CITATION: Giuliani v. Region of Halton, 2011 ONSC 5119
COURT FILE NO.: 3491/03
DATE: 2011-08-31

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: PATRIZIA GIULIANI and TINA GIULIANI, Plaintiffs

AND:

THE REGIONAL MUNICIPALITY OF HALTON and the TOWN OF MILTON, Defendants

BEFORE: MURRAY J.

COUNSEL: Kathy Chittley-Young. Counsel for the Plaintiffs

Douglas O. Smith, Counsel for the Defendant, The Regional Municipality of Halton

J. Murray Davison, Q.C., Counsel for the Defendant, the Town of Milton

COSTS ENDORSEMENT

And worse I may be yet: the worst is not
So long as we can say 'This is the worst'.

King Lear, Act iv, Scene 1

Overview

[1] This litigation arose as a result of a traffic accident involving the plaintiff Patrizia Giuliani. The details of the accident are detailed in my Judgment, dated August 31, 2010, and need not be repeated here. Suffice to say that the action was commenced on October 2, 2003, eventually concluding with a trial which continued for a period of 11 days during the month of February, 2010.

[2] The initial claim of the plaintiffs, Patrizia and Tina Guiliani, (the mother of the plaintiff Patrizia), was for damages in the amount of $1,250,000. Prior to the commencement of trial, the parties agreed on damages in the amount of $750,000, excluding pre-judgment interest, legal fees, GST/HST and disbursements. The trial dealt therefore only with issues relating to the applicable limitation period and liability. The plaintiff was found to be 50% responsible for the

accident and as a result was awarded $375,000. By virtue of an indemnification agreement between the Town of Milton and the Regional Municipality of Halton, damages are payable to the plaintiff by the Town of Milton.

[3] Ms. Chittley-Young is a 2001 call to the bar. Ms. Chittley-Young was assisted by Mr. Steve Kenney for purposes of trial and trial preparation. Mr. Kenney was called to the bar in 1982. Cost submissions from the plaintiffs' counsel consisted of three volumes outlining legal costs and disbursements.

[4] On a substantial indemnity basis, Ms. Kathy Chittley-Young asserts that her costs, including GST, amount to $558,327.53. Based on my review of plaintiffs' counsel's material, it appears that she has calculated substantial indemnity costs on the same basis as costs on a full indemnity basis. On a partial indemnity basis, she claims $383,246.90, including $18,249.85 for GST. In addition, there is an aggregate amount of $229,984.28 claimed for disbursements. In the disbursement brief, dated November 25, 2010, there is a claim for $92,734.26 for interest (calculated as of November 15, 2010), payable on a loan made by the plaintiff in the principal amount of $150,000. The loan is stated by Ms. Chittley-Young as having been necessary in order for the plaintiff to fund her litigation against the defendants.

[5] The judgment in this case awarded the plaintiff $375,000. The total legal costs claimed, either on a partial or substantial indemnity basis, together with the costs of disbursements, dwarf the judgment.

[6] The plaintiffs are entitled to costs on a partial indemnity scale. In assessing costs, the Court of Appeal stated in *Boucher v. Public Accountants Council for the Province of Ontario*, [2004] O.J. No. 2634, 71 O.R. (3d) 291, that it is necessary to step back and consider the result produced and question whether, in all the circumstances, the result is fair and reasonable. As noted in *Boucher*, this approach was sanctioned in *Zesta Engineering Ltd. v. Cloutier* (2002), 21 C.C.E.L. (3d) 161 (Ont. C.A.) at para. 4 as follows:

> In our view, the costs award should reflect more 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.

[7] In a similar vein, in *Davies v. The Corporation of the Municipality of Clarington et al.*,100 O.R. (3d) 66, 2009 ONCA 722, the Court of Appeal stated, at para. 52:

> … the overriding principle is reasonableness. If the judge fails to consider the reasonableness of the costs award, then the result can be contrary to the fundamental objective of access to justice. Rather than engage in a purely mathematical exercise, the judge awarding costs should reflect on what the court views as a reasonable amount that should be paid by the unsuccessful party rather than any exact measure of the actual costs of the successful litigant. In *Boucher*, this court emphasized the importance of fixing costs in an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding, at para. 37, where Armstrong J.A. said "[t]he failure to refer, in assessing costs, to the overriding principle of reasonableness, can produce a result that is contrary to the fundamental objective of access to justice".

[8] The costs and disbursements claimed by the plaintiff's counsel, Ms. Kathy Chittley-Young, raise a number of very troubling issues. The plaintiff, a woman of modest means, who suffered serious injuries in a motor vehicle accident causing permanent impairment, is now faced with another burden of unimagined proportions - a second catastrophic event - her legal costs. The legal costs and disbursements incurred and claimed by Ms. Chittley-Young produce a result that is contrary to the fundamental objective of access to justice.

[9] Firstly, the time docketed by plaintiffs' counsel is excessive. Secondly, the amounts claimed are far more than stipulated in the retainer agreements between the plaintiff and her counsel. Thirdly, the quantum of the claim is totally disproportionate to the case. Finally, the disbursement costs claimed are extraordinary and include a very substantial amount for interest payments due and owing on a loan made by the plaintiff to fund her litigation.

Quantum of Time Docketed by Plaintiffs' Counsel

[10] A review of the Bill of Costs submitted by Ms. Chittley-Young indicates that she spent 568.8 hours on this file, not including 22 days for trial preparation and attendance at trial, where Ms. Chittley-Young charged her client a flat fee and therefore she did not include her hours of work in her total docketed hours for purposes of calculating her costs. In her submissions, she states as follows:

> … throughout the trial and thereafter Kathy Chittley-Young reduced her actual hours spent to a lower block fee for service. For example time docketed demonstrate that Ms. Chittley-Young spent actual time of between 13 and 18 hours per trial day, yet she

> charged a flat fee of $2,100 per trial day and likewise during the intervening trial days those days spent in continuing preparation, Ms. Chittley-Young's time dockets demonstrate she actually spent on average 10 hours or more per day, yet she charged a flat fee of $700 per day. Given the already discounted fees, the plaintiffs submit that their fees for services are more than reasonable in this case.

[11] I accept the defendants' submissions that, based on the block fee submissions made by counsel for the plaintiff, it is reasonable to conclude that for these 22 days, at least another 224 hours should be added to Ms. Chittley-Young's docketed hours of 568.8 which means that her total time spent on this matter would be at least 792.8 hours.

[12] Mr. Kenney purports to have spent an additional 525.9 hours between May 27, 2009 and February 26, 2010. The total number of law clerks' hours for which indemnity is claimed is 381 hours.

[13] Therefore, the total hours for which indemnification is claimed by plaintiffs' counsel on this file amount to at least 1,699.70 hours.

[14] The aggregate time spent on this file by plaintiffs' lawyers and their clerks would equal the annual docketed hours for many successful lawyers. To put it another way, if one person worked on this file five days a week, seven hours per day, it would take more than 48 weeks work to reach 1,700 hrs.

[15] Ms. Chittley-Young, according to her Bill of Costs, spent 568.8 hours prior to trial, from September 2003 to the end of January 2010 - a period of six years and four months - and an additional 224 hours working as lead trial counsel, either attending or preparing for the trial, for a total of 792.8 hours. As noted above, Mr. Kenney spent a total of 525.9 hours between May 27, 2009 and February 26, 2010 working on this file. Of this total, 379 hours is claimed by Mr. Kenney for trial preparation and attendance at trial.

[16] The material submitted does not explain why Mr. Kenney worked approximately 160 hours more than Ms. Chittley-Young in preparation for and attending at trial and nearly matched her total hours of work over a six year time span in just nine months. Mr. Kenny's docketed time for preparation for and attendance at trial in nine months nearly matched Ms. Chittley-Young's total hours of work over a six-year period. Mr. Kenney was not the plaintiffs' lead trial counsel.

I agree completely with the submissions of counsel for the defendants, Mr. Murray Davison QC, that it is difficult to understand how or why Mr. Kenney worked approximately 160 hours more than Ms. Chittley-Young preparing for and attending the trial. In my view, it is reasonable to conclude that the aggregate hours of Mr. Kenney and Ms. Chittley-Young are excessive and reflect overlapping work for which the losing party should not be expected to pay.

[17] The aggregate hours for which indemnification is claimed by plaintiffs' counsel compared to the time spent by defendants' counsel on this file is also illuminating. Both defendants were separately represented. The total time spent by counsel (including time of law clerks) for the defendant Regional Municipality of Halton on the file amounts to 654 hours and for the defendant, The Town of Milton, is 533.2 hours. The time docketed by the plaintiffs' counsel on the file exceeds by more than 1,000 hours the time docketed by the solicitors (and their clerks) for the defendant The Regional Municipality of Halton and almost 1,170 hours more than the time docketed by the solicitors (and their clerks) for the Town of Milton. The time spent by plaintiffs' counsel (including time of law clerks) is in excess of 500 hours more than the aggregate time docketed by the lawyers (and their clerks) for both defendants.

[18] The words of Winkler J. (as he then was) in *Risorto v. State Farm Mutual Automobile Insurance Company*, 64 O.R. (3d) 135, at para 10, although made in the context of an award of costs on a motion, are apposite:

> In my view, the relative expenditures, at least in terms of time, by adversaries on opposite sides of a motion, while not conclusive as to the appropriate award of costs, is still, nonetheless, a relevant consideration where there is an allegation of excess in respect of a particular matter.

[19] In the case at bar, I conclude, as did the Court of Appeal in *Boucher*, that: "it is inconceivable … that the total amounts claimed are justifiable". Unlike the Court of Appeal in *Boucher*, however, I find it difficult to accept that the Bill of Costs accurately reflects the time spent by all the lawyers in this matter.

The Retainer Agreements Between the Plaintiff and Counsel

[20] The *Solicitors Act*, R.S.O. 1990 c. S.15, as amended, deals with agreements between solicitors and clients as to compensation. While s. 16 (2) permits such agreements, s. 20(2)

stipulates that: “the client who has entered into the agreement is not entitled to recover from any other person under any order for the payment of costs that are the subject of the agreement more than the amount payable by the client to the clients own solicitor under the agreement.”

[21] The first retainer agreement between counsel and the plaintiff, executed on September 2, 2003, covers the period from April 1, 2003 to November 30, 2005 when Ms. Chittley-Young was with the firm of Haber and Associates. The second retainer agreement, dated November 30, 2005, is with “KCY at LAW” and covers the period after November 30, 2005.

[22] Paragraph 6 of the second retainer agreement states that: “In addition to the fees charged in interim accounts, there will be a final account in which the complexity of the issues and the result obtained will also be taken into consideration in fixing the amount of the final fee. **In the case of a personal injury action, a medical malpractice, or a motor vehicle accident, the legal fee will be 35% of the total settlement achieved in the action.**” (Emphasis added). In the case of a motor vehicle accident, 35% is stated as being “the” legal fee. It has been suggested that the proper interpretation of this contract is that the final account will be 35% of the total settlement, in addition to any fees charged in interim accounts. I disagree with this interpretation. If that is what the contract meant, it would have said: “In the case of a personal injury action, a medical malpractice, or a motor vehicle accident, the final fee will be 35% of the total settlement achieved in the action.” The contract is not written that way. The retainer agreement does not stipulate that the final payment will be 35% of the settlement over and above interim accounts which take into account the complexity of the issues and the result obtained in fixing the amount of the final fee. In a motor vehicle accident case, the retainer agreement stipulates that 35% of the total settlement is “the legal fee”. The phrase “the legal fee” means the entire legal fee. With damages being calculated at $375,000 by the trial judge, para. 6 of the retainer agreement provides for “the legal fee” in the amount of $131,250.

[23] In my view, the maximum legal fee that counsel could render to her client is fixed by the retainer agreement and I am therefore inclined to award costs in the amount of $131,250, plus applicable taxes, provided that this amount is fair and reasonable after considering what recoverable costs would be on a partial indemnity basis without regard to para. 6 of the retainer agreement. In other words, the amount of $131,250 cannot be assessed in a vacuum. This

conclusion is not only consistent with s. 20(2) of the *Solicitors Act* but also is designed to ensure that the plaintiff does not pass on the whole of her costs to the defendants unless the amount of $131,250 is a fair and reasonable amount on a partial indemnity basis keeping in mind the circumstances of the case, other relevant provisions of the retainer agreements and the applicable legal principles.

[24] Therefore, in my opinion, it is necessary to turn to the question of what partial indemnity costs are appropriate without regard to the cap on fees contained in para. 6 of the second retainer agreement.

What costs are reasonable having regard to the retainer agreements and the factors set out in Rule 57.01(1)?

[25] First, and quite apart from para. 6 of the second retainer agreement referred to above, it is evident from the Bill of Costs submitted by Ms. Chittley-Young that the hourly rates charged on a substantial indemnity basis are significantly greater than the amounts permitted by the retainer agreements.

[26] The first retainer agreement executed on September 2, 2003, for the period from April 1, 2003 to November 30, 2005, when Ms. Chittley-Young was with the firm of Haber and Associates, stipulates that Kathy Chittley-Young will provide legal services at the rate of $200 per hour. The services of a law clerk are stipulated at $90 per hour. The second retainer agreement with "KCY at LAW" establishes that the rate Ms. Chittley-Young is permitted to charge her client is $225 per hour and the hourly rate of a law clerk is stated as being $90 per hour. Contrast these contractually stipulated hourly rates to what Ms. Chittley-Young has actually claimed on a substantial indemnity basis: $200 per hour from August 25, 2003 to September 30, 2005; $225 per hour from September 30, 2005 to January 2007; $250 per hour from February 1, 2007 to May 1, 2008; $290 per hour from May 1, 2009 to September 16, 2009; $500 per hour from September 17, 2009; and, $3,000 per day for each day of trial.

[27] Ms. Chittley-Young claims, on a partial indemnity basis, hourly rates of $140 from August 25, 2003 to November 1, 2005 to as high as $350 per hour from September 17, 2009 and

thereafter, and a flat fee of $2,100 per trial day. Neither retainer agreement contains any reference to a flat fee for trial days.

[28] From September 1, 2003 to November 29, 2005 - during the term of the first retainer agreement - Ms. Chittley-Young allegedly spent 106.5 hours on this file. Based on the contractual hourly rate of $200 stipulated in the first retainer agreement, a calculation of what Ms. Chittley-Young refers to as substantial indemnity costs would amount to $21,300. The calculation of partial indemnity costs for these 106.5 hours - at $140 per hour - would result in a claim for $14,910.

[29] From November 30, 2005 and thereafter, during the term of the second retainer agreement, Ms. Chittley-Young docketed another 686.3 hours. Based on the full indemnity hourly rate of $225 per hour stipulated in the second retainer agreement, this would permit her to bill the plaintiffs the amounts of $154,417.50, plus GST. Using her suggested partial indemnity rate of $157.50 for time billed at $225 per hour, the partial indemnity calculation for the time covered by the second retainer agreement would be $108,092.25, plus GST.

[30] The cost of clerks in each retainer agreement is stated as being $90 per hour. The total number of law clerks' time claimed is 381 hours. At the substantial indemnity rate of $90 per hour, this amounts to $34,290. Using the same proportionality as did Ms. Chittley-Young in her calculation of partial indemnity costs for hours charged at $200 and $225 per hour, the costs on a partial indemnity basis for the time of the law clerks amounts to $24,003.

[31] In summary, if one calculated the value of all of Ms. Chittley-Young's time on a partial indemnity basis at $140 per hour and $157.50 per hour (based on hourly rates set out in the retainer agreements of $200 per hour and $225 per hour, and $90 per hour for law clerks) then the aggregate claim for her time and that of her law clerks would total $147,005.25, without calculating in the cost related to Mr. Kenney and without being concerned about inefficiency, duplication or excessive docketing.

[32] The Bill of Costs claims $280 per hour on a partial indemnity basis for Mr. Kenney's time involved in this matter, based on a substantial indemnity hourly rate of $400 per hour. Neither retainer agreement mentions Mr. Kenney or any hourly rates related to his legal services.

The second retainer agreement, at para. 2, permits Ms. Chittley-Young to appoint another lawyer or legal representative to act on behalf of the plaintiff from time to time throughout the proceedings up to and including trial. As noted above, Mr. Kenney docketed 525.9 hours. At the partial indemnity rate claimed of $280 per hour, a costs claim on a partial indemnity basis in the amount of $147,252 is made for Mr. Kenney's time.

[33] Neither retainer agreement specifically contemplates retaining a lawyer at the rate of $400 per hour. This is not a case where a senior counsel was retained for consultation and advice on the file. In such circumstances, it would not be surprising if senior counsel charged at a rate higher than that charged by Ms. Chittley-Young for such consultation and/or advice. However, consultation and/or advice from senior counsel would normally result in only comparatively few hours being charged by senior counsel.

[34] It is unreasonable to construe the second retainer agreement in a manner that permits senior counsel to be retained in a junior counsel role by lead counsel at almost double the hourly rate of $225 established in the retainer agreement for lead counsel. In my view, the retainer of Mr. Kenney at $400 an hour for 525.9 hours is completely inconsistent with the reasonable expectations of the plaintiffs pursuant to the second retainer agreement. There is no evidence that the plaintiffs ever agreed to pay more senior counsel $400 an hour to act in the role of junior counsel and rack up 525.9 hours of time. In my view, given his junior role, Mr. Kenney should have his rate fixed at a maximum of $200 per hour pursuant to the second retainer agreement and at $140 per hour on a partial indemnity basis. On a substantial indemnity basis (equating this with full indemnity as Ms. Chittley-Young appears to have done), the maximum charge for his time would be $105,180. Using $140 per hour would reduce the total claim for Mr. Kenny's time to $73,626 on a partial indemnity basis.

[35] The result of applying the rates set out in the retainer agreements (including the rates fixed by me for Mr. Kenney) to the docketed time of approximately 1,700 hours would result in a maximum fee that Ms. Chittley-Young could have charged her own client of $311,187.50, plus GST.

[36] However, on a partial indemnity basis, Ms. Chittley-Young claims from the defendants the amount of $383,246.90, including $18,249.85 for GST. Therefore, I conclude that the amount claimed by Ms. Chittley-Young, even on a partial indemnity basis, exceeds what she would be entitled to claim under the retainer agreements and therefore contravenes s. 20(2) of the *Solicitors Act*. That is the first problem encountered in considering Ms. Chittley-Young's costs submissions.

[37] Secondly, the aggregate of 1,700 hours must be reduced because of inefficiency, duplication and/or excessive docketing. I have already concluded for reasons given above that it is inconceivable that the total amounts claimed are justifiable. In any event, it is clear from the jurisprudence that the awarding of costs is not the result of a simple mathematical calculation of hours worked times hourly rates but rather requires a determination of what, in all the circumstances, is fair and reasonable.

[38] The case was not overly complex.

[39] The plaintiff was held 50% responsible for the accident.

[40] The amount recovered was substantially less than the amount claimed initially and substantially less than the damages agreed upon prior to trial. A claim for partial indemnity costs in the amount of $383,246.90, including $18,249.85 for GST, in circumstances where damages recovered were $375,000 offends the principle of proportionality. The principles of proportionality and the reasonable expectations of the unsuccessful parties are, to a degree, intertwined. Both considerations support the conclusion that the costs claimed are excessive.

[41] I think a fair and reasonable award of costs on a partial indemnity basis would be an amount of $104,000, not including GST or disbursements. As a matter of interest, this amount represents slightly more than 47% (equivalent to 800 hours of time) of partial indemnity costs for 1,700 hours using the hourly rates of $140 and $157.50 for counsel and $63 per hour for law clerks.

Conclusion with Respect to the Calculation of Fees Recoverable on a Partial Indemnity Basis

[42] I stated above that, pursuant to para. 6 of the second retainer agreement, the maximum legal fee that Ms. Chittley-Young is entitled to render to her client is fixed in the amount of $131,250, plus tax. I conclude that the amount of $131,250 is too high after considering what recoverable costs might be on a partial indemnity basis (without regard to para. 6 of the retainer agreement). Since the calculation of costs on a partial indemnity basis is not a science, there will be a range of costs which could be viewed as reasonable. In the case at bar, I conclude that the amount of $131,250, plus tax, is outside the range of reasonableness.

[43] I therefore fix the costs payable to the plaintiffs on a partial indemnity basis in the amount of $104,000, not including taxes or disbursements. I now turn to the issue of disbursements.

Disbursements

[44] As noted in my earlier remarks, there are troubling aspects about the claim for costs made by Ms. Chittley-Young.

[45] The disbursement claim is equally - if not more - troublesome.

[46] Ms. Chittley-Young claims $229,984.28 as disbursements.

[47] Of this amount, in excess of $92,700 is claimed as interest on a loan made for purposes of funding the litigation. In her submissions, Ms. Chittley-Young states as follows:

> 1. The plaintiff, Patrizia Giuliani, on November 15, 2009 borrowed $150,000 from a company called Lexfund Inc. in order to fund disbursements.
>
> 2. The unpaid interest accrued on that loan by November 25, 2010 was $92,734.26.
>
> 3. Without such a litigation loan the plaintiff would have been precluded from taking her case through trial. The plaintiff's law firm could not afford to carry the disbursements through trial.

4. The risk taken over by Lexfund was a high risk and hence attracted very high rates of interest.

5. No repayment of the principal loan amount or the interest is required if the plaintiff loses her case. If the plaintiff wins, she is required to pay the principal and the interest due at the date of repayment.

6. The loan was taken out before the parties had agreed to a quantum of damages in the amount of $750,000 and, at that point, the damages the plaintiff stood to win exceeded $1 million.

7. Once judgment was rendered in the amount of $375,000, coupled with the fact that the defendants have lodged an appeal which will result in the loan repayment being pushed out further in the future, the interest charges alone will likely be in excess of $180,000.

[48] The Court has no evidence by way of affidavit or otherwise to support Ms. Chittley-Young's assertion that without the loan from Lexfund Inc. the plaintiff would have had no access to the courts.

[49] The Lexfund documentation provided to me consists of an assignment of the litigation proceeds, the loan agreement and the statement of interest charges, together with a loan application submitted by the plaintiffs to Lexfund.

[50] The assignment agreement between the plaintiff and Lexfund provides that in order to secure the payment of the borrower's obligations, the borrower agrees to assign to the lender all of her right, title and interest in and to any amounts received or receivable by the borrower from the defendants relating to the litigation proceedings. In short, the litigation proceeds are security for the amount of the loan, plus interest calculated in accordance with the loan agreement.

The Lexfund Inc. Loan Agreement

[51] The loan agreement provides, *inter alia*, that:

1. The borrower may use the loan proceeds only for the purpose of funding legal disbursements and/or living and rehabilitation expenses;

2. The full amount of the loan is advanced to the plaintiff's law firm within 48 hours following receipt of a loan advance request form;

3. The litigation proceeds are security for the debt of $150,000;

4. Except in circumstances where the borrower terminates the retainer of the borrower's law firm before the resolution of the proceedings, recourse of the lender against the borrower for payment of the borrower's obligations shall be limited to the litigation proceeds;

5. There is an underwriting fee in the amount of 7.5% of the amount of the loan granted and such fee is to be added to the borrower's obligations;

6. The lender is entitled to an early payment fee if the repayment of the loan occurs within 24 months following the date the loan proceeds are advanced to the borrower. The early payment fee will equal 24 months of interest calculated on the full amount of the loan as provided in the contract less the number of months that the loan has been outstanding. (Note: according to the schedule of interest payments provided, the amount of 24 months interest is $206,936.72 so that the total amount owing at the end of the 24 month period is $368,186.72);

7. Interest is determined and compounded monthly on the outstanding loan balance at the rates stipulated in the contract and interest on the outstanding loan balance is to be accrued and capitalized and added to the borrower's obligations.

8. The borrower is required to repay the amount outstanding on the loan in full on the 15th of the month following settlement. Any amounts not repaid bear interest, including interest on capitalized interest as provided in the agreement until the repayment in full of all amounts outstanding is made.

9. The annual rate of interest for the loan is stated to be 42% calculated monthly with an effective annual interest rate of 51.10%.

[52] In this case, the loan agreement seems to say that if there is no recovery, no money is owed to the lender. On the other hand, the whole arrangement, including the interest rates charged by the lender, is in effect a contingency arrangement which allows the lender to make huge profits from the proceeds of litigation rather than from a commercially normative interest rate on a risky loan.

[53] Courts have taken into account excessive fees as one of the factors to be considered in determining whether third party funding of litigation is champertous. (See, for example: *Metzler Investment GMBH v. Gildan Activewear Inc.*, [2009] O.J. No. 3315 at para 33.) In *Metzler*, the Court also considered whether third party financing of litigation is permitted. The Court in *Metzler* stated, at para. 42:

> Noting, then, that champerty is illegal but that third-party financing of litigation may in fact be desirable, Wilkins J. provided the relevant considerations for the legitimacy of *assignment* at p. 132:
>
> The public policy together with the statute of the Province of Ontario make it clear that champerty is an illegal activity that will not be countenanced by the Court. It is obvious that it is quite undesirable to have stranger third parties to litigation fund litigation for their benefit and profit. A review of the cases of *Trendtex Trading Corp*., supra, *Frederickson*, supra, and *Brett Pontiac Buick GMC Ltd.*, [1992] N.S.J. No. 378, supra, makes it clear that the Court will look to the intent or purpose of the assignment in determining whether or not champerty exists.

[54] There are many statements in the legal texts and cases which refer to the maxim that a person cannot do indirectly that which he cannot do directly. It may be that this loan arrangement amounts to champerty and is therefore an illegal activity which is unenforceable for that reason. However, as I mentioned, this is not an issue before me and need not be decided at this time.

[55] The defendants also argue the annual effective interest rates exceed 60% and thus are in breach of the *Criminal Code*. The defendants state that the effect of the administration charge, in this case stated to be $11,250, together with the minimum interest charge of 24 months of compounded interest in equalling $218,375.71, results in contravention of the relevant provisions of the *Criminal Code*. I need not comment on whether this argument is correct in law. Lexfund is not on trial before me for violating the *Criminal Code*.

[56] The interest rate on the loan obtained by the plaintiff for disbursements is unconscionable. It is turning the world on its head to assert, as does Ms. Chittley-Young, that this is an access to justice issue and that ordering interest payments on the Lexfund is reasonable. This loan agreement does not facilitate access to justice. This loan agreement does nothing to advance the cause of justice. It is difficult to believe that any lawyer would refer a vulnerable client to such a lender.

[57] The concept of reasonableness governs the Court's treatment of disbursements. The interest payments owed by Ms. Guiliani to Lexfund are unreasonable. This Court will not require the defendants to reimburse interest charges on the Lexfund loan whether such interest charges are calculated as of November 15, 2010 or thereafter. To do otherwise would bring the administration of justice into disrepute and encourage predatory lenders whose business it is to extract unconscionable amounts of interest from vulnerable individuals.

[58] The loan agreement requiring repayment of $379,625.71 and counsel fees, plus GST, according to Ms. Chittley-Young, amounted to $558,327.53. In other words, it is painfully clear that even if the plaintiffs had been completely successful at trial and been awarded $750,000 (the quantum of damages agreed to by Ms. Chittley-Young), even with an award of costs, after satisfying Lexfund, she would have ended up owing money to her lawyer and recovering none of the $750,000 awarded to her.

[59] I am in complete agreement with the submissions of defendants' counsel that: "this court should not reward, sanction or encourage the use of such usurious litigation loans, which in this case has interest provisions that are arguably illegal, otherwise such loans will be seen to be judicially encouraged and could become a commonplace tactic." I agree that an award of interest in this case would likely have an adverse impact on other defendants' decisions to proceed to trial or to appeal. I think the defendants' counsel is correct in stating that access to justice is a two-way street. As I have indicated above, to award interest as requested by Ms. Chittley-Young would not facilitate access to justice and would undoubtedly bring the administration of justice into disrepute.

[60] The defendants focused their criticism of the disbursements claimed to the interest charged on the Lexfund loan. However, in my view, there are other aspects of the claim for disbursements which are *prima facie* unreasonable. Some examples of disbursements which would be unreasonable for the defendants to pay are as follows:

1. A claim for $12,379 for litigation support and paralegals. A review of some of these accounts indicates that litigation support firms and paralegals were used for reviewing pre-trial memoranda, reading discovery evidence, reviewing case law and considering legal arguments. A portion of this claim, in the amount of $4,998.75, is for services purportedly rendered by Nolan Paralegals Services. None of the accounts from Nolan Paralegals provide any detail to indicate the nature of the services provided. In addition, there is another $4,704.69 billed by an organization called Taran Virtual Associates Inc. for the preparation of a factum and for legal research.

2. There is a total of $12,734 claimed for photocopying and an additional $1,639.07 for facsimile transmissions.

3. There is a charge of $420 for telephone usage. This charge appears to be based on a flat fee of $5.00 per month for 80 months.

4. $993 is claimed for Ms. Chittley-Young's mileage.

[61] Given the extraordinary docketing activity of Ms. Chittley-Young, Mr. Kenney and their law clerks, it is difficult to understand what added value could possibly be provided by Taran Virtual Associates Inc. with respect to legal research in preparation of a factum. In my view, it is reasonable to assume this work is duplicative of work done by lawyers or their clerks and therefore excessive. Similarly, it is impossible to ascertain the value of the services rendered by Nolan Paralegals because there is no detail provided which would help explain the need for such services. In my view, both of these claims are unsupportable. Certainly it is not reasonable

that the defendants be asked to pay them. The claim for the disbursement for litigation support should be reduced to $2,675.56.

[62] Of the total photocopying charges of $12,734, the amount of $10,744.19 is for "in - house" photocopying. This is an excessive charge for photocopying by the law firm and is not a reasonable disbursement which the defendants should be required to pay. I am reducing this portion of the photocopying to $3,000 with the result that the aggregate disbursement allowed for photocopying is reduced to $4,989.91.

[63] The claim for telephone usage is disallowed. This is not a disbursement which the defendants should be required to pay.

[64] The claim for Ms. Chittley-Young's mileage is disallowed. This is not a disbursement which the defendants should be required to pay.

[65] Therefore, the aggregate disbursements claimed are reduced from $140,308.11 by the amount of $18,860.53 to $121,447.58.

Conclusion

[66] For the reasons set out above, I award costs on a partial indemnity basis to Ms. Chittley-Young in the amount of $104,000, not including GST or disbursements.

[67] I award the sum of $121,447.58 for disbursements.

[68] Interest on costs should be calculated in accordance with the *Courts of Justice Act*. Interest shall be calculated on disbursements from the date on which disbursements were incurred.

MURRAY J.

Date: August 31, 2011