

COURT OF APPEAL FOR ONTARIO

CITATION: James v. HSBC Bank of Canada, 2026 ONCA 440

DATE: 20260617

DOCKET: COA-25-CV-0503

Miller, Trotter and Osborne JJ.A.

BETWEEN

Kenneth James

Plaintiff/Responding Party (Appellant)

and

HSBC Bank of Canada and HSBC Securities (Canada) Inc.

Defendants/Moving Parties (Respondents)

Tomislav Miloš and Owain Guinn, for the appellant

Mark Evans and Ara Basmadjian, for the respondents

Heard: May 15, 2026

On appeal from the order of Justice John R. McCarthy of the Superior Court of Justice, dated March 31, 2025, with reasons reported at 2025 ONSC 1944, and the costs order dated June 17, 2025, with reasons reported at 2025 ONSC 3597.

REASONS FOR DECISION

A. INTRODUCTION

[1] The appellant appeals from a summary judgment dismissing his action against the respondents. He also seeks leave to appeal the costs order in the amount of \$225,000. At the conclusion of the hearing, we dismissed the appeal

from the summary judgment with reasons to follow. We reserved our decision on the costs appeal.

[2] The following reasons explain why the appeal from summary judgment is dismissed, and why we grant leave to appeal the costs order and reduce the total amount to \$175,000.

B. FACTUAL BACKGROUND

[3] The underlying facts are set out in detail in the motion judge's reasons. They are addressed only briefly in these reasons.

[4] The appellant, a practicing lawyer at the time, opened personal and commercial accounts (including a trust account) with HSBC Bank of Canada, and investment accounts with HSBC Securities (Canada) Inc. ("HSBC Securities") (together, "HSBC").

[5] In May of 2012, less than six months after the appellant became an HSBC customer, a bank employee detected suspicious large cash deposits into the appellant's trust account. In June of 2012, the appellant was charged with possession of the proceeds of crime, money laundering, and fraud over \$5,000. This resulted in HSBC freezing the appellant's accounts. In October of 2012, the appellant's personal accounts became subject to a restraint order under the *Criminal Code*, R.S.C. 1985, c. C-46. The Law Society of Ontario obtained an order suspending the appellant's licence to practice law.

[6] As these events were unfolding, the appellant held options in Google Inc. and Priceline.com. HSBC Securities advised the appellant to close these options by end of day on June 13, 2012. The appellant failed to respond to this request. Consequently, HSBC Securities sold the options on June 15 and generated a profit of \$86,551 for the appellant.

[7] The appellant was eventually acquitted of the criminal charges. The restraint order was vacated and HSBC lifted the holds on the appellant's accounts, allowing the appellant to access all remaining funds and any accrued interest.

[8] The appellant commenced an action against HSBC on August 9, 2012. He claimed damages for the wrongful conversion of funds, intentional interference with economic relations, and other causes of action. This included a claim for funds allegedly withdrawn from the appellant's HSBC Hong Kong account.

[9] As set out in the motion judge's reasons, the appellant admitted the following facts at his discovery:

- (a) The parties were bound by the terms of the HSBC account agreements;
- (b) The HSBC account agreements governed the operation of those accounts;

- (c) On June 7, 2012, the appellant and his employee at the time were charged with the criminal offences of possession of the proceeds of crime, money laundering, and fraud;
- (d) HSBC had the right to freeze the appellant's accounts under certain circumstances;
- (e) The appellant had recovered all funds listed in Schedule "A" of the statement of claim;
- (f) The appellant's license to practice law had been revoked;
- (g) The appellant was not seeking any damages related to his practice of law; and
- (h) HSBC Hong Kong was not a party to this proceeding and is a separate legal entity from HSBC Bank of (Canada) and HSBC Securities Canada Inc.

C. THE SUMMARY JUDGMENT

[10] In August of 2018, following discoveries, the respondents advised of their intention to bring a summary judgment motion, but took no steps at that time. The action was set down for trial in January 2023. However, when the respondents served their summary judgment motion materials on February 1, 2024, no pre-trial conference or trial date was scheduled.

[11] The motion judge found that there was no genuine issue for trial. He determined that summary judgment was “a more proportionate, expeditious, and less expensive means to achieve a just result.” He found that HSBC did not unreasonably freeze the appellant’s accounts. The personal and commercial account agreements were unambiguous and authorized the preventative action taken by the respondents. Their actions were also consistent with the appellant’s bail conditions, and the *Criminal Code* restraint order.

[12] As for HSBC Hong Kong, the motion judge held, “[t]here is not a shred of evidence that the [respondents] ever accessed, transferred, controlled, or held the funds on deposit with HSBC Hong Kong.” Indeed, in his May 7, 2024 affidavit, the appellant acknowledged that his funds never left Hong Kong.

[13] The motion judge examined each of the appellant’s claims (conspiracy and collusion, wrongful interference with economic interests, conversion, and defamation) and determined that there was no genuine issue for trial with respect to any of them.

[14] The appellant appeals the summary judgment decision on the basis that the motion judge: (a) failed to address the respondents’ delay in bringing their summary judgment motion; and (b) misapprehended the evidence.

[15] The appellant submits that, although the parties made written and oral submissions on the effect of delay in bringing the summary judgment motion, the

motion judge failed to address the issue in his reasons. He submits that this amounts to insufficient reasons, which warrant setting aside the summary judgment and ordering a fresh hearing before a different Superior Court judge.

[16] We acknowledge that, depending on the circumstances, delay in bringing a summary judgment motion may warrant its dismissal, especially when a trial has been scheduled: *Avedian v. Enbridge Gas Distribution Inc. (Enbridge Gas Distribution)*, 2021 ONCA 361, at paras. 2, 11-15; *Doef v. Hockey Canada et al.*, 2022 ONSC 1411, 21 C.C.L.I. (6th) 311, at paras. 21-22, 45, 49. But that was not the case here, even though the matter was set down for trial 13 months before the respondents served their motion materials.

[17] The summary judgment motion was scheduled by the Regional Senior Judge over the objections of counsel for the appellant, who had raised the issue of delay. This argument was renewed before the motion judge. We agree with the appellant that the motion judge should have addressed the issue of delay in his reasons. However, it is clear from the record that this was an appropriate case for summary judgment. This was not a case in which the summary judgment procedure was weaponized to derail an upcoming trial. As noted above, even though the action had been set down for trial, there was no trial date in sight when the motion was heard. Allowing this dated action to linger any longer and possibly proceed to trial would have resulted in the further waste of resources. On this same theme, we do not understand the wisdom in ordering a new motion for summary

judgment, as the appellant requests, especially when he submits that summary judgment is not appropriate in the first place.

[18] On the merits of the summary judgment motion, the motion judge's reasons explain in detail why this case was appropriate for summary judgment, and why the appellant was completely unsuccessful. Thus, apart from the delay issue, the motion judge's reasons were otherwise sufficient.

[19] Further, we do not agree with the appellant's submission that the motion judge misapprehended the evidence. One of the appellant's main contentions under this ground relates to the appellant's HSBC Hong Kong account. The motion judge made a factual finding, based on the appellant's affidavit dated May 7, 2024, that the appellant learned by 2019 that his funds never left that bank. The motion judge properly concluded that "[i]t is doubtful that there was ever a genuine issue requiring a trial surrounding the fate of the funds on deposit at HSBC Hong Kong" (emphasis added). This finding, along with his other factual findings, were open to the motion judge on the record.

[20] The appeal from summary judgment is dismissed.

D. THE COSTS AWARD

[21] The respondents sought costs on a substantial indemnity basis in the amount of \$371,885.64 (comprised of \$89,499.88 for the summary judgment motion and \$282,385.76 for the underlying action).

[22] Referring to *Clarington (Municipality) v. Blue Circle Canada Inc.*, 2009 ONCA 722, 100 O.R. (3d) 66, the motion judge was not satisfied that the appellant engaged in the kind of reprehensible or scandalous conduct which “might alone” warrant costs on a substantial indemnity basis. However, he found that the appellant was “certainly guilty of misplaced and unfounded allegations against HSBC. This was regrettable, unwise, and unwarranted but I am not satisfied that they alone rose to the level required for a costs sanction” (emphasis added).

[23] However, the motion judge found that the total damages amount claimed by the appellant – \$2 million – was “significant” and included a punitive component. He also found the appellant unnecessarily complicated the summary judgment motion by filing an affidavit that contradicted key admissions made during his examination for discovery.

[24] The motion judge emphasized the appellant’s refusal to accept an offer to settle served on January 29, 2018, prior to examinations for discovery. The offer involved a dismissal of the action without costs.¹ The motion judge held that the appellant should have accepted this offer, which was made more than five years after he commenced his claim. His refusal to accept the offer in the face of a “hopeless case” resulted in seven more years of litigation with the accompanying expense and the inevitable result of a dismissal of the action.

¹ The offer remained open until March 9, 2018, following which the offer involved the dismissal of the action with costs.

[25] On the appropriate scale of costs, the motion judge found:

I have concluded that the operation of the unaccepted offer, the [appellant's] unfounded claim for punitive damages, his unwillingness to concede that HSBC had no access to the HSBC Hong Kong account funds, his contradiction of discovery admissions, factored in alongside the principles of indemnity and proportionality, all combine to warrant damages on a substantial indemnity scale.

[26] Despite this finding, the motion judge concluded that the respondents' bill of costs was excessive, given that the matter did not proceed to trial and did not involve multiple parties. He awarded costs of the summary judgment motion in the amount of \$75,000 and of the underlying action in the amount of \$150,000, both on a substantial indemnity scale.

[27] The appellant submits that there was no basis upon which to award substantial indemnity costs. He seeks an overall reduction of the costs award to \$150,000.

[28] The appellant relies on the following passage from *Clarington*, in which Epstein J.A. said, at para. 28:

This court, following the principle established by the Supreme Court, has repeatedly said that elevated costs are warranted in only two circumstances. The first involves the operation of an offer to settle under rule 49.10, where substantial indemnity costs are explicitly authorized. The second is where the losing party has engaged in behaviour worthy of sanction.

[29] The parties agree that r. 49.10 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, did not apply in the circumstances because the respondents would only have achieved the dismissal of the action (which is what they obtained on summary judgment). The appellant further submits that the motion judge specifically found that the appellant had not engaged in behaviour worthy of sanction. Consequently, costs on a substantial indemnity scale were not available. We do not agree.

[30] The motion judge did not refer to r. 49.10 in his reasons. He did not consider the rejected offer to be a r. 49.10 offer. However, the refusal to accept an offer may be taken into account in exercising the broad discretion to award costs, as set out in r. 57.01(1), which specifically refers to “any offer to settle or to contribute made in writing”.

[31] Moreover, under r. 57.01, a court may take into account the conduct of a litigant in making unproven allegations that impugn the integrity or good reputation of an opposing party. The motion judge found that happened in this case. The motion judge did not err in awarding costs on a substantial indemnity basis.

[32] Although leave to appeal a costs award is granted only sparingly, we agree with the appellant that the amount awarded in this case was excessive in all of the circumstances. We agree with the appellant that, as far as the respondents’ offer to settle was concerned, it could only justify an elevated costs award after it was

rejected; it should not have been applied to costs incurred in the roughly six years before the offer was made. With respect, this was an error in principle.

[33] In order to achieve proportionality, the costs award for the underlying action should be reduced to \$100,000, for a total costs award of \$175,000, all inclusive.

E. DISPOSITION

[34] The appeal from the summary judgment motion is dismissed. Leave to appeal costs is granted, the appeal from the costs award is allowed, and it is reduced to \$175,000.

[35] The parties agreed that the successful party on the appeal from summary judgment would be entitled to costs in the amount of \$11,000, and the successful party on the costs appeal would be entitled to \$6,000. Given the divided success on this appeal, the respondents are entitled to a net costs award of \$5,000 on this appeal, all inclusive.

“B.W. Miller J.A.”
“Gary Trotter J.A.”
“P.J. Osborne J.A.”