

CITATION: Shiralian v. Wyldewood Creek Inc., 2026 ONSC 3277
COURT FILE NO.: CV-22-1240
DATE: 20260603

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

BABAK SHIRALIAN, SAMUEL
ANSHILEVICH and ALEX ILCHENKO

Applicants

– and –

WYLDEWOOD CREEK INC.

Respondent

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) Neil G. Wilson, for the Applicants
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) Zachary Rosen, for the Respondent
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) **HEARD:** April 2, 2026

RULING RE: COSTS

MCKELVEY J.:

Introduction

- [1] This Application was commenced by three Applicants who all signed a purchase and sale agreement for a condominium unit which was to be built in Collingwood, Ontario. According to the Respondent, it was impossible to build a condominium building because of various issues with the City of Collingwood. The Applicants sought damages of \$280,000 as a result of the alleged breach of contract.
- [2] The Applicants also sought a return of their deposit which totalled \$66,000 as well as interest accruing which totalled \$463.81. The deposit was returned to the purchaser's on March 17, 2023 during the course of this Application. The interest was not paid until after my Ruling which was released on April 30, 2025. In my Ruling I held that the Applicants were entitled to the return of their deposit together with interest. However, because of a limitation clause in the purchase and sale agreement the Applicants were not entitled to damages for the breach of the purchase and sale agreement.

[3] The parties have now come before me to deal with the issue of costs on the Application.

Parties' Positions with Respect to Costs

[4] The Respondent seeks substantial indemnity costs of \$227,731.40 plus disbursements of \$20,195.28 for a total of \$247,926.68. The Applicants' position is that the claim for costs against them should not exceed \$28,000.

Factors Relating to Costs

[5] Rule 57.01 sets out the criteria which a court should consider in awarding costs. The particular factors which appear to be the most relevant in this case are as follows:

1. The results of the proceeding;
2. Any offer to settle made in the action;
3. 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 in the hours spent by the lawyer;
4. The amount of costs that an unsuccessful party could reasonably expect to pay;
5. The amount claimed and the amount recovered in the preceding;
6. The complexity of the proceeding; and
7. The conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding.

Who was the successful party at trial?

[6] It is clear that the Respondent was the successful party at trial. The purchase and sale agreement contained a provision which stated that the purchaser would have no remedy or claim against the vendor for any economic loss, expectation of damages or any other damages whatsoever. This provision effectively isolated the Respondent developer from all of the Applicants' claims except for the return of the deposit and the interest accrued on the deposit. As noted above, the deposit made by the Applicants was refunded by the Respondent to the Applicants during the course of the Application on March 17, 2023. It was never a significant issue on this application, nor was the issue of interest ever a significant issue. The amount of interest owing was less than \$500.

[7] The Applicants do not take issue with the Respondent's claim for costs against them. They do take issue, however, with respect to the scale of costs and in particular whether the Respondent should be entitled to costs on substantial indemnity basis. They also argue that a reasonable assessment of costs would be in the area of \$28,000.

Should the Respondent be entitled to their costs on a partial indemnity or substantial indemnity basis?

- [8] The Respondent argues that it should be entitled to substantial indemnity costs. This position is based on the fact that in March, 2023 it offered to “fast track” the proceedings to permit a trial to be held during the November 2023 sittings. The Respondent also refers to the fact that it offered to deal with the Application in a single day arbitration. Finally, the Respondent refers to the fact that it offered to pay the all-inclusive amount of \$10,000 to settle the claim. However, this offer to settle was delivered on September 19, 2024 in the midst of the hearing and was withdrawn shortly after. The Respondent notes that the Applicants would be in a far better position today if they had abandoned their claims after repayment of the deposits, or if they had accepted the offer of \$10,000. Instead, the Applicants chose to continue with the hearing and “therefore must bear responsibility for the significant costs incurred by the Respondent as a result”.
- [9] The Respondent acknowledges that its offer did not meet the time requirements to attract the mandatory cost consequences of Rule 49. It encourages the Court, however, to “apply a holistic approach taking into account the Respondent’s overwhelming success, the Applicants’ conduct in the litigation and the Respondent’s efforts to streamline or resolve the matter, and exercise its discretion under Rule 49.13 to take these offers into consideration in determining both the scale and quantum of costs”.
- [10] I have concluded that costs should be awarded only on a partial indemnity basis and not on the substantial indemnity basis as sought by the Respondent.
- [11] In the decision of the Ontario Court of Appeal in *Davies v. Clarington (Municipality)*, 2009 ONCA 722, the Court deals with entitlement to an award for substantial indemnity costs. The Court notes that apart from the operation of Rule 49.10, elevated costs should only be awarded on a clear finding of reprehensible conduct on the part of the party against which the costs award is being made. Rule 49.10 does not justify an award of substantial indemnity costs in this case. I have also concluded that there was no scandalous conduct on the part of the Applicants which would justify an award of substantial indemnity costs. The Applicants were well within their rights to proceed with their Application in court. The Respondent brought a motion to try and force this case to be converted into an action. This motion was rejected by the Court. Similarly there was no requirement for the Applicants to agree to an arbitration. Both parties agreed to have this Application decided in court and the Applicants cannot now be penalized for their failure to have the case decided by arbitration.

Is this a case of divided success?

- [12] There were three main issues that needed to be decided on this Application. The first issue is whether all of the Applicants were partners. That issue was relevant because one of the Applicants never signed the agreement to extend the early termination provisions which

the Applicants argued meant that the amendment to the agreement extending the date for early termination was not applicable to that individual. On that issue I found in favour of the Respondent. The second major issue in the case was whether there was a breach of the purchase and sale agreement by the Respondent. On that issue I found in favour of the Applicants. The third major issue was a proper interpretation of the exculpatory provision limiting the liability of the Respondent. On this issue I found in favour of the Respondent. In the end, therefore, the substantial claims of the Applicants for breach of the agreement were dismissed. I did, of course, find that the Applicants were entitled to a return of their deposit which was paid on March 17, 2023 during the course of the Application. I also found they were entitled to interest in the sum of \$463.81 which had not been paid prior to the release of my decision.

- [13] The issue is whether there should be a reduction in the costs award for issues on which the Respondent was not successful.
- [14] In the Ontario Court of Appeal decision in *Oakville Storage & Forwarders Ltd. v. Canadian National Railway* (1991), 5 O.R. (3d) (C.A.), the Court of Appeal heard an appeal from a judgment following a long and complex trial, which had imposed a distributive costs order, which is an order under which the major issues at trial are identified and the party who is successful on each issue is awarded costs for the time and expense attributable to that issue. The Court of Appeal pointed out the “dubious virtue” of a distributive order for costs. It noted that offer to settle rules are “result” oriented, not “issue” oriented and the distributive approach would work at cross purposes with the intended result of those rules.
- [15] In *Murray v. Pier 21 Asset Management Inc.*, 2020 ONSC 5606, Justice Penny comments that the Court in *Oakville Storage*, “did not decide whether a distributive costs order was ever appropriate (although he found it “difficult to imagine” that it could be) but clearly held that this was not the proper case for any such order. Importantly, the Court found that “individual issues can be dealt with more appropriately under the general discretion and explicit guidance set forth in” Rule 57.
- [16] Justice Penny goes on to note, however, that the unavailability of a distributive costs order does not preclude the court from considering a reduction of costs on the basis that the plaintiff was not successful on several headings of damages.
- [17] In the present case I have concluded that there should be a modest reduction in the Respondent’s costs to reflect the fact that there was some divided success on this Application.

Failure of the Respondent to refund the deposit paid by the Applicants until March 17, 2023

- [18] It is conceded by the Respondent that the Applicants were at a minimum entitled to a refund of their deposit of \$66,000. This amount was not paid by the Respondent until March 17, 2023. The Application itself had been commenced on June 24, 2022. In light of the clear obligation of the Respondent to refund the deposit, I find that the Respondent should not

be entitled to any award of costs up to March 17, 2023. In fact, I consider that the Applicants should be entitled to their costs up until this date. There is simply no reasonable basis for the Respondent to have ignored its clear responsibility under the purchase and sale agreement.

- [19] Counsel have agreed that the partial indemnity costs of the Applicants total \$6,900 for the period of up to March 17, 2023. This amount shall be set off against the amount owing by the Applicants to the Respondent.

Proportionality

- [20] The Applicants argue that their claim for \$280,000 was relatively modest and does not justify a large award of costs against them. On the other hand, the Respondent points to the fact that the Applicants' own counsel commenced a proposed class proceeding on behalf of other purchasers in the same condominium. This proposed class proceeding sought damages of \$30 million. Accordingly, it is argued the Application required a thorough and vigorous response, which in turn required a considerable investment of time by the Respondent's counsel.
- [21] The Applicants argue that they were not part of the class proceeding and therefore they should not be penalized because of the commencement of that proceeding.
- [22] In my view, however, the initiation of the class proceeding for the amount claimed meant that inevitably this Application was going to be vigorously defended. The Application was initially scheduled to be argued in a day. Not surprisingly the argument on the Application lasted for five or six days. This was not all the responsibility of the Respondent as there were extensive affidavits, facts and lengthy oral arguments by both parties on the Application. The complexity of the proceeding and the length of time needed to address all of the issues raised the bar for the amount of costs an unsuccessful party could reasonably be expected to pay in this litigation.

Hourly Rates Charged by the Respondent

- [23] This Application was heard in the fall of 2024 and early 2025. The Respondent's costs are based on very substantial hourly rates. Andrew Parley was senior counsel with 16 years experience. In 2024 his billing rate was \$900 per hour. I consider this amount to be higher than the Applicants could reasonably be expected to pay if they were unsuccessful on this Application. It produces a partial indemnity rate (calculated at 60%) of \$540. In the preamble to Rule 57 it makes reference to the published maximum hourly rates which were issued in 2005 when fixing partial indemnity costs. Using an inflation calculator the partial indemnity rate maximum for a lawyer 10 to 19 years in practice is \$462 per hour. Thus, Mr. Parley's rate was approximately 17% above that figure.
- [24] In my decision in *Wray v. Pereira*, 2019 ONSC 3354, I dealt with a claim for costs submitted by the plaintiff based on an hourly rate for senior counsel of \$850 an hour and \$400 per hour for junior counsel. I agreed with the defence that those hourly rates were excessive in the context of a case where the amount in dispute was in the area of \$225,000.

As noted in the Ontario Court of Appeal decision and in *Coldmatic Refrigeration of Canada Ltd. v. Leveltek Processing LLC*, [2005] O.J. No. 160, the overriding principle of reasonableness requires a court to stand back from the fee produced by the raw calculation of hours spent times hourly rate and to assess the reasonableness of the counsel fee from the perspective of the reasonable expectations of the losing party. This is not what a counsel is entitled to charge his or her own client, but rather is the amount that is reasonable to impose upon the loser.

- [25] In the present case I think there must be some deduction from the costs claimed by the Respondent. I am not proposing set an hourly rate for either senior or junior counsel in this case. It is a factor I have taken into consideration, but the critical question becomes what this Court views as a fair and reasonable amount that should be paid by the unsuccessful party rather than the actual cost to the successful litigant. See para. 24 of *Boucher v. Public Accountants Council for the Province of Ontario*, [2004] O.J. No. 2634 (ON CA).

Hours and Disbursements Claimed by the Respondent

- [26] In the present case there is a discrepancy between the hours claimed by the Respondent in its initial bill of costs which was filed at the beginning of the hearing and the amounts claimed at the end of the case following release of my decision.
- [27] In the initial bill of costs delivered by the Respondent at the beginning of the hearing they claimed a total of 6.9 hours were spent preparing for cross-examinations and a total of 15.1 hours were spent attending at cross-examinations. Thus, a total of 22 hours was claimed under these two headings. In their bill of costs delivered on March 31, 2026 in preparation for today's attendance, the claim for preparation for cross-examinations is 14.6 hours and attendance at cross-examinations is claimed at 23.3 hours for a total of 37.9 hours. Thus, there is a claim of 15.9 hours extra claimed on the most recent bill of costs which relates to work which would have been done prior to the start of the hearing. The Applicants' solicitor kindly suggested that possibly this difference is explained because the Respondent was prepared to waive a certain amount of hours in preparing and attending at cross-examinations which has now been fully accounted for in the latest bill of costs. With respect, if this were the case I would have expected there to be an explanation about this in the initial draft bill of costs. The exact reason why this discrepancy exists is unexplained. I am concerned that in the latest bill of costs the Respondent may have inflated the number of hours recorded on this file.
- [28] It is also significant to note that in the initial draft bill of costs put forward at the time of the initial hearing, the claim for disbursements is calculated to be \$3,799.46. However, in the most recent bill of costs the disbursements are stated to be \$20,195.28 which leaves a discrepancy of \$16,395.82. This cannot be accounted for by disbursements incurred during the course of the hearing.
- [29] I am satisfied that the above discrepancies are not attributable to counsel. Both counsel I have found to be professional in all respects. However, the fact remains that there are significant discrepancies between the earlier and subsequent bill of costs which is

unexplained and which I am attributing to systemic problems in the office of the Respondent's counsel. I am concerned that the current bill of costs may significantly overestimate the hours spent in this matter.

Conclusion

- [30] The total claim for partial indemnity costs of this Application including HST is \$147,738.78. From this amount must be deducted the sum of \$26,562 which is the amount claimed by the Respondent before return of the deposit to the Applicants on March 17, 2023. This reduces the partial indemnity fees of the Respondent to \$127,631 including HST. In addition, the sum of \$6,900 must be deducted from this figure to offset the Applicants' costs up to March 17, 2023 when the deposits were repaid. This leaves a net amount claimed for partial indemnity costs of the Respondent of \$120,731 including HST.
- [31] I have concluded that this amount must be reduced further to account for the high hourly rates which have been charged and to account for the possibility that the hours claimed may in fact exceed the hours which were worked. This was a difficult and hard-fought case. Arguments extended over five or six days. The issues were complex and the result was important both for the Applicants and the Respondent. In my view, it is reasonable to assess the costs that the unsuccessful party should be reasonably expected to pay at \$85,000 inclusive of HST. In addition to this amount, I would allow disbursements as per the Respondent's initial costs outline at \$3,799.46. I therefore have concluded that the Applicants should pay to the Respondent the sum of \$85,000 plus \$3,799.46, for a total of \$88,799.46 within 30 days.

Justice M. McKelvey

Released: June 3, 2026

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