

SUPERIOR COURT OF JUSTICE – ONTARIO

BETWEEN:

BRAIN DAMAGE INC., NANCY LANDS SHEKTER, personally and in her capacity as trustee of The Estate of Melville Lands and MELNANCE INVESTMENTS INC.

Plaintiffs

- and-

GARY LANDS, personally and in his capacity as a trustee of the Estate of Melville Lands, LANDS DEVELOPMENT CORP., LANDS EQUITY CORP., MELANOR INVESTMENTS INC., NANGAR INVESTMENTS LTD. and DEBORAH LANDS, personally and in her capacity as the power of attorney for Melville Lands

Defendants

BEFORE: ASSOCIATE JUSTICE MCGRAW

COUNSEL: J. Goldblatt
E-mail: jgoldblatt@agblp.com
-for the Defendants Gary Lands, Lands Development Corp., Melanor Investments Inc. and Deborah Lands (the “Defendants”)

Dr. N. Shekter
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-for the Plaintiffs, Self-Represented

ENDORSEMENT RELEASED: September 6, 2025

Costs Endorsement

I. Background

[1] As set out in my Endorsement dated December 23, 2024 (the “Endorsement”), the parties seek costs related to the Plaintiffs’ Second Fresh As Amended Statement of Claim dated November 21, 2024 (the “Second Amended Claim”).

[2] These are contentious proceedings between the Plaintiff Dr. Nancy Shekter and her brother the Defendant Gary Lands and various corporate entities which they control. Dr. Shekter and Mr. Lands are trustees of the Estate of their late father Melville Lands. The Defendant Deborah Lands is Gary’s spouse and the Power of Attorney for Melville Lands. Mr. Lands is a

lawyer and Ms. Lands is a Chartered Accountant.

[3] The Plaintiffs commenced this action on the Commercial List by Statement of Claim issued on February 20, 2020 with a Fresh As Amended Statement of Claim issued on October 5, 2020 (the “First Amended Claim”). The claim as pleaded in the First Amended Claim was largely for oppression remedies with respect to transactions involving the Defendant corporations and Melville Lands’ Estate and professional fees paid to Mr. and Ms. Lands.

[4] The Plaintiffs were originally represented by counsel, however, Dr. Shekter, a non-practicing lawyer, is now self-represented and representing the corporate Plaintiffs. During a dispute over Dr. Shekter’s status, the Law Society of Ontario (“LSO”) confirmed that she is registered as an L1 non-practicing category/status 3H retired over 65 lawyer. Based on Dr. Shekter’s LSO status, the Defendants did not oppose her acting for the corporate Plaintiffs.

[5] Since this matter first came before me on October 25, 2022 there have been 11 case conferences, the first on March 17, 2023. There have been significant delays and disputes over Dr. Shekter’s LSO status, productions, non-party records, pleadings amendments, security for costs and the scheduling of examinations for discovery. As of the most recent case conference on June 19, 2025, the parties were still attempting to schedule examinations for discovery.

[6] The Plaintiffs’ motion for the production of documents from the non-parties Aird & Berlis LLP (“AB”) and MNP proceeded unopposed before me on September 13, 2023. At a case conference on September 27, 2023, the Plaintiffs advised that based on documents produced by AB, they intended to bring a motion for leave to amend the First Amended Claim to add AB and David Malach, at lawyer at AB who acted on some transactions at issue. The Defendants advised that they would oppose this motion. At the next case conference on December 4, 2023, the Plaintiffs advised that they were deferring their motion to add AB and Mr. Malach and instead would be bringing a motion for leave to amend the First Amended Claim to clarify and/or add causes of action and to add Beach-Lands Inc. (“Beach-Lands”) as a Defendant.

[7] At the following case conference on July 30, 2024, the parties advised that the Plaintiffs had delivered a draft Second Amended Claim and the Defendants would not consent to its issuance. The Plaintiffs delivered two additional drafts of the Second Amended Claim in August and September 2024. The Defendants continued to oppose the proposed amendments. At the next case conference on October 24, 2024, the Plaintiffs’ motion for leave to amend the First Amended Claim was scheduled to proceed before me on April 23, 2025 for 4 hours and a timetable was ordered.

[8] The Plaintiffs delivered another draft of the Second Amended Claim on November 21, 2024. At a case conference on December 20, 2024 the Defendants advised that they did not oppose this draft of the Second Amended Claim but wished to seek costs thrown away. The Plaintiffs submitted that there should be no costs then advised later during that attendance that they also wished to seek costs. Therefore, I granted the Plaintiffs leave to amend the First Amended Claim and ordered a timetable for written costs submissions.

II. The Law and Analysis

[9] Modern costs rules are designed to advance five main purposes in the administration of justice: (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 (*394 Lakeshore Oakville Holdings Inc. v. Misek*, 2010 ONSC 7238, at para. 10).

[10] Subject to the provisions of an Act or the *Rules*, 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 costs shall be paid (s. 131(1), *Courts of Justice Act* (Ontario)). In exercising its discretion, in addition to the result and any offer to settle made in writing, the court may consider the factors set out in Rule 57.01(1). The overriding principles in determining costs are fairness and reasonableness (*Boucher v. Public Accountants Council for the Province of Ontario*, (2004) 71 O.R. (3d) 291 (C.A.)). The general rule is that costs on a partial indemnity scale should follow the event except for very good reasons such as misconduct, miscarriage in procedure or oppressive or vexatious conduct (*1318706 Ontario Ltd. v. Niagara (Regional Municipality)* (2005), 75 O.R. (3d) 405 (C.A.)).

[11] Robinson A.J. summarized the principles with respect to costs thrown away in *Moskowitz v. Toronto Transit Commission*, 2023 ONSC 5535:

“In my view, there are three components to making out a claim for costs thrown away: (i) the step for which costs thrown away are claimed was reasonably necessary; (ii) fees and/or disbursements for the step were wasted or rendered useless; and (iii) conduct of the other party occasioned the wasted or useless costs. Notably, though, demonstrating all three elements does not guarantee an award of costs thrown away. Costs of any step in a proceeding are always in the discretion of the court.” (*Moskowitz* at para. 9).

[12] Costs are generally not awarded when a motion is resolved on consent. However, there are some circumstances where costs are appropriate including where, as in the present case, the parties agreed to resolve all issues regarding the Second Amended Claim except for costs and it is unlikely that the issues would have been resolved without the opportunity to make costs submissions (*Kearney v. Hill*, 2017 ONSC 6306 at paras. 27-31; *Muskala v. Sitariski*, 2017 ONSC 2842 at paras. 5-12).

[13] The amendments as set out in the Second Amended Claim (the “Amendments”) are substantial. The First Amended Claim was 78 paragraphs and 24 pages. The Second Amended Claim is 371 paragraphs and 94 pages, an increase of 293 paragraphs and approximately 70 pages. The Amendments include new claims for restitution pursuant to the *Real Property Limitations Act* (Ontario), unjust enrichment and disgorgement and Beach-Lands has been added as a Defendant.

[14] The Defendants submit that they are entitled to all of their costs of the litigation up to January 7, 2025 (excluding those related to documentary production) on a partial indemnity scale. The Defendants argue that the Amendments have restarted the litigation by removing the

focus from oppression remedies to the new causes of action set out in the Amendments. The Defendants assert that this has rendered literally every step in the action to date moot, all steps must be re-done and all costs to date are thrown away.

[15] The Defendants seek their costs of the litigation up to January 7, 2025 in the amount of \$130,715.80 on a partial indemnity scale broken down as follows: i.) \$34,054.20 related to reviewing the issued and draft claims, drafting and reviewing a demand for particulars and drafting their Statement of Defence; ii.) \$10,887 for the judicial mediation conducted on the Commercial List which they claim may have to be re-done; iii.) \$17,430 with respect to case conferences on the Commercial List and with this Court; and iv.) \$45,029 for communications (\$24,566 with the Plaintiffs and \$20,463 with their clients). The Defendants submit that these amounts are reasonable and within the reasonable expectations of the parties given the significant steps taken in the proceedings since the Plaintiffs' first amendments over 4 years ago and the fact that the Plaintiffs agreed to pay \$7,500 for those more modest amendments.

[16] The Plaintiffs seek \$71,328 on a partial indemnity scale for the costs of their motion for leave to make the Amendments. The Plaintiffs submit that they were successful on the motion, that the Amendments were necessitated by the Defendants concealing information and documents regarding their conduct which could have been incorporated in the initial claim or the First Amended Claim had they been disclosed. They also allege that the Defendants engaged in improper conduct adding to the time required for the motion.

[17] In my view, there are multiple reasons why the costs thrown away for the action to date sought by the Defendants cannot be awarded at this stage of the litigation. Based on the Second Amended Claim and the parties' submissions, I cannot conclude that the effect of the Amendments is or will be to restart the litigation or render all steps taken to date wasted, useless or moot. While the Amendments add numerous causes of action, many new allegations and a new party, the previous allegations and causes of action pleaded in the First Amended Claim have not been removed. Although the Plaintiffs acknowledge that they removed some of the existing pleading in one or more of their drafts of the Second Amended Claim, it has been reincorporated and the Plaintiffs have advised that they intend to advance all of their claims. There is no evidence that the Plaintiffs have withdrawn any claims or do not intend to pursue their pre-Amendment claims. It may be the case that the Plaintiffs will ultimately pursue some allegations and causes of action instead of or more than others as the action continues. This is unknown at this time. The effect of the Amendments on the proceedings and the steps taken to date will not be known until later in the litigation, likely at trial. This includes if or how much of the pre-Amendment steps have been wasted or can be salvaged and what claims the Plaintiffs pursue. As a result, the trial Judge will be in the best position to determine the Defendants' claim for costs thrown away.

[18] More specifically, the Amendments include the very conduct which the Plaintiffs submit gave rise to the need to amend the First Amended Claim. The Plaintiffs submit that the Amendments were necessary due to AB's production of substantial documentation in 2023 which disclosed additional improper conduct by the Defendants. The documents included financial information and statements, emails, contracts, memos, minute books, invoices and other transactional documents. The Plaintiffs allege that the Defendants purposely withheld and

prevented the production of these documents before and after the litigation commenced in order to conceal their wrongful conduct which could have been pleaded initially or in the First Amended Claim had the documents been provided. These allegations start at paragraph 150 of the Second Amended Claim under the heading “Document Flood 2023” and continue intermittently for the balance of the pleading, most prominently at paragraphs 198, 212 and 284-287 and include allegations of spoliation. As a result, the Defendants’ alleged concealment of documents will be an issue for trial. Accordingly, I cannot make any findings regarding these allegations including if the Amendments were necessitated by the Defendants’ conduct or if any of the parties’ conduct caused costs to be thrown away.

[19] I am also unable to conclude that mediation will have to be repeated such that the costs of the judicial mediation are thrown away. There are also costs unrelated to the pleadings which must be considered including the issues related to Dr. Shekter’s LSO status, security for costs and examinations for discovery. The trial Judge will also be in the best position to consider these costs.

[20] I also decline to award the costs requested by the Plaintiffs. The Plaintiffs did not actually bring a motion for leave to amend the First Amended Claim. The Plaintiffs did not serve or file a Notice of Motion or Motion Record. A motion date was eventually scheduled and the Plaintiffs delivered a factum over a year after first advising that they intended to amend the First Amended Claim, however, the Second Amended Claim was resolved without a motion. Even if the Plaintiffs had actually brought a motion and delivered all motion materials, the motion did not proceed therefore there is no successful party and no success to measure. More significantly, the Plaintiffs’ allegations that the Defendants concealed documents are both included in the Amendments and the basis for seeking costs of making the Amendments. These are issues for trial and the trial Judge will be best positioned to consider the Plaintiffs’ claim for costs. I make no findings with respect to whether Dr. Shekter is entitled to costs as a self-represented litigant or if her LSO status affects the corporate Plaintiffs’ claims for costs.

[21] While I decline to award the costs thrown away claimed by the Defendants, I am satisfied that they are entitled to some costs arising from the process related to the Amendments based on the factors in Rule 57.01(1). These costs relate to the Plaintiffs’ conduct and steps taken during the process of making the Amendments which added unnecessary time and costs to the proceedings. This is to be distinguished from whether the Amendments were necessary, necessitated by the Defendants’ production of documents in 2023 and whether the Defendants concealed documents which are issues for the trial Judge. The Plaintiffs initially advised at the September 2023 case conference that they would be seeking to add AB and Mr. Malach as Defendants. They subsequently advised at the December 2023 case conference that they were deferring this relief and would instead be adding causes of action and Beach-Lands as a Defendant. The Plaintiffs then delivered at least 4 drafts of the significantly expanded Second Amended Claim over a period of approximately one year, at one point removing and then reincorporating some of the previous pleading. This entire process took approximately 15 months and was the primary reason for 5 case conferences. In my view, this protracted process was unnecessary, could have been completed more efficiently and caused the Defendants to incur costs above what is reasonable for which they should receive some costs. The fact that the Amendments were substantial, complex, advance serious allegations and changed numerous

times contributed to the costs incurred by the Defendants.

[22] I reject the Plaintiffs' assertion that the Defendants were responsible for the extended process leading to the Amendments or that the Defendants engaged in any wrongful conduct. There is no basis to conclude, as the Plaintiffs contend, that the Defendants strategically opposed the Amendments in order to delay the proceedings so that they could bring a motion to dismiss the action for delay and/or extract a significant costs award. The Defendants were required to review multiple, changing drafts with shifting allegations in the face of the Plaintiffs' stated intention to bring a motion. In all of the circumstances, it was reasonable and not out of the ordinary for the Defendants to critically review the Amendments and request costs as a term of any agreement. It was also open to the Plaintiffs to bring their motion or deliver their factum sooner during this period to advance the process.

[23] Having considered the relevant factors and circumstances and reviewed the Defendants' Bill of Costs, I am satisfied that it is fair and reasonable, within the reasonable expectations of the parties and proportionate for the Plaintiffs to pay costs with respect to the process by which the Amendments were made fixed in the amount of \$14,000 to the Defendants within 60 days. This amount represents \$13,000 for the 5 case conferences, reviewing multiple drafts of the Second Amended Claim and \$1,000 for preparing costs submissions. This is without prejudice to the parties' rights to seek costs with respect to the necessity of and allegations in the Amendments including the pre and post-concealment of documents which are reserved to the trial Judge.

IV. Disposition and Order

[24] Order to go directing the Plaintiffs to pay costs to the Defendants fixed in the amount of \$14,000 on partial indemnity scale within 60 days without prejudice to the parties' rights to claim the additional costs described above which are reserved to the trial Judge.

Associate Justice McGraw