Court File No.: CV-19-616261-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF SECTION 60 OF THE TRUSTEE ACT, R.S.O. 1990, C. T.23, AS AMENDED, AND RULE 10 OF THE ONTARIO RULES OF CIVIL PROCEDURE, R.R.O. 1990, REG. 194, AS AMENDED

AND IN THE MATTER OF HI-RISE CAPITAL LTD. AND IN THE MATTER OF ADELAIDE STREET LOFTS INC.

COST SUBMISSIONS OF REPRESENTATIVE COUNSEL

June 1, 2021

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Court-appointed Representative Counsel

COST SUBMISSIONS OF REPRESENTATIVE COUNSEL

1. 263 Holdings is seeking $70,522.74. This would mean that 263 Holdings' would recover its actual costs, *ie*, on a full indemnity basis. Representative Counsel submits that there is no basis to depart from the ordinary presumption that 263 Holdings should be awarded its reasonable partial indemnity costs, and no more.

2. Elevated costs are only available in two discrete circumstances: (i) where an offer to settle under rule 49.10 was made; or (ii) where the losing party has engaged in behaviour worthy of sanction. Neither of these circumstances are present in this case. There has not been any reprehensible conduct or any finding by this Court that would justify a penal cost order in favour of 263 Holdings on a full, or even on a substantial indemnity scale.

There is No Reason to Award Elevated Costs

3. Contrary to the statements made in 263 Holdings' cost submissions, nowhere in Representative Counsel's factum or in its oral submissions did it make any allegations of "bad faith" against the Neilas Parties, nor was there any other sanction-worthy conduct, justifying an elevated scale of costs. Further, Representative Counsel did not make any other allegations of the nature contemplated in the case law cited by 263 Holdings in its cost submissions, and no such findings were made by the Court.

4. Representative Counsel simply alleged that the Neilas Parties breached their duty of good faith in contractual performance, and in this regard, relied on the Supreme Court of Canada cases

of *Bhasin v Hynrew* and *C.M. Callow Inc. v Zollinger*.[1] This does not give rise to substantial indemnity costs, or any form of elevated or costs.

5. The duty of good faith in contractual performance is an organizing principle of contract law that applies to all parties to a contract and cannot be contracted out of. Although the words "good faith" appear in the description of the duty, alleging a breach of this duty is not equivalent to an allegation of fraud or bad faith, or any other allegation that carries cost adverse consequences.

6. From a practical perspective, it would make little sense for Courts to establish a principle requiring parties to a contract perform their obligations in good faith, but at the same time impose elevated and punitive cost awards against parties for seeking to enforce that obligation. If there was a risk of exposure to adverse cost consequences for seeking to rely on this principle, parties to contracts would be reluctant to pursue a counter party for breaching its duty, and it would effectively render the "duty of good faith" principle moot.

7. In *Davies v. Clarington (Municipality) et al.*, the primary issue before the Court of Appeal for Ontario involved the limits of the Court's discretion to award costs on either a substantial indemnity or full indemnity scale, referring to both generically as "elevated costs".[2]

8. The Court of Appeal, citing the Supreme Court of Canada, held that elevated costs awards are only warranted in two circumstances: (i) where an offer to settle under rule 49.10 is at play, where substantial indemnity costs are explicitly authorized; or (ii) where the losing party has

[1] See paragraphs 56, 57 and 62 of Representative Counsel's Factum dated May 3, 2021.
[2] *Davies v Clarington (Municipality) et al*., 2009 ONCA 722 at para. 1 [***Davies***].

engaged in behaviour worthy of sanction, that is, "only where that has been reprehensible, scandalous, or outrageous conduct on the part of one of the parties."[3]

9. Neither of these two circumstances exists in this case. This was a motion regarding contractual interpretation. There was no egregious or reprehensible conduct or allegations made by Representative Counsel that would justify a punitive cost award against the Investors.

10. The Court of Appeal also provided guidance on the limits of the Court's ability to exercise its judicial discretion when awarding costs:

> "In summary, while fixing costs is a discretionary exercise, attracting a high level of deference, it must be on a principled basis. The judicial discretion under rules 49.13 and 57.01 is not so broad so as to permit a fundamental change to the law that governs the award of an elevated cost award. Apart from the operation of rule 49.10, elevated costs should only be awarded on a clear finding of reprehensible conduct, on the part of the party against which the cost award is being made."[4] [emphasis added].

11. The Court of Appeal reiterated its approach to substantial indemnity costs in *Ianarella v Corbett*, and observed that in the underlying action that was dismissed, the wholly successful defendants "would ordinarily be entitled to no more than costs on a partial indemnity basis."[5] The Court confirmed:

> "Outside of rule 49.10, to make such an award [of substantial indemnity costs] as a matter of judicial discretion the court must find that the party has been guilty of egregious misconduct in the proceeding."[6]

12. No such findings were made in Justice Dunphy's reasons for decision.

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[3] *Davies*, at paras. 28 to 31.
[4] *Davies*, at para 40.
[5] *Ianarella v Corbett* 2015 ONCA 110 at para. 137 [***Ianarella***].
[6] *Ianarella*, at para. 139.

13. The Court has further held that "situations in which costs on a substantial indemnity basis are awarded are rare, one of which is where one party to the litigation has behaved in an abusive manner, brought proceedings wholly devoid of merit, and unnecessarily run up the costs of the litigation…"[7]

14. None of these additional circumstances are present here either. There is no basis here to award 263 Holdings its substantial or full indemnity costs.

Partial Indemnity Costs are the Standard and are Appropriate

15. It is well-established that as a general rule, a successful party is entitled to no more than their partial indemnity costs.[8]

16. Aside from the untrue assertions that Representative Counsel made bad faith allegations or engaged in sanction-worry conduct, 263 Holdings claims its cost on a full indemnity scale on the basis that (a) it conducted its motion in an efficient manner, and (b) the amount sought is what Representative Counsel expected to pay based on its own costs incurred.

17. These claims to costs on a full indemnity basis are inconsistent with well-settled law.

18. As the Court of Appeal stated in *Davies v Clarington (Municipality),* "a distinction must be made between hard-fought litigation that turns out to have been misguided, on the one hand, and malicious counter-productive conduct, on the other."[9] The former does not warrant sanction.[10]

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[7] *2287913 Ontario Inc. v ERSP International Enterprises Ltd*., 2017 ONSC 5621 at para.11 [***ERSP International***].
[8] *Ianarella* at para. 137; *ERSP International* at para.11; *Apotex Inc. v Eli Lilly Canada Inc.*, 2021 ONSC 3111 at para. 7; *Marcus v Cochrane*, 2014 ONCA 207 at para 14 [***Marcus Appeal Decision]***.
[9] *Davies* at para. 45.
[10] *Davies* at para. 46.

19. In following this principle, the Court has held that "Where there is no improper conduct, abuse of the court process or wrongdoing, a rebuke from the court is not warranted"[11]

20. In *Whitfield v. Whitfield*,[12] the appellant sought full payment of actual fees on the basis that the hourly rate was so low it amounted to a partial indemnity rate.[13] While not identical, the proposition asserted by 263 Holdings is analogous. It claims its actual fees on the basis that it amounts or otherwise represents a partial indemnity scale and therefore within Representative Counsel's expectations. In other words, it is saying "because my actual costs look like partial indemnity costs, I should get all of my costs in full."

21. Notwithstanding that the quantum of the full indemnity costs resembled a partial indemnity scale, the Court of Appeal in *Whitfield* declined to award full indemnity costs and held:

> Unless full indemnity costs are warranted, it would be an error in principle to grant an award of costs said to be on a partial indemnity basis that is virtually the same as an award on a substantial or full indemnity basis. The appellant's argument has been previously rejected by this court…
>
> To order otherwise would remove the distinction between partial indemnity and substantial or full indemnity costs and overcompensate the appellant. Partial indemnity costs are simply that: partial and not full compensation for a party's costs. Substantial indemnity provides far greater compensation and full indemnity results in complete reimbursement. As a result, absent applicable settlement offers, substantial and full indemnity costs are reserved for rare and exceptional cases.[14] [emphasis added].

22. In *Marcus v Cochrane*,[15] the defendant won the action. The trial judge awarded the defendant its full indemnity costs, noting that the losing party plaintiff's partial costs were greater

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[11] *ERSP International* at para.12.
[12] *Whitfield v Whitfield*, 2016 ONCA 720 [***Whitfield***].
[13] *Whitfield* at paras. 20 to 21.
[14] *Whitfield* at paras. 22 to 23.
[15] *Marcus v Cochrane*, 2012 ONSC 2331 [***Marcus Cost Decision***].

than the defendant's full indemnity costs.[16] The Court held that the "plaintiff is fortunate that the costs claimed by the defendants are in the range of partial indemnity costs, and so will receive that benefit."[17]

23. 263 Holdings is effectively asking the Court to adopt this same reasoning and confer on it the benefit of its full costs.

24. However, this cost decision was unanimously overturned on appeal.[18] The Court of Appeal held that there was nothing on the record to depart from the usual partial indemnity scale in fixing costs.[19] The Court also held that counsel advancing a theory that the judge ultimately rejected is hardly reprehensible conduct justifying full indemnity costs.[20]

Claims of Efficiency Do Not Give Rise to Elevated Costs

25. In *Boucher v. Public Accountants Council for the Province of Ontario*, the Court of Appeal for Ontario has held that in exercising its discretion "…the objective is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding, rather than an amount fixed by the actual costs incurred by the successful litigant."[21]

26. This litigation as hard-fought by Representative Counsel, and its groundwork was very extensive. It involved preparation of a responding record, preparation for and conducting cross-examinations, reviewing transcripts and reviewing answers to undertakings. It required extensive

[16] *Marcus Cost Decision* at para. 5.
[17] *Marcus Cost Decision* at paras. 28 and 29.
[18] *Marcus Appeal Decision.*
[19] *Marcus Appeal Decision* at para 14.
[20] *Marcus Appeal Decision at* para 12.
[21] *Boucher v Public Accountants Council for the Province of Ontario*, 2004 CanLII 14579 (ONCA) at para. 26.

legal research and consideration, as evident from the various cases and legal propositions cited in its factum on the motion, whereas 263 Holdings' put forward a straight forward relying on three motherhood cases on the law of contractual interpretation. The primary carriage of this motion was conducted by an associate.

27. Representative Counsel is not suggesting that the issue of costs should become an exercise of "look what I did versus what they did."

28. When the general rule is that costs are ordinarily awarded on a partial indemnity basis, Representative Counsel could not have reasonably expected to pay the actual costs of 263 Holdings, regardless of the quantum.

29. Representative Counsel did not embark on frivolous or speculative litigation. It advanced a position that was in the best interest of the Investors that it represents, that if successful, would add a substantial amount of money into their recovery pool. Any cost award granted to 263 Holdings will be borne by the Investors from their recoveries, and there is no reason to penalize them.

30. For the foregoing reasons, it is submitted that the Court ought not deviate from the ordinary practice of awarding reasonable partial indemnity costs to the successful litigant. This would represent a fair and reasonable cost award in this case.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 1st day of June, 2021.

Gregory Azeff and Stephanie De Caria

SCHEDULE "A" – LIST OF AUTHORITIES

1. *Davies v. Clarington (Municipality) et al.*, 2009 ONCA 722.
2. *Ianarella v Corbett*, 2015 ONCA 110.
3. *2287913 Ontario Inc. v. ERSP International Enterprises Ltd*, 2017 ONSC 5621.
4. *Apotex Inc. v Eli Lilly Canada Inc.*, 2021 ONSC 3111 at para. 7.
5. *Marcus v. Cochrane*, 2014 ONCA 207 at para 14.
6. *Whitfield v. Whitfield*, 2016 ONCA 720.
7. *Marcus v. Cochrane*, 2012 ONSC 2331.
8. *Boucher v. Public Accountants Council for the Province of Ontario*, 2004 CanLII 14579 (ONCA).

HI-RISE CAPITAL LTD. Applicant	and	SUPERINTENDENT OF FINANCIAL SERVICES et. al. Respondents	Court File No.: CV-19-616261-00CL

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Proceeding commenced at Toronto

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