CITATION: Bosnali v. Michaud, 2019 ONSC 2809
COURT FILE NO.: CV-13-2159-00
DATE: 20190503

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Caner Bosnali, Plaintiff

AND:

Robert Michaud and Central Graphics and Container Group Ltd., Defendants

AND:

Lofranco Corriero Personal Injury Lawyers, Plaintiff's former counsel and Moving Party

BEFORE: Petersen J.

COUNSEL: *F.J. Burns*, for Lofranco Corriero/Moving Party

N.E. Kostyniuk, for Defendants/Respondents

HEARD: April 23, 2019

ENDORSEMENT

[1] This motion is brought pursuant to s.34 of the *Solicitors Act*, R.S.O. 1990, c.S.15 by the Plaintiff's former solicitors, Lofranco Corriero. The motion seeks: (1) a declaration that Lofranco Corriero has a first charge on the monies (damages and costs) awarded to the Plaintiff at trial, in priority to any right of set-off claimed by the Defendants (who were also awarded costs at trial) and (2) an order that the Defendants pay forthwith to Lofranco Corriero all of the monies over which the charge applies.

[2] A review of steps in this litigation is required in order to provide context for the motion. Tzimas, J. outlined the history of the proceeding in her Reasons for Judgment dated June 26,

2017. I will not repeat that history in detail, but will summarize it briefly and supplement it with a chronology of steps that occurred after June 26, 2017.

Chronology of Proceeding

[3] The litigation arose out of a motor vehicle accident that occurred in November 2007. A lengthy jury trial was conducted in January and February 2017. Liability was not disputed by the Defendants. The Plaintiff's damages were the only issues to be decided by the jury. The Plaintiff was claiming $6,000,000 in damages.

[4] At the conclusion of the trial, on February 17, 2017, the jury awarded the Plaintiff $100,000 in general damages, $42,000 for housekeeping and $10,000 for past and future medical expenses. No damages were awarded for past or future economic losses.

[5] On April 18 and 19, 2017, Tzimas, J. heard submissions from the parties with respect to the applicability of the statutory deductible under the *Insurance Act*, R.S.O. 1990, c.C.8, credits claimed by the Defendants, and costs relating to the litigation.

[6] On May 10, 2017, Lofranco Corriero issued a final account to the Plaintiff for its legal services. The total of fees and disbursements billed was $339,839.31, inclusive of HST.

[7] The Plaintiff refused to pay his solicitors' account.

[8] On June 2, 2017, Lofranco Corriero commenced this motion for a charging order pursuant to the *Solicitors Act*. Notice of the motion was given to the Plaintiff but not to the Defendants. The motion was set down for a hearing on June 30, 2017.

[9] On June 26, 2017, prior to the first appearance on this motion, Tzimas, J. issued her decision on the matters argued before her in April 2017. In her reasons for judgment, she applied the statutory deductible, as well as some credits for the Defendants, and consequently reduced the amount of damages awarded by the jury. She held that the net amounts owing by the Defendants to the Plaintiff on the jury's award were $62,614.83 for general damages and $40,000 for past and future housekeeping. She calculated pre-judgment interest owing by the Defendants in the amount of $28,176.38, based on a rate of 5%.

[10] Tzimas, J. also held that the Plaintiff was entitled to costs in the total amount of $185,600 and that the Defendants were entitled to costs in the total amount of $318,487.02. In arriving at these costs awards, she took into consideration the fact that four "Rule 49" offers to settle had been made by the Defendants during the course of the litigation, including two offers that exceeded the jury's award to the Plaintiff. The benchmark offer – namely, the first offer that exceeded the ultimate trial outcome – had been made on April 14, 2016, approximately nine months prior to the trial.

[11] The first court appearance on this motion for a solicitor's charging order occurred on June 30, 2017. The Defendants were not present. The motion was adjourned to a long motion hearing date. Shaw, J. ordered that:

> There shall be an interim declaration that Lofranco Corriero has a charging order on the funds and costs recovered in this action on behalf of the plaintiff, Mr. Bosnali.
>
> On an interim basis, no money shall be paid pending the determination of the amounts owing to Lofranco Corriero for fees and disbursements.
>
> The Plaintiff shall file his responding material by October 1, 2017.
>
> All other issues adjourned to December 13, 2017.

[12] The parties appeared before Tzimas, J. on September 29, 2017 to settle the terms of the Order following her June 26, 2017 judgment. At that time, she corrected a miscalculation of the pre-judgment interest owed to the Plaintiff by applying a rate of 3.3%. In her Endorsement dated September 29, 2017, she reduced the amount of pre-judgment interest from $28,176.38 to $11,675.59. She also signed a final Order that day.

[13] The final Order sets out her rulings with respect to both damages and costs. It applies a set-off of the monies (damages, interest and costs) owed by the Defendants to the Plaintiff against the monies (costs) owed by the Plaintiff to the Defendants. It concludes with an order "that the plaintiff pay the defendants the sum of $11,675.59 within 30 days". It does not explicitly specify that a set-off in the Defendants' favour is being applied, but that is clearly how

Tzimas, J. arrived at her concluding order for payment to the Defendants in the net amount of $11,675.59.

[14] By order of Price, J. dated November 21, 2017, Lofranco Corriero was removed as solicitors of record for the Plaintiff in this matter.

[15] On December 13, 2017, the parties appeared before Shaw, J. for the continuation of the hearing of Lofranco Corriero's motion. Mr. Kostyniuk attended as counsel for the Defendants. He raised the issue of prejudice to the Defendants' right to set-off the costs awarded to them at trial against the damages, interest and costs awarded to the Plaintiff.

[16] It became apparent that Lofranco Corriero was not simply seeking a solicitor's charging order, but specifically a first charge on the monies awarded to the Plaintiff at trial, which would be in priority to any right of set-off claimed by the Defendants. Shaw, J. adjourned the hearing to August 8, 2018, on the basis that it would not be a reasonable use of judicial resources to hear Lofranco Corriero's motion for a charging order in isolation, with the risk that the Defendants would later move to have any decision on the motion set aside because of prejudice to their asserted right of set-off. In her Endorsement dated December 13, 2017, Shaw, J. ordered counsel to serve and file factums and books of authorities in advance of the next hearing date "in order to resolve the issue of the charging order and its relationship with the judgment of Justice Tzimas dated October 5, 2017." Shaw, J. held that the issues needed to be argued in their entirety.

[17] The motion came before me on August 8, 2018. The Plaintiff, Mr. Bosnali, appeared in court self-represented. He argued that the retainer agreement upon which Lofranco Corriero was relying was not the applicable agreement. He asserted that a different retainer agreement applied and had been breached by Lofranco Corriero. He argued that no money was owed by him to Lofranco Corriero.

[18] Given that the resolution of Mr. Bosnali's claims against Lofranco Corriero had the potential to render the motion before me moot, I ordered a further adjournment of the motion hearing. I gave Mr. Bosnali until September 14, 2018 to contest the fees and disbursements billed by his former solicitors by commencing a proceeding against Lofranco Corriero. In my Endorsement dated August 8, 2018, I ordered that, if he did not commence a proceeding by

September 14, 2018, the motion could be brought back before me and Mr. Bosnali would be deemed to accept that he owes Lofranco Corriero $165,000 in fees, plus HST, and $153,389.31 in disbursements, inclusive of HST – as set out in Lofranco Corriero's final account.

[19] No legal proceeding has been commenced by Mr. Bosnali to challenge the fees and disbursements billed by Lofranco Corriero. He is therefore deemed to accept that he owes Lofranco Corriero an amount of $339,839.31, inclusive of HST, for legal fees and disbursements incurred in connection with his litigation.

[20] Mr. Bosnali was given notice of the motion returnable before me, but he did not attend at the continuation of the motion hearing on April 23, 2019. Nor did he file any responding motion materials.

[21] At the outset of the hearing, I was informed by Mr. Kostyniuk (counsel for the Defendants) that Mr. Bosnali has filed for bankruptcy. Mr. Kostyniuk further advised me that he communicated with Mr. Bosnali's Trustee in Bankruptcy, Mr. Adamson, on April 4, 2019. According to Mr. Kostyniuk, he advised Mr. Adamson of Lofranco Corriero's motion and of the upcoming motion hearing date. Mr. Adamson confirmed that he would not be participating in or attending the hearing. Based on this representation from counsel, I proceeded to hear the motion in the absence of Mr. Bosnali and his Trustee in Bankruptcy, rather than adjourn the hearing a fourth time to allow for formal notice to the Trustee.

[22] I should note that Mr. Bosnali commenced an appeal of the trial decision, but his appeal was abandoned. Mr. Kostyniuk advised me that the appeal has been dismissed by the Court of Appeal.

Legal Framework

[23] Section 34 of the *Solicitors Act* states, in part:

> 34 (1) Where a solicitor has been employed to prosecute or defend a proceeding in the Superior Court of Justice, the court may, on motion, declare the solicitor to be entitled to a charge on the property recovered or preserved through the instrumentality of the solicitor for the solicitor's fees, costs, charges and disbursements in the proceeding.

…

> (3) The court may order that the solicitor's bill for services be assessed in accordance with this Act and that payment shall be made out of the charged property.

[24] In *Taylor v. Taylor* (2002), 60 O.R. (3d) 138 at para. 28, the Ontario Court of Appeal held that s. 34(1) of the *Solicitor's Act* "codifies the inherent jurisdiction in equity to declare a lien on the proceeds of a judgment where there appears to be good reason to believe that the solicitor would otherwise be deprived of his or her costs." As the Court of Appeal noted at para. 29, courts have exercised their discretion to grant charging orders liberally because the orders benefit not only lawyers but also clients who are unable to pay their lawyer's fees as their cases progress.

[25] A charging order will not, however, be granted unless the moving solicitor establishes the pre-requisites set out in s.34 and in the jurisprudence. As summarized by Brown, J. in *Bilek v. Salter Estate*, [2009] O.J. No.4454 (Ont. S.C.J.), at para.11, in order to obtain a charge on property pursuant to the *Solicitors Act*, a solicitor must demonstrate that:

> i. the property is in existence at the time the order is granted;
>
> ii. the property was recovered or preserved through the instrumentality of the solicitor; and
>
> iii. there is some evidence that the client cannot or will not pay the lawyer's fees.

See also *Thomas Gold Pettinghill* LLP v. *Ani-Wall Concrete Forming Inc.*, 2012 ONSC 2182 (CanLII) at paras.84-88; *King Road Paving and Landscaping Inc.* v. *Plati*, 2017 ONSC 7675 at para. 35.

[26] A damages award or a costs award constitute funds or "property" over which a solicitor may claim a charge: *King Road Paving*, at para. 38.

Issues

[27] Mr. Burns submits that the only issue for me to decide is whether Lofranco Corriero's solicitors' charge on the judgment recovered by the Plaintiff at trial ranks in priority over the Defendant's right to recover their costs by means of a set-off of the mutual debts between the parties to the litigation.

[28] In my view, Mr. Burns's framing of the issue is not appropriate because it presupposes that Lofranco Corriero is entitled to a charging order, which has not yet been determined. I disagree with Mr. Burns's submission that Shaw, J. effectively decided the issue of his law firm's entitlement to a charge in June 2017. He submits that an interim charging order was made by Shaw, J. and only the issue of the amount of the charge was adjourned because Mr. Bosnali was unprepared to make submissions regarding Lofranco Corriero's fees. However, it is apparent from Shaw, J.'s Endorsement dated June 30, 2017 that she made an interim order simply to preserve the *status quo*. Nothing in her Endorsement suggests that she made any findings with respect to the three criteria that must be established by Lofranco Corriero to prove entitlement to a charging order.

[29] Moreover, Shaw, J.'s subsequent Endorsement dated December 13, 2017 makes it clear that she had not decided Lofranco Corriero's motion on its merits at the first court appearance in June. She specified that both "the issue of the charging order and its relationship with the judgment of Justice Tzimas dated October 5, 2017" were to be argued and decided by the motions judge at a later date, after factums and books of authorities were filed.

[30] Mr. Burns argues that, upon return before me in August 2018, Mr. Bosnali was to make submissions with respect to the amount of fees owing to Lofranco Corriero and the Defendants were to make submissions solely with respect to the issue of priority. In my view, that is not a reasonable interpretation of Shaw J.'s Endorsement dated December 13, 2017. Shaw, J. directed that "the issue of the charging order" would be argued. She did not direct that argument be restricted to the limited issue of the amount of the charging order. Furthermore, she did not restrict the Defendants' submissions to the priority issue. On the contrary, she held that all issues

needed to be argued "in their entirety" and that they should be argued at the same time in order to make an efficient use of judicial resources.

[31] In the circumstances of this case, the issue of Lofranco Corriero's entitlement to a solicitor's charging order is inextricably linked to the issue of the ranking priority of any such charge in relation to the Defendants' right to set-off their costs. Consequently the issue for me to decide is whether Lofranco Corriero is entitled to a first charge on the monies (damages, interest and costs) awarded to the Plaintiff at trial.

Has Lofranco Corriero established its entitlement to a solicitor's charge?

[32] In my view, Lofranco Corriero has failed to establish the requisite threshold criteria for a charging order. The third criterion is undisputed; there is evidence that Mr. Bosnali is both unwilling and unable to pay the solicitors' account. However, Lofranco Corriero has failed to demonstrate the first two criteria, namely the existence of property that was recovered through the instrumentality of their legal representation.

[33] There is no property or fund in existence on which a charge can be imposed. Mr. Burns argues that property or a fund came into existence the moment the jury rendered its verdict and awarded damages to the Plaintiff. That cannot be correct, since a jury verdict may be adjusted (as it was by Tzimas, J. in this case) or set aside by the trial judge. Although trial judges show deference to jury verdicts and will only interfere with them in rare circumstances, a trial judge has discretion pursuant to s.108(5) of the *Courts of Justice Act*, R.S.O. 1990, c.C.43 not to enter a judgment consistent with a jury verdict where, for example, the verdict is perverse. A jury's verdict must be endorsed by the trial judge before it takes effect, so it cannot be the genesis of a fund over which a solicitor's charge may be ordered.

[34] If property or a fund is brought into existence through litigation, it must be as a result of a final court order, not merely as a result of a jury verdict. In this case, Tzimas, J.'s final Order sets out the net amounts of damages owing by the Defendants, the pre-judgment interest calculated on the general damages and the costs awarded in the Plaintiff's favour, as well as the costs awarded in the Defendants' favour. Tzimas, J. then concludes her final Order by stating, "In summary, it is ordered and adjudged that the plaintiff pay the defendants the sum of

$11,675.59, within 30 days from the date of this order." Thus the only property or fund created by Tzimas, J.'s final Order is the sum of $11,675.59 to which the Defendants are entitled.

[35] I reject Mr. Burns's submission that I am bound by the decision of the Supreme Court of Canada in *Wright v. Bell*, [1895] SCC vol.XXIV 656 to order a solicitors' charge on the damages, interest and costs awarded by Tzimas, J. in the plaintiff's favour. In the *Wright* case, there was a dispute over the distribution of funds held in court, which had arisen from the sale of land belonging to the Estate under administration. A solicitor for one of the parties argued that he had a first lien on the fund to recover his fees and disbursements. The solicitor's client had been ordered to pay costs to other parties in the litigation, who argued that the solicitor's lien could only attach to the balance of the funds remaining after they were paid their costs. The Supreme Court ruled at p.659 that "as soon as the fund in court was recovered a lien was by operation of law immediately attached to it in favour of the solicitor". The Court also held that "no creditor can touch that money until the solicitor's lien is first satisfied".

[36] Mr. Burns argues that a fund was similarly created by operation of law as soon as Tzimas, J. awarded damages, interest and costs in Mr. Bosnali's favour. He further submits that the Defendants are in no better position than any other creditor and must stand behind Lofranco Corriero in order of priority to collect on their debt.

[37] I find that the decision in *Wright* is distinguishable from the case before me on several grounds. First, the Supreme Court in *Wright* specifically held (at p.659) that the case before it was "not strictly speaking a case of set off", whereas the case before me is a case in which the trial judge ordered a set-off. Second, the set-off ordered by Tzimas, J. was based on her application of the cost consequences outlined in Rule 49.10(2) of the Rules of Civil Procedure, R.R.O. 1990, Reg.194. Rule 49 (or its equivalent) did not exist at the time that *Wright* was decided. Third, in the *Wright* case, the proceeds of sale of a property were being held in court, so there was no question that a fund existed over which a solicitor's charge could be ordered. In the case before me, there is no actual fund or property in existence.

[38] Mr. Burns also relies on *Budinsky v. The Breakers East Inc.*, (1993) 15 O.R. (3d) 198 (Ont.Gen.Div.). In that case, the court found that the respondent's counsel was entitled to a

solicitor's charging order that ranked in priority to the registered interest of a secured creditor of the respondent. The *Budinsky* case is also distinguishable on its facts because there were deposits paid by the applicants to the respondent, which the respondent's counsel succeeded in preserving through the litigation. The deposits constituted property in existence at the time that the charging order was made.

[39] In an effort to demonstrate that there is property or a fund in existence in this case, Mr. Burns submits that Tzimas, J.'s final Order is severable. He argues that each paragraph in the final Order stands on its own, such that the first four paragraphs awarding damages, pre-judgment interest and costs to the Plaintiff create a fund or property upon which Lofranco Corriero is entitled to a charge, independently of the next two paragraphs in the Order, which award costs to the Defendants, and the penultimate paragraph in the Order, which compels the Plaintiff to pay the Defendants a set-off amount of $11,675.59 within 30 days.

[40] I disagree with this interpretation of the final Order. The Order must be read in its totality. To sever the Order as suggested by Mr. Burns would ignore the careful consideration given by Tzimas, J. to Rule 49. Moreover, it would undermine the purpose of Rule 49.10(2), which sets out the consequences of a plaintiff's failure to accept a defendant's offer to settle, where the judgment obtained by the plaintiff at trial is less favourable than the terms of the defendant's offer.

[41] This issue was addressed by Pardu, J. in *Poulin v. Pettitt*, [1992] O.J. No.1387 (Ont.Gen.Div.), a case in which the facts resembled those before me. The Plaintiffs in *Poulin* were awarded general damages together with interest. The Defendant had made an offer to settle that was more favourable than what was ultimately recovered at trial, so the Plaintiffs were awarded costs only up until the date of the offer to settle and the Defendant was awarded costs thereafter. The Plaintiffs' lawyer brought a motion for a declaration that the solicitor's lien upon the Plaintiffs' judgment for damages and costs would rank in priority over the Defendant's right to set-off the judgment against his costs. I agree with the following observations of Pardu, J., at para.21:

> The purpose of granting a solicitor a lien upon the fruits of an action is to recognize that it is unfair for a party to enjoy the results of a solicitor's work without paying the solicitor's account incurred in achieving the result. Where a client derives no net benefit from the solicitor's work, that rationale is not compelling.

[42] I do not doubt that Mr. Bosnali's partial success at trial was achieved at least in part through the instrumentality of Lofranco Corriero's representation. I am not suggesting that he did not benefit whatsoever from the efforts of his lawyers, but he did not achieve a net benefit from their work. His solicitors' efforts did not result in the recovery of any property/money. Rather, Mr. Bosnali was ultimately ordered to pay the Defendants the sum of $11,675.59 in costs.

[43] Mr. Burns stresses that Lofranco Corriero strongly recommended acceptance of the Defendant's offer to Mr. Bosnali, but he rejected their advice. Mr. Burns submits that equity favours a solicitor's charging order in these circumstances to ensure that lawyers are paid for their efforts even when their client acts unreasonably. He argues that a charging order is required to incentivize counsel to take on difficult cases.

[44] I can appreciate the access-to-justice principles underlying these submissions, but Rule 49.10 promotes equally important access-to-justice principles by encouraging reasonable settlement of disputes without resort to protracted and costly trials. As Pardu, J. remarked at para. 21 of the *Poulin* decision:

> The defendant will suffer substantial prejudice if he is not permitted to set-off the money owed to the plaintiff by him against the funds owed to him by the plaintiff. The assertion of a solicitor's lien [over the damages and costs awarded to the plaintiff] may render illusory the cost consequences of offers to settle and in my view that result would be undesirable.

[45] Mr. Burns argues that the concern expressed by Pardu, J. is unfounded. He submits that, even if a solicitor's charge is established in priority to a defendant's right of set-off, there remains a sufficient incentive for a plaintiff to accept a reasonable offer to settle in order to avoid adverse cost consequences. He notes that, in this case, Mr. Bosnali will still be required to pay the Defendants' costs, even if Lofranco Corriero's account is paid first. In his supplemental

factum, Mr. Burns argues that "the question of priority following an adverse cost award does not change the personal liabilities of the plaintiff and therefore should have no effect on the way that a plaintiff in a case such as the one at bar reflects upon a reasonable offer."

[46] What this argument fails to grasp is that Rule 49.10 not only motivates litigants to accept reasonable offers from the opposing party, it also incentivizes litigants to make reasonable offers to settle cases in advance of trial. A solicitor's charging order on the facts of this case would not only be contrary to the set-off ordered by Tzimas, J., it would also undermine one of the purposes of Rule 49.10(2), namely to encourage defendants to make reasonable offers to settle in the hope of obtaining favourable costs awards even in the event that the plaintiff's claim succeeds. Mr. Burns argues that the Defendants can pursue Mr. Bosnali for payment of the costs awarded by Tzimas, J., even if a solicitor's charging order is granted to Lofranco Corriero. While that is true, it hardly constitutes incentive comparable to a set-off of the costs, particularly in light of Mr. Bosnali's recent bankruptcy.

[47] Finally, Mr. Burns submits that Pardu, J.'s analysis "cannot and should not be taken to mean that if a lawyer's client is not entirely successful in litigation, then the lawyer is not entitled to be paid any monies for the work that they have done or for the disbursements which they have incurred." That is certainly not what I am saying. The particular circumstances of this case are such that Lofranco Corriero has not established its entitlement to a charging order. The mere fact that the Plaintiff was not entirely successful in this litigation in not the basis upon which Lofranco Corriero has failed to demonstrate the requisite criteria. A solicitor might well succeed in satisfying the criteria in another case in which their client was only partially successful.

[48] For example, a Plaintiff's counsel in *King Road Paving* succeeded in obtaining a solicitor's charge despite the fact that his client was only partially successful. That case involved a complicated web of litigation with multiple parties. A general contractor sued property owners for breach of contract. Two subcontractors brought *Construction Lien Act* claims against the same property owners. One of the subcontractors assigned its lien to the general contractor. The other subcontractor commenced a breach of contract action against the general contractor.

[49] The second subcontractor succeeded in its *Construction Lien Act* claim against the property owners, as well as its contract claim against the general contractor. The general contractor succeeded with both its contract claims and its assigned *Construction Lien Act* claim, but failed in its defence of the claim brought by the second subcontractor. As a result, the general contractor ended up in a net loss position financially.

[50] The successful subcontractor issued a Notice of Garnishment against the property owners requiring the owners, as garnishees, to pay the sheriff the amounts they owed to the general contractor, up to the total amount owing by the general contractor to the subcontractor. The objective was to have the sheriff advance the money to the subcontractor as creditor.

[51] The general contractor's law firm did not want the property owners to pay the sheriff because the firm had not been paid for the litigation and likely would not be paid if their client (i.e., the general contractor) did not receive payment of the judgment against the owners. The law firm therefore brought a motion for a priority charging order over all amounts owed to the general contractor in the two successful actions.

[52] The subcontractor opposed the charging order, arguing that the lawyer's client was a net loser in the litigation and therefore no funds had been recovered through the lawyer's instrumentality. Charney, J. rejected this argument. He held, at para. 38, "The fact that King Road [the general contractor] is in a net loss situation as a result of the consolidation of three actions does not negate the fact that King Road was successful in both its contract claim and assigned *Construction Liens Act* claim ... and these successes resulted in a debt owing" to the general contractor by the property owners. The court ordered a solicitor's charge on the monies recovered in the general contractor's two successful actions.

[53] Mr. Burns argues that the facts of the *King Road Paving* case parallel those of this case. He argues that Charney, J.'s ruling supports his claims for a solicitor's charge, despite Mr. Bosnali's net loss in the litigation. I disagree. The facts of *King Road Paving* are distinguishable on several grounds. First, the net loss situation of the general contractor in that case arose out of separate actions that involved different parties, which are not the facts before me. Second, the respective liabilities of the parties in *King Road Paving* were not based on cost awards made

pursuant to Rule 49 considerations. Third, equity did not favour the subcontractor's position in the *King Road Paving* case because the subcontractor's success in its own *Construction Liens Act* claim against the property owners was partially attributable to the efforts of the general contractor's solicitor. The general contractor had been assigned the other subcontractor's lien and had advanced arguments in the Construction Liens Act matter that benefitted both subcontractors. Indeed, Charney, J. found at para. 36 that the general contractor's law firm was instrumental in the recovery of holdback funds, half of which were payable to the very subcontractor that was seeking to be paid in priority to the lawyers. Similar equitable concerns do not apply in the case before me.

[54] For all of the above reasons, I do not find Charney, J.'s analysis to be applicable to the facts in the case before me.

Conclusion

[55] I dismiss Lofranco Corriero's motion for a charging order pursuant to s.34 of the *Solicitors Act*. As explained above, Lofranco Correiro has not established that a fund exists over which a charge could be made, or that such a fund was brought into existence by the instrumentality of the law firm's representation.

[56] There is no basis upon which to order the Defendants to pay any money to Lofranco Corriero. That portion of the motion is therefore also dismissed.

[57] The interim orders made by Shaw, J. in June 2017 are hereby terminated.

Costs

[58] The Defendants seek their costs of this motion on a full indemnity scale in the amount of $13,202.68.

[59] Upon review of the parties' written costs submissions, I conclude that there is no basis upon which to order costs on an elevated scale. While I agree with Mr. Kostyniuk that Mr. Burns ought to have provided him with notice of the motion in June 2017, such notice was not strictly required by the Rules and the failure to give notice is not what caused the multiple adjournments and court appearances in this motion.

[60] Moreover, although the motion did not succeed, I do not find that it was unnecessary or unreasonable for Lofranco Corriero to bring it before the court. The case law on the issue of priority is difficult to reconcile and there has been misapplication of the Ontario Court of Appeal decision in the *Wright* case.[1] The motion therefore was not improper.

[61] The defendants are the successful party in the motion. They are entitled to their costs on a partial indemnity scale.

[62] I order that Lofranco Corriero pay the Defendants costs in the amount of $7,250, all inclusive, within 30 days.

[63] This costs award is made against the moving law firm, rather than the Plaintiff, not because of any misconduct on the part of the solicitors personally, but rather because Lofranco Corriero brought this motion in its own name. It no longer represents Mr. Bosnali. It did not bring this failed motion on Mr. Bosnali's behalf or with the goal of advancing Mr. Bosnali's interests. In these circumstances, it is appropriate that the moving party, Lofranco Corriero be liable for payment of the Defendants' costs.

[64] Although Mr. Bosnali was responsible for a couple of adjournments, I find that there is no basis to award costs against him in favour of either Lofranco Corriero or the Defendants.

Petersen J.

Date: May 3, 2019

[1] Lower courts have (mis)applied the Court of Appeal decision, which was reversed by the Supreme Court of Canada.

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