

CITATION: Drost v. Salonen, 2025 ONSC 6036
COURT FILE NO.: CV-22-616
DATE: 2025/10/27

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Lawrence Drost, Plaintiff, Defendant by Counterclaim

AND:

Eric Salonen, Defendant, Plaintiff by Counterclaim

BEFORE: The Honourable Justice G. E. Taylor

COUNSEL: Robert Scriven, Counsel for the Plaintiff

Robert Tolhurst and Melisande Galipeau, Counsel for the Defendant

HEARD: In Writing

COST ENDORSEMENT

[1] On September 11, 2025, I released reasons for judgment after a seven-day trial. I found that the plaintiff had established a trust interest in the amount of \$560,000 in proceeds from the sale of milk quota and the counterclaim was dismissed. The parties were encouraged to resolve the issue of costs but if they were unable to do so, written submissions were invited. Written Cost Submissions have been received from both parties. These are my Reasons dealing with the costs of the action.

[2] The plaintiff seeks an award of costs in his favour calculated on a substantial indemnity basis in the total amount of \$250,068.74. The defendant submits that the plaintiff is entitled to an award of partial indemnity costs to June 6, 2025 and that the defendant be awarded costs on a partial indemnity scale thereafter. The defendant seeks partial indemnity costs of \$60,292.78.

[3] Both parties made Offers to Settle which both claim to have R. 49 cost consequences in their favour. The plaintiff made an offer dated March 26, 2025. The parties exchanged offers on June 6, 2025.

[4] The plaintiff proposed on March 26, 2025 that he be paid \$200,174 for invoices he sent to Legend in July 2021 after the relationship with the defendant had effectively ended, \$150,000 on account of his shareholder loan to Legend and \$230,000 representing one half the remaining balance in the Legend bank account after creditors were paid. I calculate the amount the plaintiff would have received if the offer had been accepted to be \$580,000.

[5] On June 6, 2025, the plaintiff provided a second option to the defendant while specifically keeping open his previous offer. The plaintiff proposed that the defendant be paid \$200,000 for his shares in Legend which would be transferred to the plaintiff and the plaintiff would deal with the unpaid creditors of Legend. This offer required that a portion of the \$200,000 to be paid to the defendant be held back on account of potential tax liability.

[6] The defendant's offer on June 6, 2025 was that the creditors of Legend would be paid according to a schedule prepared by the defendant. The total amount to be paid to the creditors was \$441,399. The plaintiff would be paid \$325,000 in return for the transfer of his shares in Legend to the defendant.

[7] The difficulty that I have with the offers made by both parties is that the offers are inconsistent with the way the claim and counterclaim were presented at trial. While there was evidence presented at trial about the amount owing to some of the creditors of Legend, it was apparent that there was disagreement about the amounts owing and to whom. The plaintiff's case at trial was presented on the basis of a trust interest in the proceeds from the sale of the milk quota, plus damages for the amount of the invoices sent by his corporation to Legend in July 2021. The plaintiff succeeded on his trust claim only.

[8] The defendant claimed damages from the plaintiff for breach of contract and misrepresentation. He was unsuccessful.

[9] The position of the plaintiff, as I understand it is that the result at trial was more favourable to him than either offer made by the defendant and more favourable to him than his offers to settle. The defendant's position appears to be that by offering to pay the plaintiff \$325,000 and to pay

creditors approximately \$440,000 the result at trial is less favourable to the plaintiff than the defendant's offer.

[10] In my view, the claim and the counterclaim, being separate actions, must be addressed separately for the purpose of determining costs.

[11] The plaintiff obtained a judgment for \$560,000. That was less than he would have received based on my calculation of his offer of March 26, 2025. I am unable to calculate the amount the plaintiff would have received had the second option in the June 6, 2025 offer been accepted. R. 49.10(3) provides that the burden is on the party claiming entitlement to enhanced costs to prove that the result at trial is as favourable or more favourable than the party's offer. The plaintiff has failed to discharge this burden. If the plaintiff chooses to base his offers on a different theory than he chooses to present at trial, it is not up to the trial judge to parse through the offers in detail to determine if the result at trial was as favourable or more favourable than his offers to settle.

[12] The plaintiff asserts that he should be entitled to substantial indemnity costs because the result at trial was more favourable to him than the defendant's offer of June 6, 2025. No authority is cited for this proposition.

[13] With respect to the defendant's offer to settle, I do not understand how an offer to pay the plaintiff \$325,000 and to pay third parties \$440,000, the total of which payments exceeds the amount of the judgment in favour of the plaintiff, can be interpreted as being as favourable or more favourable to the plaintiff than the result at trial.

[14] The plaintiff was successful in obtaining a judgment on his claim against the defendant. The plaintiff successfully defended the counterclaim. The plaintiff is entitled to costs on the partial indemnity scale for the entire action.

[15] I have reviewed the plaintiff's Bill of Costs. It appears to be based on all the accounts sent to the plaintiff by his counsel. It appears to me that the plaintiff is seeking an award of costs for all legal services provided to the plaintiff from September 2020 to the end of the trial. The Statement

of Claim was not issued until June 2022. Costs are claimed in relation to a related but separate proceeding involving the same parties. In the Bill of Costs is a disbursement for over \$18,000 payable to the accounting firm, BDO. The plaintiff did not call an accounting expert witness at trial. It is improper to include the amount of an invoice from DBO as a trial disbursement.

[16] A comparison of the plaintiff's Bill of Costs with the defendant's Bill of Costs is instructive. With one exception, the amounts claimed by each party for the various steps in the proceeding are roughly equivalent when the plaintiff's fees are reduced by 40% to estimate partial indemnity costs. However, the plaintiff seeks over \$68,000 for "Initial Investigation, Drafting and Exchanging of Pleadings, Motions". In comparison, the defendant claims \$5,320 for "Pleadings and Preliminary Matters". By my calculation, the amounts claimed by the plaintiff excluding initial preparation total \$110,000 and the amount claimed by the defendant, excluding preliminary matters and travel time total \$106,000.

[17] I am not conducting an assessment of costs. I decline to review the invoices sent to the plaintiff by his lawyers in order to decide which charges are properly related to the trial and which are not. I am fixing the costs of this action.

[18] One of the important factors in fixing costs is the amount the unsuccessful party could reasonably expect to pay. In this case the defendant must have realized that if he was unsuccessful, the amount of costs he would be required to pay would be significant. This was a seven-day trial. There were significant facts that were admitted. The amounts in issue in the claim and counterclaim were significant.

[19] I have come to the conclusion that a reasonable amount for partial indemnity costs to be paid by the defendant to the plaintiff is \$120,000 inclusive disbursements and HST.

Date: October 27, 2025