

CITATION NO.: Denny’s Lube Centre (2016) Inc. v. 1121209 Ontario Inc., 2025 ONSC 4879
COURT FILE NO.: CV-24-84610
DATE: August 25, 2025

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Denny’s Lube Centre (2016) Inc., Applicant

- and -

1121209 Ontario Inc., Respondent

BEFORE: MacNeil J.

COUNSEL: *Andrei Dobrogeanu* – Lawyer for the Applicant

Terry Corsianos – Lawyer for the Respondent

REASONS FOR DECISION ON COSTS

[1] This is my decision on costs respecting the Applicant’s application for an order that the Respondent comply with its obligation under a commercial lease to provide audited statements, and that the Respondent is estopped from claiming any rent that may have been payable prior to January 1, 2021. The Applicant was the successful party.

[2] The parties were unable to settle the issue of costs. They have both made written submissions setting out their positions in respect of same.

General Principles

[3] Section 131(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 provides that an award of costs is in the discretion of the court.

[4] Rule 57.01(3) of the *Rules* provides that, when the court awards costs, it shall fix them in accordance with subrule (1) and the Tariffs. Tariff A establishes the fees and disbursements that are allowable under Rules 57.01 and 58.05.

[5] Rule 57.01(1) sets out factors to be considered by the court in exercising its discretion to award costs, including:

- the result in the proceeding;
- any offer to settle or to contribute made in writing;
- the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;

- the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;
- the amount claimed and the amount recovered in the proceeding;
- the complexity of the proceeding;
- the importance of the issues;
- the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
- whether any step in the proceeding was: (i) improper, vexatious or unnecessary, or (ii) taken through negligence, mistake or excessive caution;
- a party's denial of or refusal to admit anything that should have been admitted; and
- any other matter relevant to the question of costs.

[6] Rule 49.10 of the *Rules* provides costs consequences where a party fails to accept an offer to settle. Where a plaintiff makes an offer to settle that is not accepted and obtains a judgment as favourable as or more favourable than the terms of the offer, rule 49.10(1) provides that the plaintiff is entitled to partial indemnity costs to the date the offer was served and substantial indemnity costs thereafter, unless the court orders otherwise. Rule 49.01.1 provides that the rule applies to actions, applications and, with necessary modifications, motions, counterclaims, crossclaims and third or subsequent party claims.

[7] The intent of rule 49.10 is to induce settlements and avoid trials. The Ontario Court of Appeal has held that a court should depart from the costs consequences imposed by rule 49.10 only where, after giving proper weight to the policy of the rule and the importance of reasonable predictability and the even application of the rule, the interests of justice require a departure: *Starkman v. Starkman*, [1990] O.J. No. 1627, 28 R.F.L. (3d) 208 (Ont. C.A.), at para. 31.

[8] Rule 1.04(1.1) provides that, in applying the rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

[9] Modern costs rules are designed to advance five main purposes: (1) to indemnify successful litigants for the cost of litigation, although not necessarily completely; (2) to facilitate access to justice, including access for impecunious litigants; (3) to discourage frivolous claims and defences; (4) to discourage and sanction inappropriate behaviour by litigants; and (5) to encourage settlements: *Fong v. Chan*, 1999 CarswellOnt 3955, 128 O.A.C. 2 (Ont. C.A.), at para. 22; *394 Lakeshore Oakville Holdings Inc. v. Misek*, 2010 ONSC 7238, at para. 10.

[10] Ultimately, in fixing costs, the primary principles remain fairness, reasonableness and proportionality.

[11] As stated by the Ontario Court of Appeal in *Boucher v. Public Accountants Council (Ontario)* (2004), 71 O.R. (3d) 291 (Ont. C.A.), at para. 26, when fixing costs, the calculation of hours and time rates is only one factor to be taken into account. The overall objective is “to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding, rather than an amount fixed by the actual costs incurred by the successful litigant.” (See also *Zesta Engineering Ltd. v. Cloutier*, 2002 CarswellOnt 4020, [2002] O.J. No. 4495 (Ont. C.A.), at para. 4.)

Position of the Applicant

[12] The Applicant submits that it was entirely successful on the application and seeks its costs in the amount of \$35,585.01. This is comprised of partial indemnity (60%) costs in the amount of \$13,268.80 prior to the date of the Applicant’s offer to settle, May 16, 2024, which was not accepted; \$14,144.44 in substantial indemnity (90%) costs thereafter; and disbursements in the amount of \$8,171.77.

[13] It is submitted by the Applicant that the costs amount sought is proportionate to the importance of the issues raised in the litigation as they relate to an ongoing landlord and tenant relationship. The parties prepared comprehensive records and written submissions, obtained opinion evidence, completed cross-examinations, and the hearing itself took most of a day. The Applicant delegated appropriately to junior lawyers, law clerks and students.

[14] The Applicant submits that rule 49.10 should apply. On May 16, 2024, the Applicant offered to settle the matter on terms that were as favourable or more favourable for the Respondent than the outcome of the application. The written offer was made more than seven days before the hearing and remained open for acceptance until after the commencement of the hearing. Accordingly, the Applicant should be awarded partial indemnity costs until the date of the offer and substantial indemnity costs thereafter.

[15] The Applicant submits that, ultimately, it was not necessary for it to argue for an order summarizing the actual costs related to the Additional Rent as the Respondent produced those documents as part of its responding materials; and the Applicant did not end up making interim motions for an order that it pay only the Minimum Rent until the Respondent complied with its contractual obligations or for the production of the Respondent’s books and records. Seeking such relief in the Notice of Application was proper in the event that such interim relief was necessary. Since no motions for interim relief were brought, no costs were incurred as a result of that relief being claimed. Further, the Applicant retained an expert to provide an expert report which increased its costs. The Respondent also did not include any pre-litigation costs in its bill of costs. As a result, there is no reason to reduce the costs claimed by the Applicant.

Position of the Respondent

[16] The Respondent submits that the Applicant was not entirely successful on the application given that it abandoned a number of claims for relief prior to the hearing, including an order that the Landlord provide a statement summarizing actual costs related to the Additional Rent, an order

that the Tenant pay Minimum Rent while awaiting delivery of the audited statements from the Landlord, and an interim order for the production of certain books and records for inspection.

[17] The Respondent further submits that the quantum of costs incurred by the Applicant is excessive. The Applicant's law firm had two senior lawyers, one articling student, and two law clerks working the file. The Respondent, however, used only one counsel for the entirety of its services. The Respondent's Costs Outline sets out costs incurred in the amount of \$37,138.07.

[18] The Respondent contends that costs in the amount of no more than \$16,712.12 should be awarded in favour of the Applicant. This amount reflects partial indemnity of the \$37,138.07 reasonable expectation amount, less a 15% discount for the Applicant's partial success.

Analysis

[19] As the successful party, the Applicant is entitled to costs of the application.

[20] I am satisfied that the Applicant's written offer to settle, dated May 16, 2024, qualifies as a rule 49.10 offer. It was served after the Application Record was delivered. It was made more than seven days before the hearing, it was not withdrawn and remained open for acceptance until after the commencement of the hearing, and it was not accepted by the Respondent. I find that, in the offer, the Applicant offered to settle the matter on terms that were as favourable or more favourable than the decision that was ultimately rendered by the court. The interests of justice do not require a departure from the costs consequences of rule 49.10 and so I conclude that it is appropriate to apply same.

[21] With respect to the disbursements claimed, while the majority of them appear to be reasonable and related to the litigation, the purpose of the "Firm Administration Expense" charge, in the amount of \$150.00 plus \$19.50 HST (total \$169.50), is not clear to me. Nor is it clear to me that the Respondent should be responsible for paying that expense item.

[22] With respect to the Respondent's submissions that certain of the Notice of Application relief was abandoned, I am satisfied that the Respondent's production to the Applicant of the summary of the actual costs related to the Additional Rent, together with copies of original invoices, meant that there was no further need for the Applicant to seek such relief at the hearing itself. There was nothing to indicate that the Respondent would have produced such information but for the claim being made in the Notice of Application initially. Further, the Respondent's Factum acknowledges the relief that was abandoned by the Applicant at the outset, and so no aspects of the Factum preparation were wasted addressing those abandoned issues.

[23] The Respondent's full litigation costs, as set out in its Costs Outline submitted at the hearing, were \$37,138.07. I find that the costs incurred by the Applicant would be expected to be a bit higher than the Respondent's given that it had to prepare the Notice of Application and prosecute the matter. The Applicant's bill of costs also includes a disbursement for expert services of a professional accountant, while the Respondent did not claim costs for the services provided by its professional accountant.

[24] In addition, I have considered the following factors:

- (a) It was reasonable for the Applicant to have brought the application.
- (b) The issues raised on the application were of importance to the Applicant.
- (c) The proceeding was of moderate complexity.
- (d) The relief ultimately sought at the hearing of the application was granted in its entirety.
- (e) The hourly rates claimed appear to me to be reasonable.
- (f) The work done on the file as undertaken by counsel for the Applicant appears to me to be reasonable.
- (g) The costs amount claimed does not exceed the reasonable expectations of the Respondent in light of the Respondent's own Costs Outline as submitted.
- (h) The Respondent could reasonably have expected to pay costs in the event of lack of success on the application.

[25] Having regard to all of these factors, and considering the balancing exercise required under Rule 57.01 and the guidance provided by the *Boucher* decision of the Ontario Court of Appeal, I am satisfied that awarding costs to the Applicant in the requested amount of \$35,585.01, inclusive of HST and disbursements, less the \$169.50 "Firm Administration Expense" disbursement, is fair, reasonable and proportionate in the circumstances.

Disposition

[26] For the foregoing reasons, this court orders that the Respondent pay costs to the Applicant fixed in the amount of \$35,415.51, payable within 30 days of the release of these reasons.

MacNEIL J.

Released: August 25, 2025