CITATION NO.: Son et al. v. Hwang et al., 2026 ONSC 677
COURT FILE NO.: CV-22-043
DATE: February 3, 2026

2026 ONSC 677 (CanLII)

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: John Ho Son aka John Son and Byung Hwa Son aka Susan Son, Applicants

-and-

Keun Ik Hwang aka Ken Hwang and 2691765 Ontario Inc. o/a Wright's Variety, Respondents

BEFORE: MacNeil J.

COUNSEL: *Christopher Statham* – Lawyer for the Applicants

S. David Hwang – Lawyer for the Respondents

REASONS FOR DECISION ON COSTS

[1] This is my decision on costs respecting the Applicants' motion for an order to enforce a written settlement agreement between the parties respecting the within application or, alternatively, an interlocutory injunction restraining the Respondents from interfering with the Applicants' operation of the Corporation's business. The motion was ultimately dismissed without prejudice to the Applicants' ability to raise the same issues at trial or, as it related to the interlocutory injunction, in the event that evidence respecting a potential sale of the subject property was subsequently acquired.

[2] The parties were unable to settle the issue of costs of the motion. 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] Generally speaking, costs on a substantial indemnity basis will be awarded "where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties". The fact that a proceeding has little merit is no basis for awarding substantial indemnity costs: *Young v. Young*, [1993] 4 S.C.R. 3, 1993 CarswellBC 264 (SCC), at para. 260.

[9] 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.

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[10] 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.

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

[12] 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 Respondents

[13] The Respondents seek their costs on a substantial indemnity basis in the amount of $50,606.00 plus HST and disbursements of $4,892.31, for a total of $62,077.09; or, alternatively, on a partial indemnity basis in the amount of $37,954.50 plus HST and disbursements of $4,892.31, for a total of $47,780.90. The Respondents assert that elevated costs are warranted in this case. They submit that the court found the Applicants' conduct to be "egregious and abusive" and, in paragraph 11 of their written costs submissions, further submit that: "The Court found the Applicants' case relied on fraudulent misrepresentations, fraudulent documents, and inconsistent evidence creating substantial obstacles. They failed to prove contributions and sought extraordinary relief without basis. This conduct lengthened and complicated the proceeding …"

[14] The Respondents submit that they were wholly successful in responding to the Applicants' motion as the court found there was no enforceable settlement agreement and declined to grant injunctive relief. The motion raised a number of contested issues and was complicated by the Applicants requiring extensive affidavits, cross-examinations, and translation evidence. The Applicants' motion materials were voluminous and, at times, duplicative. They required extensive review and expenditure of time on an urgent basis. The Respondents also submit that the Applicants' arguments were based on misrepresented facts and falsified documentation. The issues were of critical importance to the Respondents as the relief would have permanently altered the legal status to the subject property.

[15] Counsel for the Respondents submits that they billed at reasonable, market rates and the hours spent were necessary to address the evidentiary and procedural complexities created by the Applicants. The disbursements of $4,892.31, primarily for translation, transcripts, and court reporters, were essential.

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[16] The Applicants did present an offer to settle on February 22, 2023 for payment of $542,500 and costs on a partial indemnity scale for the application in the amount of $26,000.00. For his part, the Respondent, Mr. Hwang, provided the Applicants with an opportunity to provide proof of contribution and to obtain financing since March 3, 2022.

Position of the Applicants

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[17] The Applicants submit that costs should be awarded in the cause and fixed by the trial judge or, in the alternative, fixed on a partial indemnity scale in an amount no more than $20,000.00. They contend that there is no basis for the Respondents' request for substantial indemnity costs, and that the Respondents appear to misstate the court's findings as it was not held that the Applicants' conduct was "egregious and abusive".

[18] It is the submission of the Applicants that this was an interlocutory motion. While it was dismissed, the court did so on a without prejudice basis to the Applicants being able to raise the same issues at trial or should evidence respecting a potential sale be obtained. The Applicants submit that the situation is similar to that in *Mittal v. Jindal*, 2012 ONSC 4297, at para. 4, where there had been an unsuccessful motion brought to enforce a settlement and the motion judge ordered costs in the cause on the basis that "there were no real winners or losers on the motions because the merits of the underlying action remain to be determined". (The Respondents assert that *Mittal* is distinguishable as it involved two separate motions with each party seeking relief and neither party was fully successful there.)

[19] The Applicants submit that it was reasonable for them to have made this motion given the existence of signed minutes of settlement and evidence that the Applicants had invested funds in the business. While the court was not satisfied that they had proven a valid settlement agreement, the court did find that it appeared "that the parties did subsequently act in a manner that supports that some kind of arrangement had been reached between them".

[20] The Applicants submit that the costs claimed by the Respondents are excessive and are greater than their reasonable expectations. The Applicants' own costs outline shows their partial indemnity costs, including disbursements, to be $36,398.13. The written materials delivered by the Applicants were voluminous compared to the responding materials served by the Respondents. The Applicants' costs outline indicates a combined total of 96.6 hours on this motion while the Respondents' costs outline has a combined total of 153.6 hours.

[21] The Applicants note that it appears that the costs claimed by the Respondents include clerical tasks ordinarily performed by a legal assistant and not billed to a client such as binding, formatting, serving and filing documents. They argue that other courts have found that the losing party should not be required to have to pay for the cost of unreasonable or duplicative work incurred by the winning party and cite *Mader v. Hunter et al*, 2013 ONSC 2336, at paras. 7-8, citing *Pagnotta v. Brown* [2002] O.J. No. 3033 (unreported) in this regard.

Analysis

An award of costs is appropriate

[22] As the successful parties, the Respondents are presumptively entitled to costs of the motion. With respect to the case *Mittal* as cited by the Applicants, at para. 5 of that decision, Perell J. explained:

> At the time of my Reasons for Decision and again now, it was my thought that the technical winners of the two motions might ultimately be the losers at the trial and since the technical winners' success on the motion was so modest that the appropriate order was to make costs in the cause.

Justice Perell held that he did not find it fair that the party who was successful in having the motion to enforce the alleged settlement agreement dismissed should recover costs unless that party succeeded at trial.

[23] Given the nature of the evidence led on the motion before me, it is my view that this dispute requires a trial of the issues and is not conducive to proceed as an application. Unlike the situation in *Mittal*, this is not a case where I, as the motion judge, was able to come to any strong sense of which of the parties would likely prevail in the end result. Accordingly, I find it appropriate to order costs of the motion at this stage of the proceeding and not order costs in the cause.

[24] While I was not persuaded on the motion to find that the settlement agreement was a valid and enforceable agreement, as indicated by the Applicants, I did accept that the parties' actions made it appear as though they had reached some kind of an arrangement between them. However, the serious factual disputes between the parties were incapable of resolution on the record before the court on the motion. I found that a fulsome record of evidence was required to make dispositive findings, and that this could only be achieved by way of a trial with *viva voce* evidence and cross-examinations.

Partial indemnity basis

[25] The references in my decision with respect to the Applicants conducting themselves in an "egregious and abusive" manner were not actual findings made by the court but, rather, only reflected the Respondents' submissions in that regard. I also did not find that the Applicants' case "relied on fraudulent misrepresentations, fraudulent documents, and inconsistent evidence creating substantial obstacles" or that they "failed to prove contributions and sought extraordinary relief without basis", as contended in the Respondents' written costs submissions.

[26] I am not persuaded that the Applicants' conduct has been "reprehensible, scandalous or outrageous" warranting an award of costs on a substantial indemnity basis, as requested by the Respondents. As a result, I will determine costs on a partial indemnity basis.

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Fair and reasonable costs

[27] I am satisfied that the hourly rates claimed by the Respondents' counsel, while high, are reflective of rates that other Toronto counsel charge – including that of counsel for the Applicants – and so can be considered to be fair and reasonable. However, I agree with the Applicants' submission that the hours claimed in the Respondents' costs outline are excessive given that this was an interlocutory motion and the Applicants were the moving parties. As well, it appears to me that not all of the legal work done needed to be performed by a senior lawyer. Further, I agree with the Applicants' submission that they should not have to pay for the strictly clerical work done (e.g., binding and formatting).

[28] I accept the disbursements claimed by the Respondents in the amount of $4,892.31 to be reasonable and necessarily incurred in the circumstances of this case.

[29] It is noted that the Applicants' full litigation costs, as set out in their submitted costs outline, were $54,392.25. I find that the costs incurred by the Applicants would reasonably be expected to be a bit higher than the Respondents' costs given that they were the moving parties and responsible for prosecuting the motion. The Applicants' costs outline also includes disbursements in the amount of $3,745.08.

[30] I have also considered the following:

(a) It was not unreasonable for the Applicants to have brought the motion.

(b) The issues raised on the motion were of importance to both parties.

(c) The motion materials were voluminous.

(d) The Applicants could reasonably have expected to pay costs in the event of lack of success on the motion.

(e) With respect to the offer to settle served by the Applicants, this related to the application proper and not to the motion itself. So, I have not taken it into account in making this decision.

[31] 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 Respondents in the amount of $30,000.00, inclusive of HST and disbursements, is fair, reasonable and proportionate in the circumstances.

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Disposition

[26] For the foregoing reasons, this court orders that the Applicants pay costs to the Respondents fixed in the amount of $30,000.00, payable within 30 days of the release of these reasons.

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B. MacNeil J.

MacNEIL J.

Released: February 3, 2026