

CITATION NO.: FirstOntario Credit Union Limited v. Carmichael et al., 2026 ONSC 4872

COURT FILE NO.: CV-23-83513

DATE: August 25, 2026

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: FirstOntario Credit Union Limited, Plaintiff

- and -

Kevin Carmichael and Aria Sage Tesolin, Defendants

BEFORE: MacNeil J.

COUNSEL: *Howard Reininger* – Lawyer for the Plaintiff

Philip Holdsworth – Lawyer for the Defendant, Aria Sage Tesolin

REASONS FOR DECISION ON COSTS

[1] This is my decision on costs respecting the trial of this action. Judgment was made against the defendant, Aria Sage Tesolin (“Ms. Tesolin”), as a result of the transfer to her by the defendant, Kevin Carmichael (“Mr. Carmichael”), of the net sale proceeds of a condominium he had owned being found to be a fraudulent conveyance under the *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29.

[2] The trial of this matter proceeded only as against Ms. Tesolin since the plaintiff, FirstOntario Credit Union Limited (“FirstOntario”), had reached an earlier settlement with Mr. Carmichael.

[3] FirstOntario and Ms. Tesolin were unable to settle the issue of costs of the action. They each made written submissions setting out their positions in respect of same.

General Principles

[4] 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.

[5] Rule 57.01(3) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 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.

[6] 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.

[7] 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.

[8] 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.

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

[10] 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 FirstOntario

[11] As the successful party, FirstOntario seeks its costs on a substantial indemnity basis in the amount of \$105,090.00 in fees (including HST) and \$4,347.93 in disbursements, for a total of \$109,437.93. It submitted a detailed bill of costs.

[12] FirstOntario relies on the costs decision in *Bank of Nova Scotia v. Visentin* (1997) 14 C.P.C. (4th) 257 (Ont. Ct. (Gen. Div.)), wherein Gibson J. held that a higher scale of costs was appropriate in that case in light of the court's finding that two mortgages given by a daughter to her parents were in effect fraudulent and contravened the provisions of the *Fraudulent Conveyances Act*. The mortgages were set aside even though the parents were unaware of their daughter's fraudulent intent which was established by badges of fraud.

[13] FirstOntario argues that the facts before the court in the present case are virtually identical to the facts in *Visentin* and it is not necessary to find fraudulent intent on the part of Ms. Tesolin. While she was not aware perhaps that Mr. Carmichael intended to defeat FirstOntario or that it was a creditor, Ms. Tesolin had to have been aware that Mr. Carmichael was evading other creditors. FirstOntario submits that Ms. Tesolin's assertion of no knowledge of any wrongdoing on the part of Mr. Carmichael is not credible.

Position of Ms. Tesolin

[14] It is submitted on behalf of Ms. Tesolin that this is not an appropriate case for an award of substantial indemnity costs. The action proceeded in the ordinary course with a three-day trial. Ms. Tesolin's conduct during the litigation itself was not criticized. No findings of fact were made establishing her knowledge of FirstOntario's mortgage at the time she came into receipt of the impugned sale proceeds. Because the court found that the transfer from Mr. Carmichael was made for no good consideration, it was not necessary for FirstOntario to also prove a fraudulent intent on the part of Ms. Tesolin for the purpose of s. 2 of the *Fraudulent Conveyances Act*. The central wrongdoing identified by the court was that of Mr. Carmichael's conduct. FirstOntario did not pursue its conspiracy claim at trial. Costs should be awarded on a partial indemnity scale and should be "moderated to reflect that Ms. Tesolin was not found to have knowingly participated in Mr. Carmichael's fraud and was required to defend serious claims for personal liability arising primarily from his conduct".

[15] No bill of costs was submitted on behalf of Ms. Tesolin.

Analysis

Scale of costs

[16] Costs may be awarded on a substantial indemnity basis "where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties": *Young v. Young*, 1993 CanLII 34 (SCC), [1993] 4 S.C.R. 3, at p. 134.

[17] A finding of fraud or attempted fraud may justify an award of costs on an elevated scale: *Bayford v. Boese*, 2021 ONCA 533, at para. 4.

[18] I accept the submissions made on behalf of Ms. Tesolin that this is not a case in which the allegations of wrongdoing by Ms. Tesolin should lead to an elevated costs award. There was no finding made that she had a fraudulent intent. Rather, it was inferred from badges of fraud that Mr. Carmichael intended to defeat his creditors, including FirstOntario, such that the transfer of the net sale proceeds amounted to a fraudulent conveyance.

[19] All things considered, I am satisfied that costs should be awarded on a partial indemnity basis.

Amount of costs

[20] Since Ms. Tesolin did not submit a bill of costs, the court did not have the benefit of being able to compare the legal fees paid by both parties which can be helpful in determining a party's reasonable expectation of costs.

[21] In my view, while the hourly rate charged by counsel for FirstOntario is reasonable given his years of experience, the number of hours should be reduced as some of the work claimed was administrative in nature or entailed the drafting/preparation of standard litigation documents (e.g., affidavit of documents, trial record) which could have been appropriately performed by a law clerk at a lower hourly rate. Accordingly, I have reduced the number of hours to be indemnified.

[22] I have also considered the following:

- (a) FirstOntario was successful in proving its case at trial.
- (b) The issues raised in the action were moderately complex.
- (c) The trial was of importance to both parties.
- (d) It was a three-day trial and there were no concerns with the conduct of the litigation.
- (e) Ms. Tesolin could reasonably have expected to pay costs in the event of lack of success.
- (f) The claimed disbursements are reasonable and were necessarily incurred for the purpose of the trial and should be reimbursed.

[23] 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 FirstOntario in the amount of \$62,000.00, inclusive of HST and disbursements, is fair, reasonable and proportionate in the circumstances.

Disposition

[24] For the foregoing reasons, this court orders that Ms. Tesolin pay costs to FirstOntario fixed in the amount of \$62,000.00, payable within 30 days of the release of these reasons.

MacNEIL J.

Released: August 25, 2026