

Court file no. T-1203-11

ONTARIO SUPERIOR COURT OF JUSTICE

B E T W E E N:

FRANCIS CARLISLE

Plaintiff

- and -

JANET MacDONALD

Defendant

FACTUM FOR THE PLAINTIFF

On the Matter of Costs

Counsel for the plaintiff,
John Brown
Brown and Associates

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PART I – OVERVIEW

1. The plaintiff, Francis Carlisle, requests substantial indemnity costs against the defendant. This request arises because of the defendant's condemnable behaviour towards the plaintiff.
2. Jurisprudence on costs demonstrates that behaviour deserving of condemnation should attract substantial indemnity costs.
3. The defendant's conduct deserves condemnation. Francis contracted with the defendant for the purchase and delivery of a luxury car. The defendant knew that the stakes were high for Francis, who risked losing his job if the contract were breached. Nonetheless, the defendant breached the contract.
4. The defendant's breach derived from her anti-social worldview, which disregards contractual obligations. She believed in the rule of "buyer beware," rather than the rule of law. The defendant entered a contract, yet she never intended to fulfill it. The defendant breached the contract, yet she offered no excuse. The defendant learned that Francis lost his job as a result of the breach, yet she remained remorseless. Worse, she blamed Francis for trusting her, and insisted that she had done no harm.
5. The trial judge determined that the defendant's behaviour was worthy of condemnation, and awarded both compensatory and punitive damages in recognition of the extent of the defendant's wrongdoing.
6. Failure to award Francis substantial indemnity costs would compound injustice upon injustice. He suffered a clear injustice at the hands of the defendant. He should not be forced to go out of pocket to have this injustice recognized and compensated. The defendant should be forced to pay for her wrongdoing. An award of substantial indemnity costs is the just result.

PART II – STATEMENT OF FACTS**A. The plaintiff required a car for his job, but did not get it**

7. Francis Carlisle required a luxury car for his job. If he failed to get it within three months, he risked losing his job.

Reasons of the Trial Judge, *Trial Transcript*, vol. 8, p. 3,457- 3,459.

8. Francis did not get the car in time. He lost his job. He remained out of work for six months. The sole silver-lining was that Francis eventually found a new job at higher pay.

Reasons of the Trial Judge, *Trial Transcript*, vol. 8, p. 3,457- 3,459.

B. The plaintiff relied on a contract with the defendant to ensure he would get the car

9. Francis tried to avoid his misfortune – he tried to ensure timely receipt of the car. He contracted with the defendant for the purchase and delivery of the car. He stipulated that the car must be delivered within three months. He warned the defendant that the car was necessary for his job.

Reasons of the Trial Judge, *Trial Transcript*, vol. 8, p. 3,457- 3,459.

C. The defendant never intended to fulfill the contract

10. Nevertheless, three months passed and the car was not delivered in time. The defendant breached the contract. This is why Francis lost his job.

Reasons of the Trial Judge, *Trial Transcript*, vol. 8, p. 3,457- 3,459.

11. The defendant knew that Francis required the car for his job. The defendant promised to deliver the car within three months. The defendant lied. She knew that Francis relied on her to fulfill the contract. Nonetheless, she entered into the contract with no intention of fulfilling it. In fact, she never even told Francis of her intention to breach the contract. He was entitled to rely on a legally binding contract. But she made him suffer for this reliance.

Reasons of the Trial Judge, *Trial Transcript*, vol. 8, p. 3,457- 3,459.

Trial Transcript, vol. 6, page 2,546-2,537.

D. The defendant remained without remorse

12. The defendant did not show much regard for the consequences of her actions. Instead of showing remorse, the defendant showed pride. She insisted there was “no harm done” – in reality, Francis lost his job as a result of her actions. She congratulated herself for having finagled a “great deal” – in reality, she lied and broke a contract. She admitted her conduct was “tricky,” but claimed that Francis was at fault for being tricked.

Trial Transcript, vol. 6, p. 2,546-2,537. “I did not deliver the car to the plaintiff until three months after I promised] [b]ecause it was ... buyer beware. ... He was just dumb not to put anything in writing or ask for a receipt.”

13. Instead of offering excuses for her breach of contract, the defendant offered insults. At trial, she described Francis in the following ways:

- “dumb as a bag of hammers”;
- “ripe for the picking”;
- “naive as a two year old”; and
- “deserv[ing] to be hurt.”

In the mind of the defendant, Francis “deserved” such ridicule and “deserved” to lose his job for relying on their contract.

Trial Transcript, vol. 6, p. 2,546-2,537.

E. The plaintiff was awarded punitive damages

14. The trial judge found in favour of Francis, and awarded him \$35,248.42 in compensatory damages. In addition, the trial judge awarded Francis \$500 in punitive damages in order to condemn the defendant’s conduct.

Reasons of the Trial Judge, *Trial Transcript*, vol. 8, p. 3,457- 3,459.

F. The plaintiff will pay out of pocket without substantial indemnity costs

15. This dispute cost Francis \$8,589. Partial indemnity costs, which amount to about 25% of the total cost, would give Francis roughly \$2,150. Even including the punitive damages in the calculation, if Francis were only awarded partial indemnity costs, he would be required to pay nearly \$6,000 in out-of-pocket expenses to obtain his duly owed compensation.

Reasons of the Trial Judge, *Trial Transcript*, vol. 8, p. 3,457- 3,459.

PART III – POINTS IN ISSUE

16. Should the plaintiff be awarded substantial indemnity costs?

PART IV – ARGUMENTS IN BRIEF

Since the defendant's conduct was deserving of condemnation, substantial indemnity costs should be awarded

17. When a party's conduct deserves condemnation, substantial indemnity costs should be awarded under Ontario Rule 57.

Smith v. Loblaw's Grocery Inc. (1999), 42 O.R. (3d) 321 (Ont. C.A.). The conduct of the parties is a factor that should be considered in awarding costs under Rule 57. It is captured by the Rule 57 factor of "any other matter that is relevant to the issue of costs." Conduct deserving of condemnation attracts an award of substantial indemnity costs.

Rules of Civil Procedure, R.R.O. 1990, c. C.43, as amended.

18. The defendant's conduct deserves condemnation. She wilfully and knowingly breached a contract with Francis, resulting in the loss of his job. She did so without remorse or excuse. The trial judge determined that the defendant's behaviour was "not acceptable in a well ordered society." The trial judge determined that punitive damages were "needed" for "retribution, deterrence, and denunciation" of the defendant's conduct.

Reasons of the Trial Judge, *Trial Transcript*, vol. 8, p. 3,457- 3,459.

19. This is a clear case for substantial indemnity costs. Similar cases involving less condemnable wrongs have resulted in substantial indemnity costs. A comparison between *Smith v. Loblaw's Grocery Inc.* (1999), 42 O.R. (3d) 321 (Ont. C.A.), and the case at bar is instructive:

	<i>Smith v. Loblaw's Grocery Inc.</i> (1999), 42 O.R. (3d) 321 (Ont. C.A.)	The case at bar
The contract	The defendant contracted to pick up apples within a specified period of time.	The defendant contracted to deliver a car within a specified period of time.
The breach	The defendant did not perform in time.	The defendant did not perform in time.
The result of the breach	The delay resulted in the plaintiff's apples going rotten.	The delay resulted in the plaintiff losing his job.
The extent of the wrong	The actions of the defendant deserved condemnation, but not sufficiently to attract punitive damages.	The actions of the defendant so deserved condemnation that they attracted punitive damages.
The costs award	Substantial indemnity costs were awarded on the basis that the defendant's conduct deserved condemnation.	Substantial indemnity costs should be awarded on the basis that the defendant's conduct deserves condemnation.

These two cases differ in one material respect alone: punitive damages were only awarded in the case at bar. Punitive damages express the court's condemnation of a party's conduct, and are awarded only in "exceptional case[s] ... that ... [offend] the court's sense of decency." Since substantial indemnity costs are appropriate where the conduct at issue does not attract punitive

damages, justice demands that they be awarded in “exceptional cases,” such as the case at bar, where the conduct was so deserving of condemnation that punitive damages were necessary.

Smith v. Loblaw’s Grocery Inc. (1999), 42 O.R. (3d) 321 (Ont. C.A.).

Fidler v. Sun Life Assurance Co., 2006 SCC 30 (punitive damages for breach of contract are an exception, awarded only for heinous conduct).

Reasons of the Trial Judge, *Trial Transcript*, vol. 8, p. 3,457-3,459.

20. Without an award of substantial indemnity costs, Francis will have to pay \$6,000 out of pocket to cover his legal fees: \$6,000 to right a wrong, though the wrong is indisputable; \$6,000 to see justice done, though the defendant wilfully dealt him an injustice; \$6, 000 to see the defendant’s conduct condemned, though the conduct “offended the court’s sense of decency” and was worthy of condemnation.

21. An award of substantial indemnity costs is both just and appropriate.

PART V – ORDER REQUESTED

22. The Plaintiff requests an award of substantial indemnity costs.

ALL OF WHICH is respectfully submitted.

Signed on this 23rd day of February, 2012.

John W. Brown
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Counsel to the Plaintiff