CITATION: McKenzie v. Fabco Holdings Inc., 2025 ONSC 2196
COURT FILE NO.: CV-16-129168-00 & CV-18-136865
DATE: 20250409

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN: GARY MCKENZIE AND JENNIFER MCKENZIE Plaintiffs **– and –** FABCO HOLDINGS INC., JAYMOR SPECIALTY HOUSING GENERAL PARTNER INC. and YOUR COMMUNITY REALTY INC. Defendants	Patrick Summers and Star Deak, for the Plaintiffs No one appearing, for the Defendants
AND BETWEEN: GARY MCKENZIE AND JENNIFER MCKENZIE Plaintiffs **– and –** GERALD ANTHONY also known as GERALD VAN ERP Defendant	Patrick Summers and Star Deak, for the Plaintiffs Gerald Anthony, self-represented for the Defendant
	HEARD: via Zoom and in writing on February 11, 2025

REASONS ON COSTS

McCARTHY J.

The Judgments

[1] The Plaintiffs were successful in their related actions against the Defendant, Jaymor Inc. ("Jaymor"), in the Fabco claim and against the Defendant, Gerald Anthony ("Anthony"), in the Title claim.

[2] In the Fabco claim, the Plaintiffs obtained judgment against Fabco's assignee, Jaymor, in the amount of $1,747,633.15 (the "Jaymor judgment").

[3] In the Title claim, the Plaintiffs obtained judgment against Anthony in the amount of $57,790.88 (the "Anthony judgment").

Costs and Interest Sought

[4] The Plaintiffs now seek their costs of both actions as follows:

- costs on a partial indemnity basis against Jaymor in the Fabco action in the amount of $104,114.19;
- a 50/50 split between Jaymor and Anthony for the balance of their fees actually incurred in the Fabco action ($169,934.32); and
- costs against Anthony in the Title claim in the amount of $185,079.94 on a full indemnity scale.

[5] The Plaintiffs also seek pre-judgment interest on both judgments. They have calculated the interest on the Jaymor judgment as $345,337.10, and on the Anthony judgment as $10,050.76.

[6] The Defendants, Fabco/Jaymor, did not oppose the costs or interest being sought on the Jaymor judgment.

[7] For his part, Anthony claims that in respect of the Fabco claim, he should be entitled to his costs since he was successful in avoiding any judgment in that action.

The Fabco Claim – The Jaymor Judgment

[8] There is no doubt that the two actions were inseparable. They arose out of the same series of events, namely the McKenzies' frustrated sale of their property to Fabco /Jaymor, which failed to close on November 30, 2016. In order to establish a fulsome evidentiary record and as an alternative to being able to recover damages from the contracting party to the aborted Agreement of Purchase and Sale ("APS") (ultimately Fabco's assignee, Jaymor), the McKenzies were perfectly justified in naming Anthony as a Defendant in the Fabco claim.

[9] Importantly, although Anthony escaped a judgment against him in the Fabco claim, he did so narrowly. The court found that the Plaintiffs had established three of the four criteria for injurious falsehood and slander of title against Anthony. That is, Anthony made deliberate and malicious false statements about the McKenzie property to induce persons (principally Fabco) not to deal with the McKenzie property.

[10] It was only because the court found that Fabco/Jaymor were unjustified in repudiating the APS based upon Anthony's baseless claim of a proprietary interest in the disputed acreage that liability for the McKenzies' losses fell upon Jaymor. The court concluded that the damages claim against Anthony foundered upon the fourth prong of the test for injurious falsehood. In other words, there was no direct or natural connection between Anthony's assertions of August 2016 and the Plaintiffs' losses on the repudiated APS.

[11] Ironically then, it was the very frivolity and vexatiousness of Anthony's claims that saved him from exposure to a staggering judgment in the Fabco claim.

[12] That same conduct cannot save him from a fair share of the costs in the Fabco action.

[13] Anthony's actions and assertions loomed large in the Fabco claim. Although baseless, they plagued the history of the dealings between Fabco and the McKenzies beginning in August 2016 before finally being raised by Fabco/Jaymor as the reason for their repudiation of the APS in the days leading up to its scheduled closing on November 30, 2016.

[14] I consider the following in exercising my discretion on costs in the Fabco claim:

i) The McKenzies received a substantial judgment, only slightly less than the amount claimed.

ii) The amount sought for costs is proportional to the importance of the issues, the complexity of the case, the length of the trial, and the judgment recovered.

iii) The trial lasted six days, was highly contested, and featured skillful advocacy on the part of Plaintiffs' counsel.

iv) The evidentiary record was dense and daunting; it was distilled, organized, and conveyed to the court in a coherent and digestible fashion.

v) The legal issues demanded extensive research and careful preparation.

vi) The litigation was lengthy, with litigation counsel first becoming involved in the fall of 2016.

vii) Written submissions from Plaintiffs' counsel were thorough, professional, and polished.

viii) The importance of the issues and the complexity of the record justified the involvement of multiple counsel.

ix) The issues were important, not least because the McKenzies required a finding by the court to recover the $200,000 deposit and to know which of the Defendants would be responsible for paying the damages they had sustained.

x) Damages were appropriately calculated and generously supported by back-up documentation.

xi) Anthony's baseless and frivolous claims provided Fabco/Jaymor with the grounds for resiling from the APS. Had Anthony not asserted and maintained his baseless proprietary claim to the disputed acreage, it might have left Fabco/Jaymor without an excuse not to close, resulting in the likely uncontested forfeiture of its deposit and quite possibly fertile ground for a motion for specific performance or summary judgment on contractual liability.

xii) Had Anthony agreed to sign the release proffered by John Peddle before the APS was set to close, it would have deprived Fabco/Jaymor and its solicitors of any grounds for not closing the APS. Granted, this would not have guaranteed that the APS would have gone on to close, but it would have spared the subsequent litigation the incredible complexity and decidedly thick shroud of uncertainty that it bore.

[15] I also have regard to r. 57.01(2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, which reads:

> **Costs Against Successful Party**
>
> (2) The fact that a party is successful in a proceeding or a step in a proceeding does not prevent the court from awarding costs against the party in a proper case.

[16] In my view, this is a proper case to award costs against Anthony even though he was "successful" in one aspect of the case (i.e., in avoiding a judgment).

[17] Anthony's conduct helped give rise to the litigation. This, in my view, constitutes "any other matter relevant to the question of costs" contemplated by r. 57.01(1)(i).

[18] There is authority for the proposition that certain conduct in the circumstances giving rise to litigation can justify costs on an elevated basis: see *Mortimer v. Cameron* (1994), 17 O.R. (3d) 1 (C.A.), at p. 23. I see no reason why this principle cannot be expanded to permit a court awarding costs to consider conduct which was disruptive, reckless, vexatious, baseless, or reprehensible in all of the circumstances, regardless of whether the offending party managed, because of the overriding breach of its co-defendant, to avoid judgment:

see *King v. Gulf Canada Ltd.* (1992), 45 C.C.E.L. 238 (Ont. C.A.); *Sandrin v. 126001 Ontario Inc. (c.o.b. Highland Creek Motors)*, [2005] O.J. No. 2796 (S.C.).

[19] The principal of indemnity must play a part here as well. The McKenzies should be made whole for the losses they sustained through no fault of their own. Costs on a higher scale are a way of achieving that.

[20] I would stop short of awarding costs on a full indemnity scale. These should be reserved for the rarest of cases, which would include fraud and criminal activities on the part of a tortious or contract-breaching Defendant: *Marcos Limited Building Design Consultants v. Lad*, 2018 ONSC 7812, at para. 7.

[21] The McKenzies are entitled to their costs in the Fabco action on a substantial indemnity basis. The costs are to be apportioned between Jaymor, which breached the APS and against which they obtained a large judgment on the one hand, and the defendant Anthony, whose irresponsible and cynical machinations on the sidelines of the main struggle served both to complicate the unfolding of the APS and to offer the repudiating parties an excuse, however flimsy, to escape their contractual obligations.

[22] There was no challenge to the dockets or time entries filed by Plaintiffs' counsel. The materials filed in support of the claim for costs were fulsome and transparent. There is no reason to question the hours devoted to the file. The disbursements are adequately described and wholly justified.

[23] I would therefore award the McKenzies their costs of the Fabco action on a substantial indemnity basis in the amount of $150,000, inclusive of all fees and HST. The partial indemnity portion of those costs is payable by Jaymor ($100,000). The remaining balance of the full indemnity costs are payable by the Defendant Anthony ($50,000). Those costs are fixed and payable forthwith, not on a joint and several basis.

[24] I accept the Plaintiffs' calculation of pre-judgment interest on the Jaymor judgment and would award the Plaintiffs $345,337.10 as claimed for pre-judgment interest.

The Title Claim – The Anthony Judgment

[25] The McKenzies request costs for the Title claim against Anthony on a full indemnity basis.

[26] Their claim is not unreasonable.

[27] Anthony persisted in his twisted course of action after Jaymor's repudiation of the Fabco APS in November 2016.

[28] As I stated in my reasons, Anthony was wrong and reckless to do so. The court found him to have committed the twin torts of slander of title and injurious falsehood.

[29] These were not innocently committed. Anthony clearly had no basis to claim a proprietary interest in the disputed lands. As stated in the judgment at paragraph 63:

> Anthony's claim to an interest in the disputed lands was no better after the repudiated Fabco APS than it was before. Yet he persisted in his designs on those lands and went as far as to register first the caution, then the application on title. Anthony did so knowingly, without legal foundation or factual justification. He did so in bad faith.

[30] Anthony's motive became apparent to the court as the narrative unfolded. In particular, the note Anthony sent to the Plaintiffs (the "Anthony note") laid bare his cynical agenda. I quote from paragraph 55 of the judgment:

> There can be no better indication of Anthony's true intent than the Anthony note of June 23, 2017. It is clear from the tone, content, and timing of the Anthony note that its author was bent on obtaining an advantage out of his phantom interest in the disputed acreage. I find that the "win-win" points he enumerates were nothing more than a poorly veiled attempt to extract a cheap conveyance of the disputed acreage from the Plaintiffs. While Anthony does not specify what a "nominal but fair price" would amount to, it is obvious that he wanted something for nothing or for very little and was prepared to intimidate his neighbours with the threat of "litigation costs."

[31] Anthony's conduct was unreasonable and was the sole basis for the damages awarded in the Title claim. The damages awarded flowed naturally from his actions.

[32] The factors under r. 57.01(1) weigh heavily against Anthony:

i) the Plaintiffs were successful in the action;

ii) the Plaintiffs prevailed in the evidentiary ruling on the "Anthony note" of June 23, 2017;

iii) the proceeding was moderately complex;

iv) the issues were important;

v) Anthony's vexatious and deliberate acts led to the Plaintiffs' damages; and

vi) Anthony's positions in law and on the facts were not reasonable.

[33] The quality of advocacy on the Plaintiffs' side was just as high in the Title action as in the Fabco claim. Counsel for the Plaintiffs were efficient, thorough, and well prepared. Their written submissions were informative, focused, and persuasive. In his submissions, Anthony claims to have spent $350,000 in legal fees on the litigation. With that in mind, he cannot have expected to pay costs to the other side of anything less than $100,000, given that he was wholly unsuccessful in defending the Title claim.

[34] There is no basis to question or reduce the hourly rates charged by Plaintiffs' counsel. Their level of expertise, experience, and the quality of their preparation and advocacy was top

notch and contributed greatly to the success the Plaintiffs enjoyed at trial. The use of two counsel at trial was wholly justified.

[35] The principle of indemnity requires the court to consider the legal costs actually incurred by the Plaintiffs to pursue the modest but wholly justified judgment against Anthony.

[36] There remains the question of proportionality. A costs award of the kind the Plaintiffs are seeking does not at first instance appear to be proportional to the amount recovered. The Plaintiffs' more significant damages were caused by the failure of Fabco/Jaymor to close the Fabco APS in November 2016. Anthony's conduct, though egregious and malicious, was not criminal or fraudulent. The quantum of costs sought on a full indemnity basis would almost triple the amount of the Anthony judgment. Even the partial indemnity fees sought represent almost twice as much as the damages awarded.

[37] Still, it would be a complacent approach to costs to relieve Anthony of the obligation to make the McKenzies whole simply because of the modesty of the judgment and a misplaced application of the principle of proportionality. As I explained in *Aacurate v. Tarasco*, 2015 ONSC 5980, at para. 16:

> An over-emphasis on proportionality may serve to under-compensate a litigant for costs legitimately incurred. Assuming, as is often the case, that a successful Plaintiff's lawyer is working on an actual fees basis (as opposed to a contingency agreement), this will inevitably result in the Plaintiff having to fund her successful litigation out of the proceeds of judgment that a court found she was entitled to. This is patently unfair to litigants who have been wronged and who choose to invest their hard-earned resources into pursuing a legitimate claim. One does not say to one's lawyer, "I have only a modest claim. I am instructing you to do a mediocre job in advancing it." Few litigation lawyers would be attracted to a litigation landscape where they could not recommend giving a matter the time and effort it requires to be properly advanced because the principle of proportionality predestines a costs award that promises to turn a successful result in court into a net financial loss for their client. A pattern of such outcomes would result in an unintended but nonetheless real denial of access to justice; it will send a message to litigants that it is not worth one's while to pursue legitimate claims in court because one cannot possibly make it cost effective to do so. This is a denial of justice in the most fundamental sense. It tends to encourage those resisting legitimate but modest claims to take unreasonable positions, the logic being that any exposure to costs will be limited because of the size of the claim, regardless of the time and expense necessary to extract a judgment. At the same time, legitimate claimants will be left without cost effective remedies. This danger may be partly alleviated by the availability of the simplified procedure under Rule 76 and the Small Claims Court for certain types of claims; however,

> it offers little comfort to lien claimants who are required to bring their actions in Superior Court proper.

[38] That reasoning should apply here. It is desirable that the Plaintiffs should be made as whole as reasonably possible. Costs on a higher scale are the method for achieving this.

[39] Again, I would stop short of awarding full indemnity costs, which should be granted in the rarest of cases where fraud or other criminal activities deserve the court's sanctions. That said, substantial indemnity costs are fit and appropriate in the circumstances of this case.

[40] I find that a fair and reasonable amount for substantial indemnity costs in the Title claim is $125,000, which is inclusive of fees, HST, and disbursements.

[41] Those costs are fixed and payable forthwith by the Defendant Gerald Anthony.

[42] I accept the Plaintiffs' counsel's calculation of pre-judgment interest on the Anthony judgment and would award pre-judgment interest as sought in the amount of $10,050.76.

Summary and Disposition

[43] In summary, the Plaintiffs are awarded costs and pre-judgment interest as follows:

a) In the Fabco claim, costs in the amount of $150,000 fixed and payable forthwith as follows: i) by the Defendant Jaymor, the sum of $100,000; ii) by the Defendant Anthony, the sum of $50,000. These costs awards are not payable on a joint and several basis.

b) In the Fabco claim, pre-judgment interest in the amount of $345,337.10.

c) In the Title Claim, costs in the amount of $125,000 fixed and payable forthwith by Anthony.

d) In the Title claim, pre-judgment interest in the amount of $10,050.76.

[44] There shall be orders to go in accordance with the foregoing. Should the Plaintiffs encounter difficulty in having their proposed draft judgments approved by either Defendant, they may seek an appearance before me to settle the form and content of any proposed judgment.

McCARTHY J.

Released: April 9, 2025