CITATION: Wilhelm Concrete v. Shackelton, 2025 ONSC 4222
COURT FILE NO.: CV-19-00003030
DATE: 20250716

ONTARIO

SUPERIOR COURT OF JUSTICE (STRATFORD)

BETWEEN:	
634573 ONTARIO LIMITED O/A WILHELM CONCRETE Plaintiff/Defendant by Counterclaim	Dennis Crawford, for the Plaintiff/Defendant by Counterclaim
– and –	
JAY SHACKELTON AND COLLEGE GRAIN INC. Defendants/Plaintiffs by Counterclaim	Jacob Damstra and Matthew McGuckin, for the Defendants/Plaintiffs by Counterclaim
	HEARD: In Writing

DECISION ON COSTS

JUSTICE E. TEN CATE

[1] This decision on costs follows my reasons for judgment dated May 23, 2025, in which I awarded $97,754.04 to Wilhelm Concrete for outstanding invoices and $177,897.34 to College Grain Inc. Once the set-off was applied, College Grain's award exceeded Wilhelm Concrete's by $80,143.30.

[2] I have reviewed the parties' written submissions.

[3] College Grain seeks partial indemnity costs of $105,448.99 plus HST of $13,705.64 and disbursements of $37,315.31 for a total of $156,448.99. Wilhelm Concrete submits that each party should bear their own costs; alternatively, any costs awarded to College Grain should not exceed $55,000 in total.

[4] Wilhelm Concrete argues that success was divided. It also argues that since its formal offer to settle in 2019 included no interest, it was less than the ultimate award in the main action and should attract the cost consequences outlined in Rule 49.10.

[5] I prefer Reilly J.'s more holistic view of success in *Jomar Cattle Feeders Inc. v. Murphy* which takes into account the overall result considering the counterclaim and set-offs.[1] Additionally, as Ramsay, J. noted in *Amelin Engineering v. Steam Eng Inc*., when assessing whether a party matched or beat its Rule 49 offer, "all the terms of the offer to settle must be compared, including costs, with all the terms of the judgment".[2]

[6] Importantly, Wilhelm Concrete's offer to settle included a term that required College Grain to sign a comprehensive release covering "all matters raised in, or which could have been or ought to have been raised in, this proceeding including, without limiting the generality of the foregoing, any and all claims relating to or arising out of the construction of grain silos for the Defendants, or either of them".

[7] In other words, had College Grain accepted Wilhelm Concrete's offer, it would have been forced to abandon its counterclaim. College Grain declined the offer, succeeded on its counterclaim at trial, and received an award greater than the main claim. Therefore, Wilhelm Concrete's offer does not trigger the cost consequences of Rule 49.10 because the overall result obtained was less favourable than its offer.

[8] College Grain argues that prior to litigation commencing, it made multiple attempts to resolve the issues, including a partial offer of $50,000 against outstanding invoices, while Wilhelm continued to investigate and repair the water infiltration issues. I find that although College Grain made some attempts to resolve the litigation prior to litigation, none of the partial offers were in writing and therefore do not attract the cost consequences under Rule 49.10. College Grain acknowledges that its formal offer of $398,404.01 exceeded the result at trial and is not operative.

[9] Given the result at trial, the real issue is proportionality.

[10] Subrule 57.01(1)(a) directs the court to consider the amount claimed and the amount recovered in the proceeding. Here, Wilhelm Concrete claimed $105,774.23 for outstanding invoices and recovered $97,754.04. College Grain counterclaimed for $717,570 but recovered only $177,897.34 – netting only $80,143.30.

[11] The policy reason behind the Simplified Rules is to attempt to *reduce* the cost of litigating claims of modest amounts using a simplified procedure. According to Rule 76.12.1, no party to an action may recover costs exceeding $50,000 or disbursements exceeding $25,000 exclusive of HST. Because the claim and counterclaim were both commenced before January 1, 2020, Rule

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[1] *Jomar Cattle Feeders Inc. v. Murphy*, 2007 CanLII 14333 (ON SC), at paras 6-7, aff'd 2008 ONCA 267.
[2] *Rooney (Litigation Guardian of) v. Graham*, 2001 CanLII 24064 (ON CA), at para. 57, cited in *Amelin Engineering v. Steam Eng Inc.*, 2022 ONSC 5064 at para. 29.

76.12.1 does not apply. However, costs are in the court's discretion, and it is open to me to consider the rule and the policy reason behind it.

[12] In my view, the sum of $50,000 plus HST of $6,500 is an appropriate award for fees.

[13] With respect to disbursements, College Grain's expert fees are appropriate because the engineer from IRC Group/Rimkus assisted the court regarding liability. I deduct unspecified "office charges" of $1,264.41 plus HST and award disbursements in the amount of $35,886.52.

[14] I therefore order Wilhelm Concrete to pay total costs of $92,386.52 to College Grain.

Justice E. ten Cate

Released: July 16, 2025

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ten Cate J.

Released: July 16, 2025