.) at para. 54; *Risorto v. State Farm Mutual Automobile Insurance Co.*, 2003 ONSC 43566, 64 O.R. (3d) 135 at para. 10. The plaintiffs have not filed the dockets of their own counsel in support of their submission. Perell J. summarized the jurisprudence in *LivingArt Kitchens Inc. v. Merenich*, 2024 ONSC 3640. He stated, at para. 12:

> Although the unsuccessful party is not obliged to disclose what he or she expended on costs, where the unsuccessful party submits that the costs claimed by the successful party are excessive, <u>evidence of what he or she expended is relevant to the determination of what is reasonable and of what the unsuccessful party might</u>

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> reasonably have expected to pay and the failure to proffer this evidence tempers and diminishes the unsuccessful party's criticism of the excessiveness of the costs claim. An attack on the quantum of the opponent's claim for costs without disclosing one's own bill of costs is no more than an attack in the air. [Emphasis added]

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[52] The plaintiffs' hours appear artificially low. The plaintiffs say that the trial preparation was substantially reduced by the court order to replace the direct testimony with affidavits. I am convinced that the time to prepare the witnesses would have been reduced by the fact that evidence in chief was by way of affidavit. Presumably, there would have been more pre-trial preparation, but the plaintiffs only indicate 25 hours of preparation time, as compared to the defendants' 72 hours for each lawyer.

[53] The plaintiffs have indicated only 25 hours for an eight-day trial, fewer hours, in comparison, to the time apparently spent on several interlocutory motions. Given the misstatements made by the plaintiffs in their submissions, the court is more inclined to accept the submissions of the defendants.

[54] The plaintiffs' Costs Outline indicates costs, on a partial indemnity basis, totaling $36,238, with $23,220 allocated to fees, plus HST of $3,018.60, and disbursements totaling $10,000 (presumably inclusive of HST). The Costs Outline indicates seven hours devoted to pleadings, ten hours devoted to documentary discovery, eight hours expended on mediation, and the same amount of time for pre-trials. The same amount of time, 25 hours, is indicated for preparation and conducting examination for discovery and preparation for trial, and a further 25 hours for the actual trial itself. Neither party indicated to the court how many of the named parties were examined for discovery nor the number of hours to complete the examinations for discovery.

[55] Additionally, the document refers at times to a "motion" as if it were prepared for an assessment of costs for a motion as opposed to a trial. For example, the document indicates the following:

- "The motion is simple," under the heading regarding complexity.
- "The plaintiffs need to have their investments and loans repaid to them," under the heading regarding the importance of the issues to the parties.

[56] The plaintiffs estimate that 90 percent of the costs were consumed by eight motions, which the plaintiffs estimate amounts to approximately $250,000. The plaintiffs do not provide any support for the guesstimate, nor do they identify on which motions, if any, the costs were reserved to be assessed or determined by the trial judge. The plaintiffs do not make any submissions with respect to costs to be allocated for any interlocutory motion. In the absence of any such submissions, no determination will be made with respect to costs of any interlocutory motions.

[57] The plaintiffs' total costs for an action that occupied almost eight trial days, is equivalent to the among being claimed by the defendants at the pleadings stage; the defendants are seeking $33,315.90, exclusive of HST, for this item. The plaintiffs have not expressly challenged this item;

they have challenged "exaggerated" costs. In my view, 120.96 hours docketed by three different lawyers amounts to $33,315.90 at the pleadings stage is not fair, reasonable, or proportionate. I would allow $16,657.95 given the serious allegations of fraud raised in the pleadings.

[58] The plaintiffs say that the "hours of the examinations for discovery were also exaggerated" but provide no particulars.

[59] One of the items that the plaintiffs did identify as exaggerated was the time for mediation. The plaintiffs submit that it was a roster mediator and the mediation lasted three hours. The plaintiffs indicate 8 hours for drafting and attending on the mediation. In contrast, the defendants' lawyer (one timekeeper) docketed 91.58. I am not prepared to question the time spent by counsel to prepare for the mediation, draft the materials, meet with clients, an attend on the mediation given what was at stake in terms of the amounts involved, the allegations of fraud, the number of parties involved, and presumably the need for an interpreter. I have allowed the time claimed on a partial indemnity basis, set out below.

[60] There were three pretrial conferences. The defendants consistently had a junior lawyer noted for each pretrial conference. There is no explanation as to why this case would have required two lawyers for all three. Having regard to the issues involved, including fraud, issues of interpretation (Mr. Hong speaks Korean and was of assistance at times at the trial), it is not entirely unreasonable that two lawyers would have been involved at the pre-trial stage. I have reduced the amount claimed, however. An award of $5,097 is fair, reasonable, and proportionate having regard to the issues in this case, including the allegation of fraud, and the allowance for some preparation time by a junior lawyer.

[61] The plaintiffs contend that:

> There was absolutely no document from the defendants which was exhibited at trial. All exhibits came from the plaintiffs. The defendants either never produced any relevant document or produced irrelevant documents to waste time and costs of the parties and the court.

[62] Aside from these bald statements, the plaintiffs have not provided any authority to suggest that in determining costs, the court may take into consideration which party's documents were made exhibits at trial.

[63] As for the trial preparation and attendance at trial, the plaintiffs' time allocated for preparation and the hearing are inexplicably low. The evidence in chief was by way of affidavit. This does not minimize the pre-trial work that went into preparing for the affidavits of each of the parties. As the defendants point out, the parties did not speak English which resulted in increased costs for translation. The trial occupied eight days, and without a doubt having an interpreter added to the length of the hearing. As all the affidavits filed with the court were in English, presumably the affidavits had to be translated for them. The court does not accept the estimate of 25 hours by the plaintiffs and prefers the estimate of 72 hours indicated by the defendants. The court will allow the trial preparation for both counsel ($20,610), as it was reasonable for a junior to be involved to assist with trial preparation.

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[64] As for attendance at trial, the court agrees with the plaintiffs that two lawyers were not required by the defence throughout the trial. It was reasonable for a junior lawyer to attend at some points during the trial given the nature of the serious allegations of fraud raised by the plaintiffs, the requirement of an interpreter, and the assistance, which was apparent to the court, that the junior lawyer, Mr. Hong, provided to lead counsel. This assistance took the form of translating documents for various witnesses from Korean to English at various points in the trial. In the result, the court would allow Mr. Chen's time of 72 hours totaling $15,120 and allowed 30 percent of Mr. Hong's time, which amounts to $8,748.

V. **Quantum**

[65] It appears that, for the most part, costs of the interlocutory proceedings were dealt with by various judicial officers.

[66] I am persuaded by the defendants' argument that the issues were very important to the defendants, not only because of the amounts claimed, but because of the allegations of fraud and the potential for reputational harm.

[67] The only party who demonstrated any attempt to compromise were the defendants. While the offer to settle does not attract the costs consequences under the rules, I have taken the offer into account into account in determining costs. In exercising its discretion with respect to costs, the court may consider any offer to settle made in writing, the date the offer was made and the terms of the offer: see, r. 49.13; see also *Elbakhiet* v. *Palmer*, 2014 ONCA 544, 121 O.R. (3d) 616. The plaintiffs attempt to compromise was made at an early stage, only a year after the action was commenced, and the lion share of the costs in the action was incurred.

[68] On the materials before the court, and the submissions made, and after considering the issues involved, the attempt to resolve the case by the defendants, at an early stage, the court finds the following amounts to be reasonable for the various stages of litigation:

i.	Pleadings	$16,657.95
ii.	Mediation	$21, 979
iii.	Examination for discovery	$59,685.60
iv.	Pre-Trial Conferences	$5,097
v.	Preparation Trial	20,610
vi.	Trial	$23,868

VI. **Impecuniosity**

[69] The plaintiffs further submit that there should be no costs awarded against them because they are impecunious. The plaintiffs rely on *Baines v. Hehar*, 2013 ONSC 849, 114 O.R. (3d) 551.

[70] Pursuant to clause (i) of subrule 57.01(1) of the *Rules*, the court may consider "any other matter relevant to the question of costs", which may include impecuniosity. In general, impecuniosity does not and should not eliminate a party's obligation to pay costs: *Balasundaram v. Alex Irvine Motors Ltd*., 2012 ONSC 5840, [2012] O.J. No. 6323 at para. 17; *Agius v. Home*

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Depot Holdings Inc., 2011 ONSC 5272, [2011] O.J. No. 4424 at para. 17; *Boucher;* and *Guelph (City) v. Wellington-Dufferin-Guelph*, 2011 ONSC 7523, [2011] O.J. No. 6009, at para. 30; *Barber v. Goerz*, 2021 ONSC 3689. The rationale is "avoiding a situation in which litigants without means can ignore the rules of the court with impunity, and the distastefulness of creating a rule incapable of consistent application": *Myers v. Metropolitan Toronto (Municipality) Chief of Police*, 125 D.L.R. (4th) 184 (Ont. Div. Ct.) at pp. 189-90. In *Jessica Greenhalgh, et. al. v. The Corporation of the Township of Doura-Dummer*, 2011 ONSC 2064, [2011] O.J. No. 1657, at para. 36, aff'd *Greenhalgh v. Douro-Dummer (Township)*, 2012 ONCA 299, Lauwers J. (as he then was) identified "the problem posed for the system of justice if the costs disincentive established by the *Rules* were to be displaced by a rule that routinely advantaged a party's hardship in the exercise of judicial discretion over costs."

[71] *Baines*, relied upon by the plaintiffs, is distinguishable. The case involved a motor vehicle accident tried before a jury. The plaintiff represented herself at trial. She had rejected an offer to settle from the defendant. The jury found the defendants primarily liable for the accident, and only apportioned ten percent liability against the plaintiff. There were issues involving threshold. The plaintiff had rejected an offer by the defendants to settle for $100,000. After a 12-day trial, the jury found that the defendants were 90 percent liable for the accident and that the plaintiff was ten percent liable.

[72] Justice Moore did not award costs against the unsuccessful plaintiff. At paras. 23 and 24, Moore J. noted that the plaintiff did not lose the case because she did not suffer injuries and serious permanent impairments of important bodily functions as the result of the accident; rather, "she lost because she failed to marshal and adduce the evidence necessary to make out her case at trial." In this case, the plaintiffs failed on the merits. Moore J. also noted the plaintiff "may well have applied compromised cognitive functioning in considering whether to settle her case rather than pursuing her day in court". Unlike the plaintiff in *Baines*, here, the plaintiffs were represented by counsel. Also, unlike the plaintiffs in *Baines*, there is no evidence before this court of any impairment or other factor that would otherwise compromise the plaintiffs' cognitive functioning in determining whether to settle the case. And, unlike *Baines*, here the plaintiffs did not establish any merit to the disputed claims.

[73] Finally, in *Baines*, there was evidence before the court of the plaintiffs' inability to bear the financial burden of the award. Here, the plaintiffs rely on the decision of Associate Justice Jolley dated January 30, 2020, in the context of the defendants' security for costs motion. They contend that the Associate Justice found that the plaintiffs were impecunious. At paragraph 19 of their Costs Submissions, the plaintiffs state:

> The details of all their assets and their income by way of retirement pensions were disclosed. Since then, the financial situation of the plaintiffs only became worsened.

[74] The defendants submit that although the plaintiffs have claimed that they were impecunious, they own property and have financed the litigation, including numerous motions.

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[75] In this case, I find that the position advanced by the plaintiffs of impecuniosity is not a defence available to the plaintiffs for liability to the defendants' costs. The court is not bound by the Associate Justice's finding on a procedural motion that the plaintiffs are impecunious. Even if that finding was binding, which it is not, the decision of Associate Justice Jolley was made four years ago.

[76] Moreover, the court is not able to consider merely bald statements by the plaintiffs, without actual evidence. The onus is on the party relying on impecuniosity to adduce evidence to establish their impecuniosity: *Kolosov v. Lowe's Companies Inc.*, 2016 ONCA 973, [2016] O.J. No. 6702, at para. 18. In other words, the party asking the court to consider impecuniosity in the assessment of costs must establish impecuniosity on the evidence: *Great V & L Trading Incorporated v. Skyline Car Rental Inc.*, 2018 ONSC 2928, at para. 81.

VII. Disbursements

[77] The court has allowed $10,000 all-inclusive for the defendants' disbursements .an unsuccessful party should not be liable for disbursements related to travel fee and food or Westlaw license fees; the former is not an assessable disbursement, and the latter is overhead. The court also allows approximately 70 percent of the disbursements being claimed for "Courier/fax/scanning/printing/delivery/binding," as some of these items in the bundle, including scanning and delivery, are properly part of overhead.

A.P. Ramsay J.

Date: August 26, 2024

[i] The order of Associate Justice Jolley dated April 1, 2019, in which she dismissed the plaintiffs' motion to strike and awarded the defendants $24,000, is silent as to when those costs should be paid.

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