

CITATION: Sharma v. Kim Spencer McPhee Barristers P.C., 2026 ONSC 15
COURT FILE NO.: CV-23-00693764-0000
DATE: 20260102

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: RAVINDER SHARMA, KENNETH TESLIA, IMRAN BASHIR, EVP GP INC.
and EXTREME VENTURE PARTNERS FUND I LP, Applicants

AND:

KIM SPENCER MCPHEE BARRISTERS P.C., Respondent

BEFORE: Justice Papageorgiou

COUNSEL: *Gerald L.R. Rankin and Jesse Harper*, for the Applicant

Robert W. Staley and Douglas Fenton, for the Respondent

HEARD: In Writing

COSTS ENDORSEMENT

Overview

[1] The Applicants (the “Clients”) are involved in the venture capital industry focused on investments in the technology space. The individual Applicants are founders.

[2] In or around late 2013, the Clients retained the Respondent, Kim Spencer McPhee Barristers (the “Lawyers”), to bring an action against a number of former business partners and related parties (the “Action”). The litigation was complex and involved allegations that these former business partners had established a competing fund in breach of their contractual and fiduciary duties.

[3] On May 14, 2019, after a 28-day trial, Conway J. released reasons awarding the Clients a total of USD \$17.5 million as follows:

- US \$12.33 million in disgorgement of profits.
- US \$3.36 million in damages to certain individual plaintiffs.
- US \$500,000 in punitive damages.

[4] There is no question that the Lawyers secured a very good result at trial through their dogged efforts.

[5] The defendants appealed, and the Lawyers commenced a cross appeal on behalf of the Clients.

[6] On December 1, 2021, the Ontario Court of Appeal dismissed the defendant's appeal and also increased the disgorgement of profits award to US \$29.5 million, another stunning victory achieved through the Lawyers' efforts.

[7] At the conclusion of the appeal, the Clients were awarded a total of US \$35,742,587.33 and CA \$3,020,000, all with interest. Thereafter the Clients and defendants entered into a settlement to avoid collection efforts. The settlement was approximately the same as the value of the Court of Appeal award.

[8] On August 4, 2022, the Supreme Court of Canada dismissed the defendants' request for leave to appeal.

[9] Afterwards, the Clients objected to the validity of the contingency fee agreement (the "CFA") that the parties had signed after the trial.

[10] The Clients began this proceeding.

[11] Throughout most of the proceeding, the Clients took the position that the CFA did not apply to the trial judgment and/or it did not apply to the Court of Appeal award or subsequent settlement. They argued it could not be enforced in any respect. They made alternate claims including that it did not apply to the appeal and settlement even if it applied to the trial.

[12] Three days before the hearing, and after all the parties filed their facts, the Clients conceded that the CFA was enforceable and entitled the Lawyers to the contingency on the trial award but continued to maintain as a matter of law that the CFA properly interpreted did not apply to the appeal award or the settlement.

[13] The Lawyers seek costs in the amount of \$200,000 on a partial indemnity basis in respect of all steps taken up to the oral hearing and that no costs should be awarded for the steps taken after the oral hearing.

[14] The Clients seek \$592,690 on a partial indemnity basis or \$888,104.37 on a substantial indemnity basis for their costs taken up to the oral hearing. The Clients do not seek any costs in respect of further submissions made after the oral hearing.

Decision

[15] For the reasons that follow I award no costs to either party.

Analysis

[16] Pursuant to s. 131(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, costs are in the discretion of the court. Rule 57 of the *Rules* sets out the factors which courts should have regard to when awarding costs. 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”: *Zesta Engineering Ltd. v. Cloutier* (2002), 21 C.C.E.L. (3d) 161 (Ont. C.A.), at para. 4; *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.), at para. 26; *Clarington (Municipality) v. Blue Circle Canada Inc.*, 2009 ONCA 722, 100 O.R. (3d) 66, at para. 52; and *G.C. v. Ontario (Attorney General)*, 2014 ONSC 1191, at para. 5.

[17] In exercising that discretion, the Court should consider among other factors: (a) the result in the proceeding; (b) the complexity of the proceeding; (c) the importance of the issues; (d) the conduct of any party that tended to lengthen unnecessarily the duration of the proceeding; and (e) the amount of costs that the successful party could reasonably expect to pay.

The Relevance of the Applicants’ Concession

[18] When the matter began, the Lawyers had deducted \$12,000,000 from the proceeds of the settlement on the basis that they were entitled to 30 % contingency on the total award. The Clients were seeking reimbursement through the proceeding.

[19] The case as originally framed was a request for a declaration that the CFA was entirely unenforceable and did not apply to either the trial award or the appeal and settlement on the basis that it did not comply with the *Solicitors Act*, and/or was not fair and reasonable, and an order fixing the amount payable to the Lawyers.

[20] In the alternative, the Clients sought a declaration that the CFA only applied to the trial award which also entailed a request that the Lawyers would be entitled to recover their fees in relation to the appeal, cross appeal and the leave to appeal motion before the Supreme Court based on their reasonable hourly rates. It also requested an order for a full accounting of all amounts billed for legal fees and disbursements and retainers and other amounts paid to the Lawyers.

[21] Because of the abandonment of part of the case, the Lawyers succeeded on the portion of the case related to whether the CFA was an enforceable agreement with respect to the trial award which then entitled them to a contingency fee in respect of the trial decision which was approximately \$6,000,000.

[22] The Clients then succeeded on their argument that the CFA did not apply to the increased award by the Court of Appeal or the settlement which entitled them to the return of the \$6,000,000 that the Lawyers had been holding.

[23] Although I raised the issue in my decision as to whether the Lawyers might be entitled to costs because of the abandonment of a part of the Clients' case, upon review of the Clients' submissions I am persuaded that this would not be appropriate in this case for a number of reasons:

- While aggressively pleaded, I do not view the Clients as having committed any misconduct, miscarriage in procedure, or that this proceeding was oppressive or vexatious. It was hard fought litigation on both sides with significant potential outcomes for both. *The Solicitors Act*, R.S.O., 1990, c. 15 expressly permits clients to bring proceedings questioning the fairness and reasonableness of a contingency fee agreement and to make the kinds of arguments made in the materials filed on the Application. An order for costs against the Clients in these circumstances could have a chilling effect.
- The Clients say they abandoned part of the claim because the Lawyers argued for the first time, in their factum dated December 20, 2024 that the credibility issues that arose on cross-examination meant that the Application had to be converted to an Action. At that point the parties had already been litigating this matter for two years and conversion of the matter to an Action would have resulted in significant additional delay. The concession was made to get the case heard as scheduled. They also indicated that they wanted to reasonably compensate the Lawyers for their work. This was not unreasonable and courts should not penalize parties for making reasonable concessions.
- In *Nahum v Honeycomb Hospitality Inc.*, 2021 ONSC 1988 at para 15, Akbarali J. observed that claims may be abandoned for many reasons that have nothing to do with the likely result on their adjudication on the merits. She concluded that since she was not in a position to determine whether the claims lacked merit, it was not appropriate to make a costs order against the successful party related to abandoned claims. This is also the case here; I am not in a position to adjudicate whether the claims that were abandoned lacked merit. The issues were complex. There was a two-year process to bring this matter to the argument. The Application materials were thousands of pages long, there was no argument on the issues that were abandoned, and in any event, I agree with the Lawyers argument their factum that there were credibility issues raised by the materials that could not be adjudicated by way of Application.
- In *Miller v Her Majesty the Queen in Right of Canada*, 2015 ONSC 2554 at para 31, the court remarked on the practical reality that to promote settlement, a plaintiff should not be penalized for sensibly abandoning claims before trial unless there are indications that the defendant has been put to unnecessary expense in responding to the abandoned claims.
- I do not view as relevant in this case the case law cited by the Lawyers which holds that where a party abandons a motion or application or significant relief sought, that party should generally be required to pay the other side's costs incurred in responding to the motion or application: *Orkin on the Law of Costs*, 2nd 3d, Chp. 4, III, Abandoned Motions, s. 4.6; Rules rr 37.09(3), 38.,08, 58.07; *Rothman v. Kaba ILLco Corp*, 2012 CanLII 73056 at paras 16, 19; *Skoblenick v. Aviva*, 2021 ONSC 6243 at para 4; *Baryluk (Wyrd Sisters) v.*

Warner Bros, Entertainment Inc. 2007 CanLII 5450 at paras 11-14; *Di Battista v. Di Battista*, 2016 ONSC 7592 at para 15. *Rothman* was a case where materials were filed for a motion that was then consented to after it had put the other party to the expense of bringing the motion. *Skoblenick* was a case where the court accepted that there were abandoned portions of the motion but it is unclear whether the entire relief was abandoned or why the court made this decision. In *Baryluk* the court determined that 85 % of the time and effort invested in the motion were directed to issues ultimately abandoned. In *Di Battista* the court determined that the moving party invoked the specter of very different and more consequential relief such that work done by the other party was ultimately unnecessary.

- In the circumstances of this case, the abandonment of the part of the Clients' claim should be viewed as part of the reason why there was divided success. That is, it was the work the Lawyers did that ultimately led to the Clients' withdrawing that part of the case. The work the Lawyers did to respond to the Application was not unnecessary; it contributed to the very real success they achieved on one half of the claims brought by the Clients initially. As such, there were no costs thrown away.
- Had the entire Application been argued the Clients would have still won the same argument before me on the applicability of the CFA to the appeal award or the settlement. Assuming that the Clients had argued and lost the part of the case that they ultimately abandoned, then that outcome would be the exact same as if the Clients had abandoned that part of the case as they did. It is not clear why there should be a different impact on the costs assessment because that portion of the case was abandoned shortly before the argument which did in fact then, save on time and expense overall since the matter did not have to proceed to trial.
- In my view the Lawyers were not put to unnecessary expense in responding because their response is the reason why the Clients ultimately abandoned that part of the case.
- Further, while the arguments regarding the fairness and reasonableness of the CFA and complaints about some of the Lawyers' conduct were no longer relevant, some of the materials were still relevant to the claim for the accounting. Although the Lawyers did agree to provide documents in response to the Application almost immediately, this is not the same thing as consenting to a court ordered accounting. As well, by the time they wrote advising they would provide this production, the Clients' materials had already been prepared.

[24] In my view, there was divided success such that there should be a no costs order.

[25] Here, I also reject that Clients' argument that they had "acknowledged that [the Lawyers were] entitled to significant fees for [their] work and agreed to pay [the Lawyers] \$6 million USD (plus HST) from the settlement proceeds prior to the initiation of the Application."

[26] What the September 27, 2022 email referenced here said was that the Clients wanted to work out a solution, and that they were prepared to allow the Lawyers to withdraw \$6,000,000 from the first payment to be made by the defendants “on the basis that no further amounts will be deducted for fees from subsequent payments (made by the defendants) until the issue of your entitlement to fees has been finally resolved either by agreement, assessment or arbitration.”

[27] This was not an offer to settle for \$6,000,000 as it clearly contemplated further discussions or proceedings to determine the Lawyers’ entitlement to fees and only spoke of withdrawal of fees, not payment of the \$6,000,000 to the Lawyers on a final basis.

[28] Had the Clients wanted to settle for this amount, they could have and, in my view, would have made a rule 49 offer in this respect or set this out in a manner that was clear, but they never did.

[29] Further, in later communications from Faskens, the Clients referenced permitting the Lawyers to withdraw funds from further payments from the defendants on the basis that they place such funds in a GIC pending resolution of the issues. Again, this in no way could be considered an offer of payment as it was still premised on further discussions or proceedings to resolve the issue of the Lawyers’ fees.

[30] Therefore, I order that there shall be no order as to costs.

Papageorgiou J.

Date: February 13, 2026