

IN THE COURT OF KING'S BENCH OF NEW BRUNSWICK
TRIAL DIVISION
JUDICIAL DISTRICT OF FREDERICTON

BETWEEN:

AYUB CHISHTI,

- and -

LAUGHLIN DRUG CO. LTD.

Plaintiffs,

- and -

NORTHSIDE PHARMACY LTD.,

N.N.Y. HOLDINGS LTD.,

FAHIM CHISHTI, and

SOUTHSIDE MEDICAL CLINIC LTD.

Defendants,

DECISION

Date of Hearing: July 23, 2025

Date of Decision: July 24, 2025

Before: Justice Richard G. Petrie

Representation of Parties at Hearing:

Kevin C. Toner, K.C., Counsel for the Plaintiffs

Randy G. Bishop, Counsel for the Defendants

Petrie, J.

I. INTRODUCTION

[1.] This matter stems from a lengthy, long delayed but ongoing litigation between these parties. In a decision after a trial in respect to a severed part of the underlying original action, consistent with a bifurcation order of Justice Clendening, July 9, 2019, Justice Morrison dismissed the Plaintiffs' claims in regards to their alleged "ownership interests" in the Defendants' corporations (For more complete context, reference should made to Justice Morrison's decision dated February 24, 2021 (2021 NBQB 035)).

[2.] As Justice Morrison states, in part, at paragraph 7 of his judgment:

...Justice Clendening's bifurcation order was not a simple severance of the issues of liability and damages. It confined the issue to be tried to whether or not the plaintiff has established that he is a 40% shareholder of the defendant corporations.

[3.] In a subsequent costs decision dated September 10, 2021, Justice Morrison awarded the Defendants costs of \$86,250.00 inclusive of HST. No costs have yet been paid, notwithstanding this order. No appeal was taken of either of Justice Morrison's

decisions. While I am informed the Defendants sought leave to appeal the bifurcation order of Justice Clendening, it was refused.

[4.] According to Justice Morrison’s February 2021 trial decision, the issues arising from the original Statement of Claim and the bifurcation order left to be adjudicated, center around alleged wrongful dismissal of the Plaintiffs by the Defendants.

[5.] Before me today, the Plaintiffs have filed a motion by which they are seeking leave of the Court to amend their Statement of Claim pursuant to Rules 27.10(1) and 27.10(2)(c) of the Rules of Court. They maintain the amendments are necessary for the purpose of determining the “real questions” remaining in issue between the parties.

[6.] The Plaintiffs have prepared an Amended Statement of Claim which they say reflects their “true position” and addresses the issues involved in the remaining suit between the parties.

[7.] The Defendants object to the Plaintiff’s request to amend their Statement of Claim but not in all respects. Their objections are raised in regards to proposed paragraphs 40.1

through 40.20 as they argue those additions relate to entirely new causes of action and/or are “too late” and are subject to a “limitation problem” under the *Limitation of Actions Act*, SNB 2009, c. L-8.5 (LAA).

[8.] Moreover, the Defendants say that the Plaintiffs ought to be disentitled to apply for leave to amend, as the Order for costs from the first trial remains unpaid and, therefore, the Plaintiffs are not of "clean hands" in seeking such a discretionary remedy from this Court.

[9.] In response, the Plaintiffs say that neither of these objections should prevent the Court from granting leave. Mr. Toner argues that there are substantial monies still held by the Defendants' corporations and which are “clearly” owed to his client. He argues these should more than offset any security for costs concerns.

II. ISSUE

[10.] As I stated at the hearing, I am compelled to first address the issue of the effect, if any, on the unpaid costs order.

[11.] I wish to note, under Rule 59 the Defendants would be a party entitled to reasonable disbursements, following the trial and costs award. However, this amount has yet to be confirmed. While the Defendants' solicitors forwarded a proposed bill of costs for disbursements on November 15, 2021, totaling \$17,377.65, the parties did not proceed to any final determinations on the issue under the process set out in Rule 59. The amount of disbursements remains an outstanding issue and will not form the basis of my decision today.

Stay of Action for Unpaid Costs Order

[12.] The Defendants' object to the Plaintiffs' proceeding on the within motion to amend as significant costs ordered by Justice Morrison, after the first trial, remain unpaid. The Plaintiffs have not provided any evidence to explain their failure to make any payment towards the outstanding costs award.

[13.] There is authority for the proposition where outstanding cost awards have not been complied with for the Court enter a stay, pending payment.

[14.] My colleague, Justice Christie in *Williams v. Holland*, 2025 NBKB 22 recently stayed a motion for summary judgment before him on the basis of outstanding costs earlier awarded against the Plaintiff at both King's Bench and at the Court of Appeal levels. More recently, the New Brunswick Court of Appeal refused leave to appeal Justice Christie's decision.

[15.] There is evidence that the Defendants, who were entirely victorious at the first trial before Justice Morrison, incurred significant legal fees (and disbursements) in excess of \$300,000.00

[16.] Before me there is, at most, some vague assertion that the Plaintiffs are impecunious or unable to pay the outstanding costs award. There is virtually no financial or other such evidence provided by the Plaintiffs to support that contention. To be clear, to the extent the Plaintiffs argue impecuniosity, they have not established it. Furthermore, the Plaintiffs have not established that they will be non-suited if required to first satisfy the outstanding costs order.

[17.] Even in circumstances of an impecunious litigant, the Court retains the discretion to make an order that is “just” to *both* parties. In *Burrell v. Peel Police et al.*, 2007 CanLII 46173 (ONSC), Master Dash, of the Ontario Superior Court of Justice aptly captured the issue as follows:

[2] A balance must be struck between on the one hand the rights of an indigent litigant to have his or her day in court without concern that access thereto will be denied because of unpaid interlocutory costs orders and on the other hand the rights of other litigants not to be faced with litigants who, using impecuniosity as a shield against the costs consequences of their actions, are free to ignore the rules and orders of the court.

[18.] Further at paragraph 54, Master Dash states:

[54] The cases to which I have referred lead me to conclude that the court has a discretion to take into account the impecuniosity of a litigant in an award of costs and on a motion to dismiss for failure to pay those costs. The court should consider as a relevant factor in the exercise of its discretion the effect on access to justice if costs are sought to be awarded or enforced against an impecunious litigant, but the court is free to then it give it whatever weight it deems appropriate in all of the circumstances, including no weight. **Furthermore, although impecuniosity is a relevant factor, it is only one factor. There is not only one party involved in the action – the defendant has rights as well which the court must take into account. It is unfair that the defendants continue to incur substantial costs in compelling the plaintiff to comply with her production and discovery obligations and with court orders, when that plaintiff could, in the absence of sanctions, have carte blanche to ignore orders of the court and to bring, resist and appeal motions with impunity, with no fear of costs consequences by simply pleading impecuniosity at every turn. The court must also take into account the interest of the court in ensuring that its rules and orders are not ignored and retaining some measure of control over a party’s conduct.** There must be fairness and a balancing of interests, but clearly a person’s modest means cannot serve as an excuse to play by a different set of procedural rules and ignore orders of the court and the rules of court with impunity. **Unreasonable conduct should not be rewarded by denying costs to the innocent defendant or by deferring payment until after trial.**

(Emphasis Added)

[19.] Justice Morrison's cost award is premised upon a number of well known costs principles. At paragraph 6 of his decision and after citing the New Brunswick Court of Appeal's decision in *Doucet et al. v. Spielo Manufacturing Inc. et al.*, 2011 NBCA 44, he quotes in part:

- a) It is a "loser pay" system where, absent special circumstances, the purpose is to provide the successful party with partial indemnification of legal fees (par. 117);
- ...
- c) A costs award must balance two competing principles: the award should properly compensate the successful party but not deter plaintiffs from pursuing meritorious claims (pars. 117 and 158);

[20.] In my view, for court orders to have any meaning they must be enforced.

[21.] I share the view, as expressed in *Stacey v. Barrie Yacht Club* {2003} OJ no. 4171 (SCJ),

where the court stated:

- (f) Even if I were persuaded that the Appellant/Plaintiff is impoverished and without assets, which I am not, there would be good reason not to allow the appeal to proceed when costs have not been paid. **Not only would that shift the economic burden of the proceedings to which the order relates to the Respondent/Defendant contrary to the costs principles on which it was based, it would also allow the Appellant/Plaintiff to continue court proceedings without complying with the courts orders.**

(Emphasis Added)

[22.] Again, the Plaintiffs, without explanation, have failed to make any attempt to satisfy the costs award for almost four (4) years and this Court is not prepared to overlook this.

Furthermore, the resolution of this litigation has been unreasonably prolonged.

[23.] As a result, the Plaintiffs' motion is stayed for 90 days. If over that period, Justice Morrison's costs award is fully satisfied, the Plaintiffs' motion to amend will proceed to a hearing.

[24.] In the event the costs award is not satisfied within 90 days, the Plaintiffs' motion will be dismissed *with prejudice*. Any claim for costs on the dismissed motion can be spoken to by the Defendants in that event. Also, at that point and in that event, the Court will, at the request of either Counsel, convene a case management conference in order to discuss the status of the remaining action/claims of the Plaintiffs and next steps.

[25.] I will retain jurisdiction over the matters directly arising from my decision.

DATED at Fredericton, N.B. this 24th day of July, 2025.

Richard G. Petrie, J.C.K.B.