CITATION: JLPM v. Ferrovial, 2025 ONSC 4960
COURT FILE NO.: CV-22-87
DATE: 2025/08/29

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
JLPM and DWIGHT ANTHONY JR. Plaintiffs	*B. Jackson*, for the Plaintiffs
– and –	
FERROVIAL SERVICES CANADA LIMITED Defendant	*K. Takagi*, for the Defendant
	HEARD: July 17, 2025

REASONS FOR DECISION ON COSTS

WILCOX, J.

INTRODUCTION

[1] The plaintiffs commenced an action in Ontario in which they sought damages for breach of contract, negligence, negligent misrepresentation and/or unjust enrichment. The defendant brought a motion to have the plaintiffs' action dismissed or permanently stayed. That motion was dismissed. The plaintiffs/responding parties to the motion seek costs. Costs submissions have been received from both parties.

LAW RE. COSTS

[2] Section 131 of the *Courts of Justice Act* leaves the costs of a proceeding largely to the discretion of the court. Rule 1.04(1.1) of the *Rules of Civil Procedure* requires the court to make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved in the proceeding. Rule 57.01 sets out the factors to be considered by the court, in addition to the result in the proceeding and any offer to settle, in exercising this discretion.

[3] "Modern costs rules are designed to foster three fundamental purposes:

1) To indemnify successful litigants for the cost of litigation.
2) To encourage settlements, and
3) To discourage and sanction inappropriate behaviour by litigants."[1]

[4] "The costs award should reflect more about what the court views as a fair and reasonable amount that should be paid by the unsuccessful parties rather than any exact measure of the actual costs to the successful litigant."[2]

ISSUES

Whether to award costs now or in the cause

[5] The first issue is whether to award costs now or in the cause. The defendant/moving party submitted that costs should be in the cause. In support, it relied on the decision of Perell J. in *Boal v. the International Capital Management Inc.* [3] who said at paragraph 10, "(o)n interlocutory motions, the court has a discretion to order costs to be paid forthwith, but it also has the jurisdiction to order costs in the cause, …".[4] His decision in *Boal* was based on the factual situation of that case. I am unable to draw any broader principles from it to assist me in applying the discretion it identifies.

[6] The plaintiffs/responding parties resisted leaving costs to be in the cause. They relied on Rule 57.03 which says that, on the hearing of a contested motion, unless the court is satisfied that a different order would be just, the court shall, except in exceptional cases, fix the costs of the motion and order them to be paid within 30 days.

[7] I do not find that it is appropriate to leave costs to be decided in the cause in this case. The motion was not about an issue that needed to be decided on a temporary basis pending the outcome of the trial, where that decision might be changed. It was about the discrete issue of whether the case would be heard in Ontario where the plaintiff had started it or whether it should be stayed or dismissed in Ontario and brought in another jurisdiction, Texas. The decision in favour of the case continuing in Ontario, although interlocutory by Perell .J.'s

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[1] *Fong v. Chan*, 46 O.R. (3d) 330
[2] *Boucher v. Public Accountants Counsel (Ontario)*, [2004] O.J. 2634
[3] 2018 ONSC 3646
[4] Definitions of interlocutory vary but Morden and Perell's "*The Law of Civil Procedure in Ontario*" 4th Edition at page 941 says "(w)hat takes place between the commencement of a proceeding and the start of a trial in an action or a hearing of an application may be described as "interlocutory", which means something done during the course of the proceeding and before its conclusion". I assume that that is the definition that Perell J. was working with in the Boal decision.

definition, was a final one, subject to any appeal. It will not be changed by the result of the trial in Ontario. So, I find that it is appropriate to deal now with the costs of that motion. The next issue is what is the appropriate scale of costs.

What is the appropriate scale of costs?

[8] Aside from the issue of whether costs should be in the cause, it was not disputed by the defendant/moving party that costs should be awarded to the plaintiffs/responding parties. The dispute was about the scale of costs.

[9] The plaintiffs/responding parties submitted that a formal Rule 49 offer was served on the defendant/moving party on September 22, 2023. This was after receiving the motion record of the moving party but prior to any further substantial steps being taken with respect to the motion. The Rule 49 offer contained the following proposal:

i. The defendant/moving party to abandon its motion.
ii. Defendant/moving party to deliver its statement of defence and for pleadings to be closed within 30 days of delivery.
iii. Parties to deliver their respective affidavits of documents within 60 days of the close of pleadings.
iv. Examinations for discovery to be scheduled within 60 days of the close of pleadings or as agreed to.
v. No costs payable for the motion by either party if the offer were to be accepted within 10 days. (sic)

[10] Given that the motion was dismissed, the plaintiffs/responding parties submitted, they are entitled to substantial indemnity costs in accordance with Rule 49.10(1).

[11] The defendant/moving party submitted that Rule 49.10(2) applied because the plaintiffs were the responding parties to the motion. This was on the basis of Rule 49.02(2) which says that Rule 49.02(1) and Rules 49.03 to 49.14 apply to motions, with necessary modifications. Rule 49.02(1) reads:

> **49.02** (1) A party to a proceeding may serve on any other party an offer to settle any one or more of the claims in the proceeding on the terms specified in the offer to settle (Form 49A). R.R.O. 1990, Reg. 194, r. 49.02 (1).
> (2) Subrule (1) and rules 49.03 to 49.14 also apply to motions, with necessary modifications. O. Reg. 627/98, s. 4.

[12] Rule 49.10(2) reads:

> **49.10** (2) Defendant's offer - Where an offer to settle,
>
> (a) is made by a defendant at least seven days before the commencement of the hearing;
>
> (b) is not withdrawn and does not expire before the commencement of the hearing; and
>
> (c) is not accepted by the plaintiff,

> and the plaintiff obtains a judgment as favourable as or less favourable than the terms of the offer to settle, the plaintiff is entitled to partial indemnity costs to the date the offer was served and the defendant is entitled to partial indemnity costs from that date, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 49.10 (2); O. Reg. 284/01, s. 11 (2).[5]

[13] This interpretation was not disputed. So, the defendant/moving party submitted, the plaintiffs/responding parties should be awarded no costs for the period before the offer and partial indemnity costs thereafter.

[14] In this case, (a), (b), and (c) were all satisfied. However, it was the responding party, not the moving party, that was successful in obtaining a judgment. On the main point, the responding party achieved the same result as if the moving party had abandoned the motion. In that sense, the moving party might be said to have obtained a judgment as favourable as the terms of the offer. The rule and the facts of the situation are an awkward fit, however. Fortunately, the rule leaves it open to the court to order otherwise, which I will do.

[15] Apart from situations involving Rule 49 offers, "enhanced costs should be awarded only on a clear finding of reprehensible conduct on the part of the party against which the cost award is being made".[6] There was no suggestion of reprehensible conduct here. Partial indemnity costs are appropriate.

What is the appropriate quantum of costs?

[16] I now turn to the predominant relevant factors set out in Rule 57.01.

[17] There was some complexity to the proceeding. The parties were parties to a contract. It had a forum selection clause which favoured the defendant/moving party in that it required that litigation arising from the contract be in Texas. However, when the defendant/moving party exercised its contractual right to unilaterally terminate the contract, the "surviving clauses" provision did not include the forum selection clause. When the plaintiffs/responding parties sued in Ontario, the defendant/moving party sought the dismissal of the action on the ground that it was brought in Ontario contrary to the forum selection clause.

[18] This raised a series of issues which had to be worked through:

a) Did the forum selection clause survive the termination of the contract?
b) Was it invalid due to unconscionability?
c) Was it valid, clear and enforceable?
d) Was there strong cause not to enforce it?

[19] The issues were of great importance to the plaintiffs because, if the defendant/moving party had been successful on the motion, the plaintiffs would have had to bring their litigation in

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[5] For present purposes, "defendant" should be read as "plaintiffs/responding parties" and "plaintiff" as defendant/moving party.
[6] *Smith v. Inco Ltd*. 2013 ONCA 724, at para. 61

Texas. As a small sole proprietorship and owner with no connection to that jurisdiction, they had great concerns about the logistics and costs associated with having to do that.

[20] As for conduct that tended to shorten or lengthen the proceedings, the defendant/moving party submitted that the plaintiffs/responding parties had made the motion more complex by arguing all four of the above-listed issues, but only the last one successfully. However, given the importance of the motion to the plaintiffs/responding parties and the uncertainty around the issues, I cannot find fault for arguing them all. On the other hand, this was a standard form contract proffered by the defendant/moving party and, although the defendant claimed to have been open to negotiating the terms, it appeared to be a contract of adhesion. The defendant/moving parties' drafting of the contract, leaving the forum selection clause out of the "surviving clauses" section, substantially increased the complexity of the motion.

[21] The amount of costs in the unsuccessful party's costs outline is a good indication of what it would reasonably expect to pay. The plaintiffs/responding parties' costs outline claimed partial indemnity costs, including disbursements, of $13,595.63. This is not far in excess of the $12,346.05 in the defendant/moving party's costs outline.

CONCLUSION

[22] In conclusion, taking into account the factors enumerated under Rule 57, the principle of proportionality and the principles set forth in the case law, specifically that the overall objective of fixing costs is to fix an amount that is fair and reasonable for an unsuccessful party to pay in the particular circumstances, rather than an amount fixed by the actual costs incurred by the successful litigant, I conclude that an award of costs in the amount of $13,000 inclusive of fees, disbursements and taxes would be a reasonable one in the circumstances and I order the defendant/moving party to pay to the plaintiffs/responding parties that amount within 30 days.

Wilcox, J.

Released: August 29, 2025

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