Court File No.: CV-14-274

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

2403177 ONTARIO INC.

Applicant

- and -

BENDING LAKE IRON GROUP LIMITED

Respondent

BOOK OF AUTHORITIES OF LEGACY HILL RESOURCES LTD.
(Returnable May 30, 2016)

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in its capacity as the court appointed receiver

LIST OF AUTHORITIES

1. *York (Regional Municipality) v Thornhill Green Co-Operative Homes Inc*. [2009] OJ No. 3036 (Ont SCJ)

2. *Standard Life Assurance Co. v Elliot* [2007] OJ No. 2031 (Ont SCJ)

3. *Jazz Air LP v Toronto Port Authority* [2007] OJ No. 809 (Ont Div Ct)

4. *Lawson v Toronto Hospital Corp.* [1991] OJ No. 1586 (Ont Div Ct)

5. *Party City Ltd., Re* (2002), 32 CBR (4th) 286 (Ont SCJ)

TAB 1

2009 CarswellOnt 4236
Ontario Superior Court of Justice [Commercial List]

York (Regional Municipality) v. Thornhill Green Co-Operative Homes Inc.

2009 CarswellOnt 4236, [2009] O.J. No. 3036, 179 A.C.W.S. (3d) 346, 55 C.B.R. (5th) 181

IN THE MATTER OF AN APPLICATION UNDER SECTION 116(1)6 OF THE SOCIAL HOUSING REFORM ACT, 2000, S.O. 2000, c. 27

THE REGIONAL MUNICIPALITY OF YORK (Applicant) and
THORNHILL GREEN CO-OPERATIVE HOMES INC. (Respondent)

Morawetz J.

Heard: October 23, 2008; November 5, 2008
Judgment: July 16, 2009
Docket: 07-CL-7044

Counsel: Roger Jaipargas, Douglas O. Smith, Brendan Y.B. Wong for Applicant, Regional Municipality of York
Frank Bennett, Murray Klippenstein, Basil Alexander for Respondent, Thornill Green Co-Operative Homes Inc., Co-operative Housing Federation of Canada
Mervyn D. Abramowitz, L. Viet Nguyen for Receiver, Mintz and Partners Ltd.
Daniel Kuzmyk for Housing York, Inc.

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency; Property; Contracts

Table of Authorities

Cases considered by *Morawetz J.*:

Co-Operative Housing Federation of Canada v. Co-Operative Regional Municipality of York (February 11, 2009), Doc. 493/08 (Ont. S.C.J.) — referred to

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — followed

Textron Financial Canada Ltd. v. Beta Ltée/Beta Brands Ltd. (2007), 2007 CarswellOnt 4896, 36 C.B.R. (5th) 94 (Ont. S.C.J.) — referred to

York (Regional Municipality) v. Thornhill Green Co-Operative Homes Inc. (2008), 2008 CarswellOnt 5115, 46 C.B.R. (5th) 237 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 101 — referred to

Residential Tenancies Act, 2006, S.O. 2006, c. 17
Generally — referred to

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Social Housing Reform Act, 2000, S.O. 2000, c. 27
Generally — referred to

s. 95 — referred to

s. 95(3) — referred to

s. 116(1) — referred to

s. 116(1)¶ 5 — referred to

s. 116(1)¶ 6 — referred to

s. 156 — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 59 — referred to

Regulations considered:

Social Housing Reform Act, 2000, S.O. 2000, c. 27
General, O. Reg. 368/01

s. 18(4) — referred to

s. 18(4) ¶ 3 — referred to

MOTION by court-appointed receiver for approval of sale of property; CROSS-MOTION by co-operative corporation to vary appointment order to remove power of receiver to sell property.

***Morawetz J.*:**

1 This endorsement addresses the long-outstanding motion brought by Mintz and Partners Ltd. ("MPL"), in its capacity as court-appointed receiver (the "Receiver") of Thornhill Green Co-operative Homes Inc. ("Thornhill Green" or the "Co-op") for an order approving the transaction of purchase and sale (the "Transaction") contemplated by an Agreement of Purchase and Sale (the "Purchase Agreement") between the Receiver and Housing York Inc. ("HYI") and authorizing the Receiver to take such steps as are necessary to complete the Transaction. The Receiver also requests a Vesting Order relating to the Purchase Agreement as well as the approval of the forms of lease agreements as set out in the Motion Record.

2 The Receiver also seeks a declaration that, upon the filing of a Certificate by the Receiver, all occupancy agreements for the property located at 51 - 95 Inverlochy Blvd., Markham, Ontario (the "Property") would be deemed to be terminated and replaced by the leases approved by the court and that any lease agreements remaining to be executed between the tenants at the Property and HYI would be deemed to be executed, valid and in full force and effect and further that the housing units at the Property would be no longer part of any housing co-operative.

3 The motion was opposed by Thornhill Green and by the Co-operative Housing Federation of Canada ("CHFC"). (CHFC was added as a respondent at the opening of argument.)

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4 This endorsement also addresses the cross-motion brought by Thornhill Green to vary the order of Pepall J. dated June 26, 2007 (the "Appointment Order"), to the extent necessary to remove the power of the Receiver to sell or apply to sell any of the Property except in the ordinary course of business.

5 Thornhill Green also brought a motion to discharge MPL as Receiver but this motion was withdrawn at the opening of argument on October 23, 2008.

6 The background facts have been canvassed in two decisions and need not be repeated. The first is my endorsement of August 29, 2008, reported at [(Ont. S.C.J. [Commercial List]). The second is the decision of the Divisional Court dated February 11, 2009, reported at 2009 CanLII 7081 [(February 11, 2009), Doc. 493/08 (Ont. S.C.J.)]. (An application for leave to appeal the decision of the Divisional Court on the Judicial Review was dismissed by the Court of Appeal for Ontario on June 19, 2009.)

7 Although this endorsement addresses the two motions noted above, it is necessary to also take into account the ramifications of the Divisional Court ruling.

8 The Divisional Court addressed the judicial review application brought by Thornhill Green and CHFC to quash the decisions and actions of the Regional Municipality of York (the "Region" or the "Service Manager") with respect to the proposed sale of Thornhill Green to HYI, the Region's social housing arm.

9 The conclusions of the Divisional Court are set out in the decision at paragraphs [93] -[99]:

> [93] As we have concluded that the actions of the Region are reviewable by way of judicial review either as a statutory power of decision or pursuant to the common law, all prerogative remedies are available. We were not asked to review the rights and obligations of the Receiver and we make no comment on whether the Receiver owed a duty to the Co-op. We do conclude, though, that the Region owed a duty of procedural fairness to the Co-op, despite the receivership.
>
> [94] The applicants seek an Order quashing and setting aside the decisions and actions of the Region which resulted in the Region attempting to acquire the assets of the Co-op. They also wish to be given a meaningful opportunity to preserve the future of Thornhill Green as a co-op and to ensure that control of the Co-op is returned to the members.
>
> [95] The request to quash the decisions and actions of the Region, pursuant to s. 95 of the SHRA, which would result in the Region having to reconsider the issue of its consent, is not realistic given the urgent need to complete the costly necessary repairs, and the unresolved underlying financial problems of the Co-op that precipitated the appointment of the Receiver in the first place. The Co-op has ample opportunity to address all issues fully and fairly in the proceedings pending before Morawetz J.
>
> [96] We, therefore, dismiss the motion to quash the Region's consent to the sale of the Co-op under s. 95 of the SHRA.
>
> [97] Is there an alternative remedy which is appropriate, given the novel facts and circumstances of this case? In its submissions, the Co-op made it clear that it wishes to have the opportunity to solve the outstanding problems and to continue to function as a co-op. This is not an issue that we can determined in this application for judicial review.
>
> [98] However, as noted above there is an outstanding motion before the Commercial List requesting the sale of the Co-op. That motion was brought by the Receiver and has the support of the Region. Because of the novel circumstances of this case, while we make no order, it would have been preferable for the Receiver to have sought directions from the Court before the Region took steps to obtain the statutory consents. Again, while we make no order, we express the view that, having regard to the present circumstances, it would be desirable for the Commercial List to determine all issues raised, or to be raised, between the parties, as directed by the judicial team leader. All matters can then be decided in one forum.
>
> [99] For the above reasons, the application to quash the s. 95 consent is dismissed. The issues the Co-op wishes to raise with respect to the future viability of the Co-op, we suggest, should be heard by the Commercial List where the Co-op will have ample opportunity to fully and fairly address all issues.

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10 In accordance with the decision of the Divisional Court, the parties provided further written submissions in respect of these outstanding motions. Submissions were received from counsel on behalf of Thornhill Green and CHFC on March 27, 2009. Responding submissions were received from the Region dated April 8, 2009 and from the Receiver also dated April 8, 2009. Reply submissions were then received from Thornhill Green and CHFC dated April 17, 2009.

11 Counsel to Thornhill Green and CHFC referenced, at paragraph 27 of their Reply submission that the submissions of the Receiver and the Region both emphasized that the respondents (Thornhill Green and CHFC) "have not proffered any new solutions" and that "there is no evidence of any new measures proposed by Thornhill Green to address the problems with the Co-op and its future viability".

12 Counsel to Thornhill Green and CHFC submitted that the elements of a going-forward solution for preserving Thornhill Green have been in evidence before the court for some time. Their Reply submission goes on to identify certain elements of the solution at paragraph 29. However, a review of the references indicates that the evidence referred to was on the record prior to the original return date of the Receiver's motion in July 2008. In particular, numerous references are made to the affidavit of Nicholas Gazzard affirmed June 11, 2008.

13 Therefore, in considering the Receiver's motion, the record remains that which was before the court in October and November 2008. The additional submissions, received in March and April 2009, have been considered as part of the argument relating to the October and November 2008 hearings.

14 Prior to considering the motion of the Receiver, it is necessary to address the cross-motion of Thornhill Green.

15 The cross-motion raises two issues:

> (a) whether the court should vary the Appointment Order by removing the Receiver's power of sale (including the removal of paragraph 7(l)); or
>
> (b) in the alternative, whether the Receiver has sufficiently shown the need to exercise the power of sale.

16 On July 16, 2006, the Region appointed the Receiver pursuant to s. 116(1) 5 of the *Social Housing Reform Act* (SHRA"). On June 26, 2007, the Region obtained the Appointment Order appointing the Receiver pursuant s. 116 (1) 6 of the SHRA and s. 101 of the *Courts of Justice Act* ("CJA").

17 There has been no appeal of the Appointment Order.

18 On May 15, 2008, the Receiver brought the motion for approval to sell the Property to HYI in exchange for the HYI's assumption of the existing mortgages registered against the Property. HYI is a wholly-owned subsidiary of the Region that is dedicated to administering the Region's social housing projects.

19 This motion to vary the Appointment Order was served on October 21, 2008, two days before the scheduled hearing of the Receiver's motion to approve the Transaction.

20 This cross-motion is brought pursuant to the provisions of paragraph 33 of the Appointment Order which provides that any interested party may apply to the court to vary or amend this order on not less than seven days' notice to the Receiver.

21 Thornhill Green and CHFC submit that the remedy of sale is inappropriate in the context of a social housing complex and that the power of sale should not have been included in the Appointment Order.

22 I agree with the submission of the Region that this is language of appeal - not a comeback motion. Further, a motion to vary is not a substitute for an appeal. See: *Textron Financial Canada Ltd. v. Beta Ltée/Beta Brands Ltd.*, [2007] O.J. No. 2998 (Ont. S.C.J.) and *Canadian Commercial Bank v. Pilum Investments Ltd* [1987] O.J. No. 29. I also agree with the submission of counsel to the Receiver to the effect that the jurisdiction to vary an order must be exercised sparingly and comeback provisions

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are intended to apply in situations where parties impacted by an order are not provided with notice of the hearing giving rise to the order.

23 This motion to vary the Appointment Order was not brought promptly. Thornhill Green and CHFC accepted the provisions of the Appointment Order. Further, neither the Co-op nor CHFC point to any error in the Appointment Order nor do they allege any fraud, nor do they allege the discovery of any new facts or evidence. Under Rule 59, the court has discretion to vary or set aside an order based on error, fraud or new evidence. Thornhill Green and CHFC do not rely on any evidence of error, fraud or new facts discovered. The test under Rule 59 has not, in my view, been met.

24 It is also noted that in a Chambers appointment before Campbell J. on June 13, 2008, it was ordered, in part, that any additional motions for relief regarding the Receiver were to be served by June 27, 2008. There does not appear to be any explanation for why the motion was not brought in compliance with the endorsement of Campbell J.

25 Thornhill Green was involved prior to the granting of the Initial Order and, in my view, any utilization of the comeback clause should have been made immediately or shortly after the granting of the Appointment Order. In my view, the motion by Thornhill Green and CHFC is nothing but a late attempt to appeal the decision of Pepall J.

26 No reason has been given for the delay. Thornhill Green, even though they did not attend in court on the application for the Appointment Order (despite being served) have known about the order since June, 2007 and only gave notice that they sought to rely on the comeback provision to vary the Appointment Order in a very fundamental and significant way, two days prior to the motion for sale. I do not believe this to be an appropriate use of the comeback provision.

27 The power to sell the assets found at paragraph 7(l) of the Appointment Order is language which is included in the Model Receivership Order and I agree with the submission of counsel to the Region that a power of sale is essential and a fundamental power granted in court-appointed receiverships.

28 In addition, the power of sale is included in one of the legislated powers of a receiver appointed privately under s. 116(1) 5 of the SHRA and which power was then included in the Appointment Order.

29 It is acknowledged that the circumstances surrounding a potential remedy of sale in the context of a social housing complex, is arguably quite different than a remedy of sale in respect of an operating business, but that does not alter the fact that Ontario Regulation 368/01 under the SHRA, Section 18(4) provides for broad and various powers of a receiver appointed under s. 116(1) of the SHRA. Section 18(4)(3) provides the receiver with the power to, "sell, lease, give as security or otherwise dispose of the housing project assets of the housing provider". The Appointment Order at paragraph 7(w) further empowers the Receiver to exercise any powers listed at Section 18(4) of Ontario Regulation 368/01, under the SHRA.

30 I also agree with counsel to the Receiver that the Region is a secured creditor of Thornhill Green and the Appointment Order makes it clear that the Receiver was not only appointed pursuant to the provisions of the SHRA, but also pursuant to s. 101 of the CJA. The powers provided to the Receiver in the Appointment Order are consistent with the powers routinely granted to receivers appointed under the CJA.

31 In my view, the Receiver properly has the power to sell. The main motion addresses the exercise of such a power.

32 For the foregoing reasons, I conclude that the cross-motion of Thornhill Green and CHFC has no merit. It follows that the cross-motion is dismissed.

33 I now turn to the motion of the Receiver to approve the Transaction.

34 The Receiver, Thornhill Green and the Region each filed a Factum and the Receiver filed a Supplementary Factum. In addition, further written argument was provided by all parties subsequent to the release of the decision of the Divisional Court.

35 In addition to seeking approval of the Transaction, the Receiver requests an Approval and Vesting Order transferring the Purchased Assets, as defined in the Purchase Agreement, to HYI.

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36 The Receiver also seeks approval for the forms of lease agreements, as attached schedules to the draft Approval and Vesting Order, as well as a declaration that, upon the filing of a Certificate, (i) all occupancy agreements for the Property would be deemed to be terminated and replaced by the leases approved by the court; (ii) any lease agreements remaining to be executed between the tenants of the Property and HYI would be deemed to be executed, valid and in full force and effect; and (iii) the housing units (the "Units") at the Property would be no longer part of any housing co-operative.

37 The Receiver also requests approval of its First Report.

38 It is clear that certain of the issues involved in this receivership are unique to the fact that this matter involves a rental housing project that is part of the social housing network in the Region.

39 The Region initially appointed the Receiver pursuant to s. 116(1) 5 of the SHRA to take control of the Property following a determination by the Region that the Board of Directors of Thornhill Green (the "Board") had not fulfilled its responsibilities in respect of the Property. The Region appointed the Receiver after the Board had failed to adequately respond to several concerns raised by the Region, including financial management issues and problems with the operation of the Property. In late 2005, the Board identified the need for certain capital work and repairs to the Property and approached the Region for additional funds. The Region confirmed through an independent consultant that $2.1 million was required for immediate capital work and repairs to the Property. The Receiver was directed by the Region to stabilize the finances of Thornhill Green and oversee capital works in excess of $2 million and repairs (the "Work") at the Property.

40 The Receiver was subsequently appointed by the Court to continue its mandate of stabilizing the finances of Thornhill Green and to continue with the Work.

41 The Region subsequently advised the Receiver that, due to past problems with the financial management and operation of the Property by the Board, the Region would not provide additional funds to the Board to complete the Work. The Region further advised that it would only provide funding to complete the Work, if the Property was transferred to HYI.

42 The Receiver states that transferring the assets of Thornhill Green to HYI is the only viable option to ensure the rehabilitation of Thornhill Green and the Property. The Receiver further states that the Property requires funding, which funding, will only come if the Property is transferred to HYI and without proper funding, the Property will not be rehabilitated and will deteriorate further. The Receiver is also of the view that the transfer to HYI will be of benefit to all of the residents of Thornhill Green as it would result in Thornhill Green being properly funded and managed going forward as part of the Region's social housing stock.

43 The Divisional Court concluded that the actions of the Region were reviewable and, further, that the Region owed a duty of procedural fairness to Thornhill Green, despite the receivership. However, the Divisional Court dismissed the motion to quash the Receiver's consent to the sale of Thornhill Green under s. 95 of the SHRA. The Divisional Court determined that the request to quash the decisions and actions of the Region, which would result in the Region in having to reconsider the issues of its consent, was not realistic given the urgent need to complete the costly necessary repairs, and the unresolved underlying financial problems of the Co-op that precipitated the appointment of the Receiver in the first place.

44 I place special importance on the comments of the Divisional Court relating to the unresolved underlying financial problems of the Co-op that precipitated the appointment of the Receiver.

45 These underlying financial problems lead to my conclusion that the proposed sale by the Receiver to HYI has to be approved. The *status quo* is not an acceptable alternative and the only viable alternative to the *status quo* is the proposed sale to HYI. I have reached this conclusion for a number a reasons.

46 Thornhill Green's financial statements show an operating deficit. Although the deficit has been reduced and is projected to be paid off within five years dating from the implementation of the deficit reduction plan in 2007, it does not alter the fact that Thornhill Green is in a deficit position.

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47 Prior to the appointment of the Receiver, the Board had depleted the Capital Reserve Fund to pay the operating costs of the Property such that by June 30, 2006 there were minimal funds in the Capital Reserve Fund. The Receiver corrected this situation so that as at March 31, 2008, the Capital Reserve Fund had increased to approximately $91,000. However, this is a far cry from the amount required to address the Work.

48 The Region recognized that the Work was required and indicated that it was prepared to fund the repairs via a loan to Thornhill Green. However, because the Region was of the view that it was the Board's mismanagement that resulted in the need for these repairs and the lack of funds to address them, the Region only agreed to fund the Work if a receiver was placed in control of Thornhill Green. The Receiver has indicated that some of the Work has been completed but it is unable to move forward to complete remaining Work without additional funding from the Region.

49 The Receiver identified three options available to ensure that the Work was completed and that the Property preserved and managed properly going forward:

> (a) return governance and responsibility for Thornhill Green to its members, either to the existing Board or a new board composed of different members;
>
> (b) continue the receivership indefinitely until such time as the Work is completed; or
>
> (c) transfer the Property to a new entity capable of completing the Work and managing the Property as social housing going forward.

50 The Receiver, having consulted with the Region, concluded that the only viable option for Thornhill Green and its stakeholders, and in particular its residents, was to transfer the Property to the Purchaser, as:

> (a) a newly elected board would still require additional financing as Thornhill Green does not have sufficient funds to pay for Phase III Work;
>
> (b) the Region advised that it will not provide funding to a new board for the completion of the Work, as it does not have confidence in the Board or the members of Thornhill Green;
>
> (c) the Region has similarly advised that it will not approve the taking on of any additional debt by Thornhill Green;
>
> (d) the Region opposes the return of the Property to the Board, based on the Board's past failure to properly manage the finances of Thornhill Green and the Property;
>
> (e) the Board does not have specialized knowledge with construction;
>
> (f) HYI has technical expertise in respect of operating social housing projects such as Thornhill Green and the Region is prepared to provide funding to HYI; and
>
> (g) continuing the receivership is not as cost effective or beneficial for the residents in the long run.

51 In order to facilitate the transfer of the Property to HYI:

> (a) the Regional Council for the Region has approved the transfer of the Property to the HYI;
>
> (b) the Region has the additional funding of $600,000 to complete the Phase III Work and a further $135,000 to cover the cost of any land transfer taxes;
>
> (c) on April 11, 2008, the Ministry provided its consent to the proposed Transaction, such consent being required under the provisions of the SHRA. One of the conditions for the Ministry providing its consent is that the Property be maintained as part of the Region's social housing stock and operated in accordance with the SHRA;

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(d) HYI has advised the Region and the Receiver that it has agreed to acquire the Property and maintain the Property as part of the Region's social housing stock and, as the Receiver notes, the interests of all stakeholders, including the Region, the Ministry, the members and the Purchaser would thus be satisfied and protected.

52 The Receiver does recognize that if HYI acquires the Property, the Property will no longer be operated under co-operative governance. Governance will be provided by the HYI's board of directors and management.

53 It is also recognized that the Transaction will affect the rights of the members of Thornhill Green. HYI requires that all of its tenants sign a lease agreement prior to the tenants being provided with access to the units. In this case, the members are already in possession of their units and will remain so. HYI, therefore, requires that the existing occupancy agreements be terminated and all of the residents at Thornhill Green enter into lease agreements with the Purchaser.

54 The Receiver advises that the proposed form of lease agreements are similar in form to the lease agreements used by the Purchaser in its other properties and include express provisions for the calculation of subsidized rent, where applicable, and specific references to the SHRA. The Receiver stresses that the residents of Thornhill Green will continue to occupy the same units as they currently do and that they will continue to pay rent, only this time to HYI.

55 Even with the passage of time from the hearing of this motion, the view of the Receiver has not altered its views as can be seen from paragraphs 24 - 27 of its submissions filed on April 8, 2009:

> 24. The respondents have opposed the Receiver's motion, launched a new proceeding for judicial review of the Region's decisions, brought several new motions of their own, appealed to an appellate court when they lost one of those motions, and have now sought leave to appeal the decision of the Divisional Court- the very decision they argue supports their own positions. Yet, in all this, they have failed to address the basic problem facing this co-operative, namely, that it was unable to properly manage Thornhill Green and its financial affairs. Further, they have failed to come up with any solution to the fact that there is a great deal of capital work remaining to be done to ensure that the Property does not deteriorate further, and the co-operative has no funds with which to do the work.
>
> 25. The respondents postulate that, given further time, the parties may be able to work out a solution together. However, to date, they have not come forward with any solutions. Further, given the amount of time that has already passed, it is not clear when the respondents believe that they will be able to come up with such a solution, and nothing has been provided to the Receiver in that regards.
>
> 26. Further, the Receiver has brought a motion to this Honourable Court. The Receiver has requested a decision from this Honourable Court. The Divisional Court has referred the issue of the sale of the Property back to this Honourable Court. A dismissal of the Receiver's motion will only prolong the problems at Thornhill Green, leading to further difficulties for its residents. The receivership must be brought to an end to bring stability to the housing project and its residents, but there needs to be a sustainable long-term solution in place before this can occur.
>
> 27. The Written Argument of the respondents fails to raise any new arguments or propose any new solutions to the problems identified by the Receiver in its several reports to this Honourable Court, and acknowledged by the Divisional Court in its recent decision. The reports and the recommendations of the Receiver are consistent and clear. In the Receiver's view, the only viable solution to the ongoing and longstanding problems of Thornhill Green remains the transfer of the housing assets to HYI.

56 Thornhill Green and CHFC object to the proposed sale for several reasons, including that:

(a) Thornhill Green is financially and organizationally viable on a going forward basis;

(b) the proposed sale is not in accordance with various principles and requirements for such sales (including the Region and its wholly-owned subsidiary obtaining a "windfall" of Thornhill Green's substantial equity of at least $5.6 million since the subsidiary would obtain Thornhill Green by simply assuming its liabilities);

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(c) the Region's conduct raises serious questions about the proposed sale;

(d) the Receiver's conduct raises serious questions about the proposed sale;

(e) the proposed sale would have a substantially negative impact upon statutory Co-op rights.

57 I address these objections in the order in which they were presented.

58 In their materials, Thornhill Green and CHFC argued that:

(a) the Property has a "market value" of $14.5 million and would be "very valuable on the open market because of its location and surroundings and other features;

(b) the Property's liabilities are approximately $8.9 million;

(c) there is net equity of $5.6 million;

(d) to permit the transfer to the Purchaser would be to let the Purchaser obtain the Property at a bargain price or a "windfall price".

59 In my view, these arguments are ill conceived. The submissions ignore the legal context in which Thornhill Green holds the Property. First, the Property cannot be sold on the open market. Pursuant to s. 95 of the SHRA, Thornhill Green is unable to "transfer, lease or otherwise dispose of or offer, list, advertise or hold out for transfer, lease or other disposal" the Property without the consent of the Minister.

60 Secondly, the approach advocated by Thornhill Green fails to take into account that Thornhill Green has provided certain covenants to the Region in respect of the credit facilities made available by the Region such that Thornhill Green cannot encumber or dispose of any part of the Property without the consent of the Region. Further, there is no requirement that the Region be compelled to advance further credit facilities to Thornhill Green.

61 Thirdly, HYI proposes to obtain the Property for the value of the secured loans and has also agreed to upgrade and fund long-term capital and maintenance needs. The Receiver's submissions makes it clear that these costs are quite substantial due to the age of the buildings on the Property.

62 Fourthly, even if the Property were sold on the open market, Thornhill Green would be required to distribute any remaining surplus to a charitable organization or another non-profit housing co-operative pursuant to the CCA and its own articles of incorporation.

63 Fifthly, the submission as outlined in paragraph 88 of the first Gazzard affidavit that Thornhill Green "is in a good position to access [funds for capital repairs] due to its substantial level of equity" is misguided. Pursuant to s. 95(3) of the SHRA, Thornhill Green cannot encumber the Property unless it obtains the consent of the Ministry.

64 Consequently, the submission that net equity of $5.6 million exists in relation to the Property is, in my view, without merit. Due to the relevant statutory framework, this equity is "phantom" equity and is not comparable to equity held by a business corporation.

65 Thornhill Green submits that the proposed sale is not in accordance with various principles and requirements for such sales and the motion should accordingly be denied. In support of its position, counsel to Thornhill Green references *Royal Bank v. Soundair Corp.* [1991 CarswellOnt 205 (Ont. C.A.)], 1991 CanLII 2727. The Court of Appeal has set forth the factors to be considered on a proposed sale by a court-appointed receiver:

(a) whether the receiver has a made a sufficient effort to get the best price and has not acted improvidently;

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(b) the interests of all parties;

(c) the efficacy and integrity of the process by which offers are obtained; and

(d) whether there has been unfairness in the working out of the process.

66 In this case, the Receiver has identified that Work is required and requested additional funding from the Region to complete this Work. The Region has indicated that it will not provide the necessary funding unless the Property is transferred to HYI.

67 The Receiver also considered that the Property is part of the Region's social housing stock and that the Ministry has required that it be operated as social housing going forward. Consequently, the Receiver was not in a position to offer up the assets of Thornhill Green through a traditional commercial sale process. The Receiver was accordingly limited in its options but has negotiated a Transaction where the Property can be sold to an experienced social housing provider. In this respect, I am satisfied that the Receiver has considered the views of all stakeholders, including Thornhill Green. The Receiver has taken into account the specialized circumstances of the social housing context. The proposed Transaction satisfies the Region's requirement for the advance of further funding and preserves the Property as social housing. The Transaction also protects the interests of secured creditors as the Purchaser has agreed to assume the secured indebtedness of Thornhill Green. The residents also benefit as a result of a transfer of the assets to an experienced social housing provider that has the knowledge and expertise to improve Thornhill Green's financial situation and to manage the Property properly.

68 With respect to the submission of Thornhill Green and CHFC that, due in part to the Region's conduct, the Receiver was unable to exercise its duty to act "reasonably, prudently and fairly and not arbitrarily" in selling the assets of Thornhill Green, I am not prepared to give effect to this submission. The Region is not required to extend additional funding or credit to the Thornhill Green. After reviewing the matter, the Region took steps to appoint the Receiver. Although, the Divisional Court found fault in the manner in which the Region initially proceeded, it nevertheless declined to grant an order quashing and setting aside the decisions and actions of the Region which resulted in the Region attempting to acquire the assets of Thornhill Green. In its conclusion, the Divisional Court chose to focus on the practical realities facing Thornhill Green, namely, that the unresolved underlying financial problems of Thornhill Green required attention. It was not the actions of the Region that caused the financial problems of the Co-op. The Region took steps to address the issue which resulted in the appointment of the Receiver.

69 With respect to the Receiver's conduct, Thornhill Green submits that the Receiver has substantially violated the fiduciary duties it owes to all interested parties, including Thornhill Green and its members.

70 I do not give effect to this submission. The Receiver has been in place for a considerable period of time. I have dismissed the cross-motion to vary the powers of the Receiver and the motion to discharge the Receiver has been withdrawn. I am satisfied that the Receiver has acted within its mandate and has reported to court and has proposed a Transaction which, in the circumstances, I find to be fair and reasonable. In my view, the Receiver has carefully considered the available options. In arriving at its recommendation that the Transaction be approved, I find that the Receiver has taken into account the interests of the members of Thornhill Green and has proposed a resolution that substantially protects the interests of the residents. The Receiver has also proposed a transaction which reflects the commercial realities of the situation and addresses in a comprehensive manner the financial problems currently facing Thornhill Green.

71 I am satisfied that the Receiver has acted fairly and diligently in carrying out its activities during its appointment and, in particular, the sales process. In my view, the Receiver has acted in accordance with the *Soundair* principles set out above.

72 It is recognized that currently each member of Thornhill Green is the beneficiary of protected housing rights, including occupancy rights and the right to participate in management, confirmed in the CCA and that a sale to HYI will eliminate occupancy rights of members and replace them with tenancy rights.

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73 However, the provisions of the SHRA, including those provisions dealing with the Receiver's powers to sell the assets of a housing provider, apply despite any act or regulation to the contrary. Further, pursuant to s. 156 of the SHRA, where there is a conflict between any act or regulation and the SHRA, it is the SHRA that prevails.

74 The inescapable conclusion is that the co-operative governance model of Thornhill Green has not worked as envisioned. In my view, an operational change is necessary.

75 The proposed Transaction, although it does result in a change of status, does preserve the ability of the members to live in their same units with the same or similar rental obligations. HYI has similar objectives to those of Thornhill Green - to provide social housing in an effective and efficient manner. Residents will have rights as tenants of the Property and will also benefit HYI completing the Work and operating the Property in a proper manner. The tenants' rights will be governed by the *Residential Tenancies Act* whose purpose includes the protection of residential tenants and to balance the rights and responsibilities of residential landlords and tenants. The tenants will be able to raise or address any concerns or issues regarding their units and their property to the management of HYI, just as they have been able to do with the Board.

76 I accept the Receiver's submission that the change from the co-operative governance to the units being owned and managed by the Purchaser will ensure that the Property is managed for the express purpose of providing social housing.

77 In order for the Transaction to be implemented, it is necessary that the occupancy agreements be terminated and replaced by lease agreements. The proposed lease agreements contain similar terms to the occupancy agreements for the units, including terms regarding the calculation of rent, the services provided to the units and the rights of the landlord and the tenant. These agreements are approved.

78 Although there will be an impact in the change in status on the residents, it must be recognized that the *status quo* has not worked and change is necessary. The proposed change is, in these circumstances, fair, reasonable and equitable.

79 In the result, the motion of the Receiver is granted. The Transaction is approved as is the form of Vesting Order. The declaration in respect of the Certificate relating to the occupancy agreements is also granted. The Reports of the Receiver filed in connection with this motion are also approved.

80 The Region and the Receiver are entitled to their costs as against Thornhill Green and CHFC relating to the cross-motion. Costs outlines have been filed by the Region and the Receiver. If the parties are unable to agree on quantum, a brief written submission may be filed by Thornhill Green and CHFC within 30 days.

81 The Divisional Court awarded "the costs in respect of this Application in the cause, being the cause pending before Morawetz J. on the Commercial List". Costs were fixed at $20,000.00 inclusive of all fees, disbursements and GST. The respondents have been successful and are accordingly entitled to these costs.

Motion granted; cross-motion dismissed.

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TAB 2

2007 CarswellOnt 3236
Ontario Superior Court of Justice

Standard Life Assurance Co. v. Elliott

2007 CarswellOnt 3236, [2007] O.J. No. 2031, 157 A.C.W.S. (3d) 494, 50 C.C.L.I. (4th) 288, 86 O.R. (3d) 221

The Standard Life Assurance Company (Plaintiff / Moving Party) and Bonnie Elliott (Defendant) and KPMG LLP, KPMG Management Services LLP, Elizabeth Campbell, Heather O'Conner, Heather Stevens, Debra Henley, Alexandra Geysendorpher, Amy Nichols-Gordon, Beverly Broderick, Cecil Boggess, Madeline Grossmith, Louise Koster-Lloyd, Lisa Grink, Franca Calgaro, Louise Prevost, Karen O'Conner and Monet Boem (Third Parties) and Edward Masters (Respondent on the Motion)

Molloy J.

Heard: October 30, 2006
Judgment: May 23, 2007
Docket: 04-CV-280524PDA

Counsel: Elizabeth Bennett-Martin for Moving Parties / Plaintiff/ Third party current employees of the Plaintiff
Paul J. Cahill for Defendant
Andrew Spurgeon for Respondent, Edward Masters

Subject: Civil Practice and Procedure; Insurance

Table of Authorities

Cases considered by *Molloy J.*:

Apotex Inc. v. Egis Pharmaceuticals (1991), 1991 CarswellOnt 3149, 4 O.R. (3d) 321, 37 C.P.R. (3d) 335 (Ont. S.C.J.) — referred to

Aspiotis v. Coffee Time Donuts Inc. (1995), 1995 CarswellOnt 2887 (Ont. Gen. Div.) — referred to

Benquesus v. Proskauer, Rose, LLP (2005), 2005 CarswellOnt 2464 (Ont. S.C.J.) — followed

Carmichael v. Stathshore Industrial Park Ltd. (1999), 1999 CarswellOnt 1838, 121 O.A.C. 289 (Ont. C.A.) — followed

Donmor Industries Ltd. v. Kremlin Canada Inc. (1992), *(*sub nom. *Donmor Industries Ltd. v. Kremlin Canada Inc. (No. 2))* 6 O.R. (3d) 506, 1992 CarswellOnt 1728 (Ont. Gen. Div.) — referred to

Marchand (Litigation Guardian of) v. Public General Hospital Society of Chatham (1998), 1998 CarswellOnt 546, 16 C.P.C. (4th) 201, 51 O.T.C. 321 (Ont. Gen. Div.) — followed

Myers v. Elman (1939), [1940] A.C. 282, [1939] 4 All E.R. 484 (U.K. H.L.) — not followed

R. & T. Thew Ltd. v. Reeves (No. 2) (1982), [1982] 3 All E.R. 1086, [1982] Q.B. 1283 (Eng. C.A.) — not followed

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Shier v. Fiume (1991), 6 O.R. (3d) 759, 1991 CarswellOnt 1068 (Ont. Gen. Div.) — referred to

Young v. Young (1993), [1993] 8 W.W.R. 513, 108 D.L.R. (4th) 193, 18 C.R.R. (2d) 41, [1993] 4 S.C.R. 3, 84 B.C.L.R. (2d) 1, 160 N.R. 1, 49 R.F.L. (3d) 117, 34 B.C.A.C. 161, 56 W.A.C. 161, [1993] R.D.F. 703, 1993 CarswellBC 264, 1993 CarswellBC 1269 (S.C.C.) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
Generally — referred to

R. 57.01(1)(e) — referred to

R. 57.01(1)(f) — referred to

R. 57.07(1)(c) — referred to

R. 57.07(7) — referred to

RULING on costs.

***Molloy J.*:**

Introduction

1 The plaintiff ("Standard Life") commenced this action against Bonnie Elliott in December, 2004 seeking to recover an overpayment of long-term disability benefits it alleged it paid to Ms Elliott mistakenly. Ms Elliott defended and counterclaimed. Ms Elliott also issued a Third Party Claim against KPMG and KPMG Management Services (Ms Elliott's employer at the time of her disability benefit claim) and against every individual past and present employee of Standard Life who had ever handled her file. She sought contribution and indemnity from those individual employees for any amount she might be found liable to repay to Standard Life. In its defence, Standard Life acknowledged that it is vicariously liable for all the acts of its employees.

2 On July 21, 2006, I heard a motion brought by the plaintiff and by those third parties who are current employees of the plaintiff seeking an order dismissing the third party claim in its entirety as against all the individual third parties. Counsel for the plaintiff also represented the position of the former employees who had been added as third parties, although not formally retained by them and although none of those individuals had as yet been served with the pleadings.

3 There is no additional recovery possible against the individuals that is not recoverable from Standard Life, given its admission of vicarious liability for all employees. I found that the third party claim failed to disclose a cause of action against the individuals and was an abuse of process as it had been brought solely for "procedural advantage". I struck out the third party claim as against those individuals and ruled that the successful parties were entitled to their costs. The successful parties sought those costs against the solicitor for the defendant in his personal capacity. Accordingly, the matter was adjourned for the filing of appropriate material and to permit both Ms Elliott and Mr. Masters (Ms Elliott's counsel in the action and on the motion) to obtain independent legal advice.

4 In the motion now before me, Standard Life (which funded the defence costs of the motion to dismiss the third party claim) seeks the costs of that earlier motion on a substantial indemnity basis, payable by Mr. Masters personally, or, alternatively, payable by Ms Elliott.

Material Filed on the Costs Motion

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5 The moving parties filed a 10 $^{1}/_{2}$ page solicitor's affidavit setting out the history of the action and referring to some conduct by Mr. Masters which is alleged to have unreasonably run up costs, specifically: threatening a class action if Standard Life did not abandon its defence; alleging deliberate withholding of evidence and production by Standard Life; refusing to meet to discuss settlement because of the alleged failure to make full production; persisting with the third party claim although warned that it was abusive and that a motion would be brought to strike it; and sending numerous repetitive and verbose letters. The moving parties also filed a 15 page factum and a case book containing the applicable Rules and six relevant cases.

6 Mr. Masters retained counsel to represent him on the motion. In response to the costs motion, he filed a two-volume affidavit, including 99 exhibits. The affidavit itself covers 89 pages of text and contains 375 paragraphs. Much of this material is completely irrelevant to anything I have to decide. A considerable amount of the material deals with the merits of Ms Elliott's defence to the action itself. Mr. Masters also filed a 28 page factum and a brief containing 17 cases.

7 In response to Mr. Masters' affidavit, the moving parties filed a supplementary affidavit addressing some of what they alleged were inaccuracies and a brief supplementary factum.

8 Ms Elliott retained independent counsel to represent her on the motion. She filed a brief affidavit in which she said she agreed with the accuracy of Mr. Masters' affidavit and stated that she was aware of all steps taken by Mr. Masters on her behalf in the litigation, had been kept fully informed of those steps as they were being taken, and that all steps he had taken were on her express instructions. It is clear from the material that Ms Elliott is an independent, well-educated and intelligent woman. She holds a Masters in Business Administration and has considerable experience in finance and accounting. She had almost completed her training to be a Chartered Accountant at the time she went on disability benefits.

The Scale of Costs

9 Costs on a partial indemnity basis are the norm and are awarded on that scale in the vast majority of cases. The situations in which costs on a substantial indemnity basis are appropriate are rare. However, one of the situations in which such an award is appropriate 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: *Shier v. Fiume* (1991), 6 O.R. (3d) 759 (Ont. Gen. Div.); *Benquesus v. Proskauer, Rose, LLP*, [2005] O.J. No. 2418 (Ont. S.C.J.); *Donmor Industries Ltd. v. Kremlin Canada Inc.* (1992), 6 O.R. (3d) 506 (Ont. Gen. Div.); *Aspiotis v. Coffee Time Donuts Inc.*, [1995] O.J. No. 419 (Ont. Gen. Div.); *Apotex Inc. v. Egis Pharmaceuticals* (1991), 4 O.R. (3d) 321 (Ont. S.C.J.).

10 In exercising discretion as to an appropriate costs award, it is relevant to take into account "the conduct of any party that tended to shorten or lengthen unnecessarily the duration of the proceeding" and "whether any step in the proceeding was improper, vexatious or unnecessary": *Rules of Civil Procedure*, Rule 57.01(1)(e) and (f).

11 It is apparent from Mr. Masters' affidavit, and from the exchange of correspondence between counsel prior to the commencement of the third party claim, that Mr. Masters added the individual employees as third parties as a tactic to put further pressure on Standard Life to settle on terms advantageous to his client and to obtain the procedural advantage of multiple examinations for discovery of all employees of Standard Life. I had concluded this was the case at the time of the original motion before me, and this is now confirmed by the material filed. Standard Life's counsel had been attempting to persuade Mr. Masters to meet so they could discuss outstanding issues. Mr. Masters repeatedly responded by insisting that Standard Life had failed to produce all of the relevant documents and was trying to pressure his client into a settlement without allowing her the opportunity to be fully informed. There are, of course, remedies in the Rules for obtaining production of documents from a party who has failed to make full disclosure. Mr. Masters made no attempt to do that. Instead, he proceeded to add as parties every single employee of Standard Life who had ever had anything to do with Ms Elliott's file. In my view, this was a vexatious and unnecessary step in the proceeding and one which had the effect of unnecessarily lengthening the proceeding and driving up costs. As such, it falls squarely within the kind of conduct contemplated under the Rules as warranting an increased level of costs to the other party.

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12 In addition to having brought the third party proceeding in the first place, there was also considerable repetitive and lengthy correspondence from Mr. Masters that increased the legal costs of the other side. Also, he twice amended the third party claim, again necessitating further time and expense for the plaintiff.

13 Counsel for Standard Life gave Mr. Masters several opportunities to drop the third party claim against the employees without the necessity of a motion, but he refused.

14 Standard Life's original claim against Ms Elliott for overpayment of benefits is in the approximate amount of $30,000.00. Ms Elliott has defended and counterclaimed for a total of $900,000.00, which includes a claim of $100,000 for aggravated damages and $500,000 for punitive damages.

15 As a result of the third party proceeding alone, Standard Life will have incurred nearly $40,000.00 in legal fees. This kind of tactical litigation is not conducive to the legitimate settlement of disputes in our judicial system. On the contrary, it is exactly the kind of conduct that makes litigation so prohibitively expensive that legitimate disputes cannot be litigated. It is appropriate in this kind of situation to discourage such conduct by imposing stiff costs consequences. As was stated by my colleague, Stach J. in *Benquesus v. Proskauer, Rose, LLP* (at para 17):

> One of the legitimate functions of the costs system is to discourage frivolous and unnecessary litigation. Doing so in the proper case enhances access to the justice system for other litigants

16 In view of all of the circumstances, I consider an order for costs at the substantial indemnity level to be appropriate.

Liability for Costs

17 Ms Elliott has filed an affidavit stating that all steps in the litigation, including the bringing of the third party proceeding and resisting the motion to strike it, were taken with her knowledge and on her informed instructions. Before swearing that affidavit she had the benefit of independent legal advice. On the evidence before me, there is no basis to excuse her from the responsibility to pay those costs.

18 The moving parties also seek to have those costs jointly payable by the solicitor personally.

19 Mr. Masters argues that the claim for costs against him personally has the "intended effect of intimidating the plaintiff personal injury bar with objectionable threats of costs which are contrary to the interests of justice and meant to inhibit the fulfillment of a lawyer's duty to their [*sic*] clients": factum, para 2. Paragraph 38 of his factum alleges, without any reference to evidence, that:

> Mr. Masters is not being pursued to recover costs from Standard Life. Rather, Standard Life has targeted Mr. Masters so that he may be made an example of what happens to aggressive plaintiff lawyers who take on insurance companies. Standard Life is sending a signal to the plaintiff personal injury bar to not aggressively and forcefully advocate for their clients against insurance companies.

20 There is no evidence whatsoever to support that accusation. There is, in my view, considerable merit to Standard Life's request that Mr. Masters be personally liable for the costs. Although Ms Elliott is an intelligent, well-educated person, she is not a lawyer, has no legal training and cannot have been the inspiration behind the third party proceeding. That litigation strategy must have been developed and recommended by her lawyer. In my decision on the original motion, I held that the third party claim against the employees was an abuse of process. I further stated, "Procedural advantage is not a proper basis to add a host of individual third parties, and that is the most innocuous characterization of the tactic, in my view." While costs would certainly also have been recoverable from Ms Elliott, she has been on disability benefits for over a decade. The legal costs in this proceeding have been escalating out of control and now vastly exceeds the value of the claim itself. Given my findings, and the realistic prospect that as a practical matter costs might never be recovered from Ms Elliott, it was no means unreasonable for Standard Life to proceed against Mr. Masters.

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21 Furthermore, from what I have seen of Mr. Masters' conduct in the material before me, I believe it goes well beyond a lawyer "forcefully and aggressively" advocating for his client. In all of the circumstances, adding all of these individual third parties was a completely unnecessary step that was grossly out of proportion to the actual amount in dispute between the parties. I see the position taken by Standard Life on the motion before me as a legitimate step to try to curb these excesses by counsel and to attempt to focus the litigation on the real matters in dispute. I reject the suggestion that this motion was brought improperly to intimidate the entire plaintiffs' bar.

22 Mr. Masters submits that before a lawyer can be found personally responsible for costs, there must be a finding he acted in bad faith or has been derelict in his duty to his client or the court, relying on the historic roots of the power to make such an order as articulated in cases such as *Myers v. Elman*, [1939] 4 All E.R. 484 (U.K. H.L.); *R. & T. Thew Ltd. v. Reeves (No. 2)*, [1982] 3 All E.R. 1086 (Eng. C.A.). While those cases still apply to a residual discretion in the court at common law to award costs against a solicitor, I do not believe that is the applicable test now in Ontario.

23 In Ontario, the test is now set out in Rule 57.07 (1) (c), which states:

> 57.07 (1) Where a solicitor for a party has caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default, the court may make an order,
>
> (c) requiring the solicitor personally to pay the costs of any party.

24 There is no reason not to apply the plain meaning of those words. There is no requirement of bad faith or dereliction of duty before the power under Rule 57.07(7) to award costs against a solicitor personally is triggered. Indeed, the Rule specifically refers to negligence as a ground for recovery of such costs.

25 However, just because the actions of a solicitor may fall within the defined circumstances in which costs may be awarded against him personally, does not mean that the court's discretion ought to be exercised in that manner. On the contrary, the discretion ought to be exercised sparingly and only in exceptional circumstances. In this regard, I agree with the observations of Granger J. in *Marchand (Litigation Guardian of) v. Public General Hospital Society of Chatham*, [1998] O.J. No. 527 (Ont. Gen. Div.) at para 115, as follows:

> . . . As I am satisfied that Rule 57.07 is not a codification of the common law, the ordinary meaning of the words contained therein can be applied to determine if an order for costs should e made against the solicitor personally. Applying the ordinary meaning to the words found in Rule 57.07, costs incurred without reasonable cause, or by reason of undue delay, negligence or other default can be charged back to the solicitor who is responsible for such costs being incurred. Pursuant to Rule 57.07 mere negligence can attract cost consequences. In addition, actions or omissions which fall short of negligence may also attract cost consequences. Causing undue delay in a trial could be the result of bad judgment as opposed to negligence. The reference to "negligence or some other default" indicates that the categories for making an award under rule 57.07 are within the discretion of the court. Although "bad faith" is not a requirement to invoking the costs sanctions of Rule 57.07 against a solicitor, such an order should only be made in rare circumstance and such orders should not discourage lawyers from pursuing unpopular or difficult cases. It is only when a lawyer pursues a goal which is clearly unattainable or is clearly derelict in his or her duties as an officer of the court that resort should be had to R. 57.07.

26 In *Young v. Young* (1993), 108 D.L.R. (4th) 193 (S.C.C.), the Supreme Court of Canada held that costs ought not to have been awarded personally against the solicitor for the father in protracted child custody proceedings dealing with the extent to which the father could involve the children in his Jehovah's Witness religious activities during periods of access. The Supreme Court recognized that the proceedings had been lengthy and acrimonious. However, the Court held, at p. 284 that costs are compensatory and are not awarded for the purpose of punishing a barrister. McLachlin J, (writing for the majority on this point), stated p. 284:

> . . . Any member of the legal profession might be subject to a compensatory order for costs if it is shown that repetitive and irrelevant material, and excessive motions and applications, characterized the proceedings in which they were involved, and

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> that the lawyer acted in bad faith in encouraging that abuse and delay. It is as clear that the courts possess that jurisdiction to make such an award, often under statute and, in any event, as part of their inherent jurisdiction to control abuse of process and contempt of court. . . . Moreover, courts must be extremely cautious in awarding costs personally against a lawyer, given the duties upon a lawyer to guard confidentiality of instructions and to bring forward with courage even unpopular causes. A lawyer should not be placed in a situation where his or her fear of an adverse order of costs may conflict with these fundamental duties of his or her calling.

27 The Supreme Court in *Young* did not purport to interpret every statutory provision dealing with costs payable by a solicitor personally and to read into each such statute a requirement that the solicitor must have acted in bad faith before such an award could be made. The decision in *Young*, does not, therefore, restrict the application of Rule 57.07(1)(c) to cases of bad faith, or otherwise limit the broader language of the Rule. However, the cautionary advice of the Court is applicable to any situation in which a trial judge is called upon to exercise the costs jurisdiction. Before ordering costs against any solicitor in his personal capacity, it is important to bear in mind the nature of the solicitor and client relationship, the importance of fostering the confidentiality underlying that relationship and the necessity of giving leeway to solicitors who find themselves acting for clients with unpopular or difficult causes. As was stated by Doherty J.A. in *Carmichael v. Stathshore Industrial Park Ltd.*, [1999] O.J. No. 2182 (Ont. C.A.) at para 15:

> Bearing in mind the extreme caution which should be exercised before awarding costs personally against a solicitor, I am not satisfied that the respondent has made out a case for ordering costs personally against Mr. Wysocky: *Young v. Young*, [1992] 4 S.C.R. 3. In my view, the caution expressed in *Young v. Young, supra*, applies to applications for costs made under Rule 57.07, just as it does to applications under the inherent jurisdiction of the court.

28 One of the difficulties faced by the Court in *Carmichael* was that the principle basis advanced for ordering costs personally against the solicitor for the appellant was that the appeal had been brought frivolously. Since the appeal had been dismissed on consent, there was no determination of the merits of the appeal, and the Court could not know if it was indeed frivolous. However, Doherty J.A. did note, at para 9, "I would not order costs against a solicitor personally solely on the basis that the solicitor took an appeal which I regarded as frivolous." In my view, it follows that a mere finding that a step in a proceeding is an abuse of process does not automatically trigger an award of costs against a solicitor personally.

29 Applying those principles to the case before me, I conclude that it is not necessary for me to find that Mr. Masters acted in bad faith before he can be held personally liable for the payment of costs. However, neither does my finding that issuing the third party claim against the individual employees was an abuse of process necessarily mean that Mr. Masters should pay the costs personally.

30 I would not go so far as to say that Mr. Masters did act in bad faith. He cited some case authority for the position he took on behalf of his client. I did not elect to follow that authority, but the position taken was not totally devoid of merit. Further, I accept that Mr. Masters himself believed he had an arguable case on the point. That said, in my view, his conduct went well beyond what was necessary to protect the interests of his client. He waged a war of attrition against the insurer company, intending to make it so expensive for the insurer to litigate his client's claim that they would simply give up. The fact that he felt there was some case law to support his position, does not mean that the position was legitimately taken, as opposed to being taken for an ulterior purpose. Based on my review of the material filed, I am satisfied that Mr. Masters was using the Rules as a weapon in his war against the insurer, rather than as a mechanism for obtaining a fair and just result for his client. He deliberately caused excessive costs to be incurred without reasonable cause in order to put pressure on the insurance company. Even though his client approved what he did, I do not see her as the instigator. She was following her counsel's advice.

31 Costs are meant to be compensatory. The likelihood of recovering the costs thrown away as against the defendant are remote. The only way to truly compensate the plaintiff insurer for its costs would be to make them payable by the solicitor. Given my finding that Mr. Masters was the instigator of the action taken and that he took the steps he did for an improper purpose, as well as the fact that his general conduct of the litigation excessively drove up costs, it is in my view appropriate that he pay the costs personally.

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32 That is not the end of the matter, however, in so far as the allocation of the ultimate responsibility for those costs between Mr. Masters and Ms Elliott is concerned. It is difficult while the action is still ongoing and the solicitor and client relationship still in existence to determine the extent to which Ms Elliott approved the steps taken with full knowledge of the purpose of those steps and the potential for adverse costs consequences. If Ms Elliott instructed Mr. Masters to take those steps based on his advice that it was appropriate to do so and without any appropriate warning as to costs consequences, justice might well require the costs to be fully borne by Mr. Masters, or at least reflected in the bill Ms Elliott is ultimately required to pay. On the other hand, if this strategy was discussed between them and Ms Elliott approved it as a way of driving up the insurer's costs in order to pressure the insurer into settling more advantageously for her than might otherwise be the case, then this may well be a factor to be taken into account in placing the liability for those costs, at least in part, on Ms Elliott. Likewise, if the merits of proceeding in this manner were fairly discussed with her and the costs consequences reviewed and she nevertheless insisted that her solicitor proceed, notwithstanding his advice to the contrary, then she might well be required to reimburse him for the costs he has had to pay in following her instructions.

33 That allocation of responsibility as between the solicitor and client are not the concern of the plaintiff, however, and should await the conclusion of the proceeding, or at least the termination of the solicitor/client relationship. For purposes of this application, the order shall simply be that the costs are payable to the plaintiff by Ms Elliott and Mr. Masters, jointly and severally, on a substantial indemnity basis.

Quantum of Costs

34 It was agreed in argument that the quantum of costs would be addressed in writing, if it cannot be agreed upon by counsel. Since the plaintiff was the successful party, I would ask Ms Bennett-Martin to coordinate that effort. The parties should agree on a timetable for the delivery of submissions, with the plaintiff going first, a reasonable period for the responding parties after that and a short period for a final brief reply by the plaintiff if required. All of the submissions should be bound in one volume and forwarded to me by Ms Bennett-Martin by no later than June 22, 2007. The written submissions should also address the costs of the costs motion before me. If the parties are unable to agree on a schedule, an appointment can be made through my secretary to address that issue.

Order accordingly.

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TAB 3

2007 CarswellOnt 1268
Ontario Superior Court of Justice (Divisional Court)

Jazz Air LP v. Toronto Port Authority

2007 CarswellOnt 1268, [2007] O.J. No. 809, 155 A.C.W.S. (3d) 1038, 221 O.A.C. 274, 44 C.P.C. (6th) 32, 84 O.R. (3d) 641

Jazz Air LP (Appellant) and Toronto Port Authority, City Centre Aviation Ltd. Regco Holdings Inc., Porter Airlines Inc. and Robert J. Deluce (Respondents)

Lane, Matlow, Pardu JJ.

Heard: February 9, 2007
Judgment: March 5, 2007
Docket: 257/06

Proceedings: affirming *Jazz Air LP v. Toronto Port Authority* (2006), 2006 CarswellOnt 6104 (Ont. S.C.J.); additional reasons to *Jazz Air LP v. Toronto Port Authority* (2006), 2006 CarswellOnt 3111 (Ont. S.C.J.)

Counsel: Donald H. Jack, Brian N. Radnoff for Appellant
Robert L. Armstrong, Orestes Pasparakis for Respondents

Subject: Civil Practice and Procedure; Corporate and Commercial

Table of Authorities

Cases considered by *Pardu J.*:

Andersen v. St. Jude Medical Inc. (2006), 264 D.L.R. (4th) 557, 208 O.A.C. 10, 2006 CarswellOnt 710 (Ont. Div. Ct.) — followed

Apotex Inc. v. Egis Pharmaceuticals (1990), 2 O.R. (3d) 126, 1990 CarswellOnt 2702, 32 C.P.R. (3d) 559 at 568 (Ont. Gen. Div.) — considered

Boucher v. Public Accountants Council (Ontario) (2004), 48 C.P.C. (5th) 56, 2004 CarswellOnt 2521, 188 O.A.C. 201, *(*sub nom. *Boucher v. Public Accountants Council for the Province of Ontario)* 71 O.R. (3d) 291 (Ont. C.A.) — considered

Controlled Media Investments Inc. v. Penfund Capital (No. 1) Ltd. (2000), 2000 CarswellOnt 551 (Ont. S.C.J. [Commercial List]) — considered

Hamilton v. Open Window Bakery Ltd. (2003), 2004 SCC 9, 316 N.R. 265, 235 D.L.R. (4th) 193, 2003 CarswellOnt 5591, 2003 CarswellOnt 5592, 2004 C.L.L.C. 210-025, 184 O.A.C. 209, [2004] 1 S.C.R. 303, 70 O.R. (3d) 255 (note), 40 B.L.R. (3d) 1 (S.C.C.) — followed

Henry Schein Arcona Inc. v. Mullin (2000), 2000 CarswellOnt 3515 (Ont. S.C.J.) — considered

Hunt v. TD Securities Inc. (2003), 2003 CarswellOnt 3141, 66 O.R. (3d) 481, 229 D.L.R. (4th) 609, 175 O.A.C. 19, 36 B.L.R. (3d) 165, 39 C.P.C. (5th) 206 (Ont. C.A.) — considered

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2878852 Canada Inc. v. Jones Heward Investment Counsel Inc. (2007), 2007 CarswellOnt 90, 2007 ONCA 14 (Ont. C.A.) — considered

Cases considered by *Matlow J.*:

Boucher v. Public Accountants Council (Ontario) (2004), 48 C.P.C. (5th) 56, 2004 CarswellOnt 2521, 188 O.A.C. 201, *(*sub nom. *Boucher v. Public Accountants Council for the Province of Ontario)* 71 O.R. (3d) 291 (Ont. C.A.) — considered

Moon v. Sher (2004), 2004 CarswellOnt 4702, 192 O.A.C. 222, 246 D.L.R. (4th) 440 (Ont. C.A.) — considered

Rules considered by *Matlow J.*:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
Generally — referred to

ADDITIONAL REASONS to judgment reported at *Jazz Air LP v. Toronto Port Authority* (2006), 2006 CarswellOnt 3111 (Ont. S.C.J.), APPEAL from judgment reported at *Jazz Air LP v. Toronto Port Authority* (2006), 2006 CarswellOnt 6104 (Ont. S.C.J.), awarding costs in amount of $160,000 plus fees and disbursements for dismissal of motion for interlocutory mandatory injunction.

***Pardu J.*:**

1 Jazz Air appeals from a substantial indemnity costs award made against it by Spence J. in the sum of $160,000 following dismissal of Jazz's motion for an interlocutory injunction. Jazz argues that Spence J. erred:

(1) In awarding substantial indemnity costs in the absence of any finding of reprehensible, scandalous or outrageous behaviour in the conduct of the litigation, and that his decision provided no basis to award substantial indemnity costs;

(2) In awarding costs in an amount that was excessive and unreasonable for a one-day motion;

(3) In allowing costs to be calculated at a minimum increment of .25 hours rather than .1 hours.

2 This one day motion was no simple matter. On January 31, 2006, one of the defendants terminated the monthly tenancy for premises occupied by Jazz on Toronto Island, effective February 28, 2006. Porter Airlines planned to begin passenger flight operations there and had purchased $500 million dollars worth of new aircraft. It had a tight construction schedule for renovations set to start March 1, 2006. Grant of the injunction restraining termination of the lease for the premises occupied by Jazz would have had catastrophic consequences for Porter Airlines. Jazz did not serve its notice of motion and some of the supporting material until 6:21 p.m. on February 23, 2006. Porter Airlines had heard rumours of the pending motion several days earlier and had begun to prepare for the motion.

3 Justice Spence reviewed the voluminous materials prepared by the parties over the weekend and heard argument from a flock of senior counsel on Monday, February 27th.

4 In an endorsement released the same day, Spence J. concluded:

(1) Jazz LP was not a party to the lease, which in any event was likely terminable on one month notice which was given.

(2) A breach of the *Competition Act* was unlikely.

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(3) The termination of the lease was likely in accordance with the terms of the lease.

(4) The defendants had good business reasons to use the leased premises and their conduct would not likely amount to conspiracy.

(5) The claims alleging restraint of trade and intentional interference with economic relations were similarly ill-founded.

5 On May 24, 2006, Spence J. released his costs endorsement:

The request of the Porter defendants for costs on the substantial indemnity scale and on the order of the large amount they request is supported by their submissions. There is no reason to defer fixing the costs or to send them to assessment. The only reasonable expectation the plaintiff could have had is that Porter would do everything it could to prepare for and present a case with the best possible prospect of succeeding. Without the bill that the plaintiff's counsel are submitting to the plaintiff for this matter, the comment that an attack of the kind they have made on quantum is "no more than an attack in the air" seems quite apt and no doubt could be put more bluntly.

I doubt that the top of the rate is appropriate for all of the lawyers for all of their work, so I would reduce the amount for fees to $160,000 before GST, with disbursements as in the bill of costs plus applicable GST. Costs are to be fixed on the above basis and to be payable in 30 days.

6 The fees claimed by the defendants totalled $176,321.25, but were reduced to $160,000 by Spence J.

7 A judge's decision on costs is entitled to a high degree of deference. As observed by Arbour J.:

A court should set aside a costs award on appeal only if the trial judge has made an error in principle or if the award is plainly wrong.

1

8 On occasion, reasons must be brief because of the pressure of time. Although not ideal, reasons which incorporate by reference a portion of a party's written submissions are adequate provided that the parties understand the reasons for the decision. [2]

9 Here the reasons met that test. Spence J. adopted the submissions of the defendants on the issues of whether costs should be awarded on a substantial indemnity basis and in the range of the massive amount claimed.

10 It was open to Spence J. to award costs on a substantial indemnity basis because of the unsubstantiated allegations of conspiracy and improper conduct [3] and because of the tactical approach to the timing of the motion.

11 As Farley J. noted in *Controlled Media Investments Inc. v. Penfund Capital (No. 1) Ltd.*, [2000] O.J. No. 614 (Ont. S.C.J. [Commercial List]):

... that scale of costs (which I would think amply supported by the work involved on a hurry up urgent basis created by Dale) would make other litigants think twice before engaging in such inappropriate tactical skirmishes. If that scale does not have that salutary result, then that scale should be adjusted in any future case under similar circumstances.

12 Spence J. concluded that the motion for the injunction was entirely without merit.

13 As observed by Mesbur J. [4]:

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> An injunction is an extraordinary remedy. Parties who seek injunctions should keep in mind, and remember that they do so at their peril, if they fail. Injunctions should not be undertaken lightly. There is good reason for the moving party to be required to make an undertaking as to the damages. **Where the injunction is without merit, the responding parties are entitled to be compensated for its losses. I see an abandoned injunction in this light. Here, damning allegations were made against defendants. They were put to considerable expenses and inconvenience to respond to them, on an urgent basis. ... I see no reason for the defendants not to receive their solicitor and clients costs, forthwith.**

14 A lost but hard fought battle alone does not justify costs on a substantial indemnity basis, although the stakes are high.

15 The appellants argue that the $160,000 awarded for costs was grossly in excess of any fair and reasonable expectation of the parties, and that an amount in the $40,000 range would have been more appropriate.

16 In *Boucher v. Public Accountants Council (Ontario)* (2004), 71 O.R. (3d) 291 (Ont. C.A.), Armstrong J.A. for the court said at paras. 37 and 38:

> **[37]** The failure to refer, in assessing costs, to the overriding principle of reasonableness, can produce a result that is contrary to the fundamental objectives of access to justice. The costs system is incorporated into the Rules of Civil Procedure, which exist to facilitate access to justice. There are obviously cases where the prospect of an award of costs against the losing party will operate as a reality check for the litigant and assist in discouraging frivolous or unnecessary litigation. However, in my view, the chilling effect of a costs award of the magnitude of the award in this case generally exceeds any fair and reasonable expectation of the parties.
>
> **[38]** In deciding what is fair and reasonable, as suggested above, the expectation of the parties concerning the quantum of a costs award is a relevant factor ...

17 Given the tight timetable and the importance of the issues, it was reasonable for Spence J. to conclude "the only reasonable expectation the plaintiff could have had is that Porter would do everything it could to prepare for and present a case with the best possible prospect of succeeding."

18 The plaintiff refused to disclose its own dockets for the motion. It is reasonable to conclude that the plaintiff spent as much or more lawyers' time on the motion. The defendants did not have the luxury of developing a finely calibrated litigation strategy. They had to go flat out with all available resources. Spence J. was entitled to consider this as a factor. [5]

19 Moreover, Spence J. did not simply take a mechanical approach of multiplying hours spent and an hourly rate, but moderated the hourly rates claimed. The defendant's actual costs of responding to the motion were approximately $280,000. The calculation of time in quarter-hour intervals was insignificant in this case because of the compressed time period over which the work was carried out.

20 The comments at paragraph 55 in *Andersen v. St. Jude Medical Inc.* (2006), 264 D.L.R. (4th) 557 (Ont. Div. Ct.) are equally apt here:

> **[55]** A final submission advanced by the defendants is that an award of this magnitude will have a chilling effect on class proceedings. We do not find this submission compelling in circumstances where the defendants, at least initially, drove the plaintiffs into a game of high stakes poker, sparing no expense in marshalling evidence and then declined to put their own costs before the court. Having lost a very expensive and important motion, it is disingenuous for the defendants to now claim that the costs award is outside the range of what they reasonably expected. If the plaintiffs had lost the motion, it similarly would not lie in their mouths to make this submission.

21 Although the costs awarded are enormous, Spence J. did not err in principle, nor was he plainly wrong to award the costs he did. Accordingly, the appeal is dismissed. If necessary, the parties may make written submissions as to the costs of this appeal, due from the defendants within 20 days after release of this decision, and from the plaintiff, within 10 days thereafter.

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***Matlow J.*, (Dissenting):**

22 With respect, I am unable to agree with the disposition of the majority with respect to the quantum of costs awarded by the motion judge. I would allow the appeal and vary paragraph 1 of the order in appeal to provide that the award of costs be fixed in the sum of $80,000 for fees plus the additional amounts specified in that paragraph. This sum is the highest that I would consider to be fair and reasonable in the circumstances. I would also invite counsel to make submissions regarding costs in the manner set out in the reasons of Pardu, J. on behalf of the majority.

23 The Rules of Civil Procedure now provide relatively few guidelines for judges to apply in the fixing of costs. Judges are generally left to apply a very broad discretion, especially with respect to quantum, based on the costs outlines which must now be filed by counsel. There are hardly any safeguards or restrictions still in place to prevent the making of costs awards that are excessive and there is no real evidence presented upon which most costs awards are based. In the case at bar, the motion judge was left to make his award on the basis of what he learned during his consideration of the motion before him and the bill of costs (not "costs outline") and submissions filed.

24 The amount that the motion judge awarded solely for fees, namely, $160,000 was a very large sum by any standard. Observers might well be forgiven for considering it odd that such a large sum could be awarded almost summarily and without formal evidence of any kind whereas judgments for even very small amounts of money can generally be granted only after evidence is considered by the court, usually after a trial or some other hearing. The process we now follow might even be seen by those observers to reflect a triumph of expedience over justice when it comes to costs.

25 This is one of several important reasons why judges must now take into account, in fixing costs, what they consider to be the reasonable expectations of the parties. Those expectations are an important factor in the determination of what is fair and reasonable, the amount which should ideally constitute both the upper and the lower limit of what should be awarded. An amount that exceeds those expectations should be awarded only sparingly and only if it is clearly justified by the circumstances. If there were ever to be a trend showing that awards of costs have risen far above such expectations, litigants would likely lose confidence in the administration of justice and would be unwilling take the risks inherent in litigating in our courts.

26 I am persuaded that the motion judge failed to give sufficient weight to reasonable expectations and that he failed to fix costs in a sum that was both fair and reasonable. The sum that he awarded far exceeded what I would regard as the upper limit for such an award even on the substantial indemnity level. Although it is not impossible, it is difficult in my view to conceive of any one-day motion, including the various associated steps also required to be taken, that could ever justify an award of costs for fees at the level of the award made. Regardless of the demonstrated very high importance of the motion to the responding parties and the extremely large amount of time that their counsel and others working with them decided to devote to it, in my view the sum awarded was unreasonable and reflected an error in principle. Despite the deference that the award of the motion judge deserves, I am persuaded that it should now be reduced.

27 Such an approach was followed by the Court of Appeal in cases such as *Moon v. Sher* (2004), 246 D.L.R. (4th) 440 (Ont. C.A.) and *Boucher v Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (Ont. C.A.). Those cases dealt with awards of costs that were made while the grids were in force and apply even more aptly now that the grids have been eliminated. In both cases the Court recognized that, in fixing costs, reasonableness was the overriding principle.

28 It is also my view that the motion judge further erred in principle in taking into account the failure of counsel for the appellant to disclose his bill rendered to his own client. There is no logical reason why the appropriate quantum of the respondents' costs should be related in any way to that bill or the underlying dockets.

Appeal dismissed.

Footnotes

1 *Hamilton v. Open Window Bakery Ltd.* (2003), 2004 SCC 9 (S.C.C.) at paragraph 27

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2 *2878852 Canada Inc. v. Jones Heward Investment Counsel Inc.*, 2007 ONCA 14 (Ont. C.A.) at para 28

3 *Apotex Inc. v. Egis Pharmaceuticals* (1990), 2 O.R. (3d) 126 (Ont. Gen. Div.) *Hunt v. TD Securities Inc.* (2003), 66 O.R. (3d) 481 (Ont. C.A.)

4 *Henry Schein Arcona Inc. v. Mullin*, [2000] O.J. No. 3733 (Ont. S.C.J.) at paras. 2, 3 & 6 (emphasis added)

5 *Andersen v. St. Jude Medical Inc.* (2006), 264 D.L.R. (4th) 557 (Ont. Div. Ct.), at 567

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TAB 4

1991 CarswellOnt 1507
Ontario Court of Justice (General Division) [Divisional Court]

Lawson v. Toronto Hospital Corp.

1991 CarswellOnt 1507, [1991] O.J. No. 1586, 29 A.C.W.S. (3d) 21, 2 W.D.C.P. (2d) 526, 52 O.A.C. 186

Victor G. Lawson, Applicant and Toronto Hospital Corporation, Patrick J. Gullane, Alan R. Hudson and W. Vickery Stoughton, Respondents

Davidson J.

Judgment: September 19, 1991
Docket: 22/91

Proceedings: Additional reasons 46 O.A.C. 376, 1991 CarswellOnt 994 (Ont. Div. Ct.)

Counsel: *Mr. A.J. Dick*, for the Applicant.
Mr. R.A. Stradiotto, for the Respondents.

Subject: Civil Practice and Procedure

***Davidson, J.*:**

1 I have had oral and written submissions in respect to the costs.

2 I am in the best position to determine this issue of costs on the motion for interim injunction. I do not feel it appropriate to delegate my primary responsibility to the full Divisional Court on the Hearing of the application for judicial review.

3 Although the motion ought not to be looked at in isolation, it is, to a large degree, separated from the main application for judicial review.

4 The applicant was unsuccessful. I rejected the grounds urged by the applicant as not being borne out in all the material. Indeed, I found the opposite had been demonstrated by the respondents.

5 I agree with the statement of Henry, J. in *Apotex Inc. v. Egis Pharmaceuticals and Novopharm Ltd.* (1990), 2 O.R. (3d) p. 126 at p. 129, lines (c) through (g).

6 As such I feel unless there are extenuating circumstances, the ordinary rule that costs should follow the event should apply. I am not persuaded that such circumstances exist here and the respondents should have their costs of the motion in any event.

7 The issue of the scale of costs remains. In *Apotex*, the unsuccessful plaintiff alleged fraud and deceit and conspiracy. Henry, J. stated at page 130 -

> These serious allegations against the defendants were made without any acceptable evidentiary basis but were speculation only. They were denied and that denial was not challanged. I agree this is a classic case for the award of solicitor and client costs.

8 In the matter before me, the applicant did not use the words fraud or deceit or conspiracy. He did allege the respondents' actions as being taken for a wrongful purpose and the submissions were that it was done in an arbitrary manner, in bad faith and with complicity and, in the words of the applicant in his affidavit - "...calculated to throw my practice into complete disarray."

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9 My Reasons for Decision particularize why I rejected these submissions. The allegations of wrongdoing were very serious. The professional integrity of the respondents was at stake. They were in positions of far reaching responsibility in the duties and obligations entrusted to them as head of overall surgery at Toronto Hospital, Chief of the Department of Otolaryngology and President and Chief Executive Officer of the Toronto Hospital. Their professional integrity emerged intact.

10 I believe the case here justifies an award of solicitor and client costs in favour of the respondents and I so order. Said costs shall include the cross-examinations of the deponents' affidavits.

11 I hesitate to prolong the matter but objection is taken to a number of items and calculations in the proposed Bill of Costs of the respondents. I cannot assess them on the written submissions. Accordingly, they will be assessed by the Assessment Officer. Alternatively, if an appointment for assessment is only available far in the future, I would be prepared to have counsel attend and make submissions to me and I shall fix the costs.

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TAB 5

2002 CarswellOnt 1116
Ontario Superior Court of Justice [Commercial List]

Party City Ltd., Re

2002 CarswellOnt 1116, 114 A.C.W.S. (3d) 378, 20 C.P.C. (5th) 156, 32 C.B.R. (4th) 286

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c.C-36, As Amended

In the Matter of the Courts of Justice Act, R.S.O. 1990, c. C.43, As Amended

In the Matter of a Plan of Compromise or Arrangement of Party City Ltd. and the other Companies as Listed in Schedule "A" the Application Herein

Cumming J.

Heard: April 4, 2002
Judgment: April 12, 2002
Docket: 02-CL-4382

Counsel: *M.H. Hilbing*, for Receiver
Tamara Vanmeggelen, for Eques Capital Corporation
B. McPhadden, for Party on Eh!
Justin R. Fogarty, for Trustee, KPMG
Fred Myers, for Party City Corp., Franchisor

Subject: Insolvency; Civil Practice and Procedure

Table of Authorities

Cases considered by *Cumming J.*:

Dallas/North Group Inc., Re, 2001 CarswellOnt 2344, 27 C.B.R. (4th) 40, 148 O.A.C. 288 (Ont. C.A.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 47 — referred to

s. 197(1) — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 131(1) — referred to

Rules considered:

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Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 37.07(1) — referred to

R. 59.06(2) — pursuant to

MOTION by creditor to set aside or vary orders approving sale of debtor's assets and expanding authority of receiver to facilitate dealings with leased premised in context of pending sale.

Endorsement. *Cumming J.*:

The Motion

1 Party on Eh!, a creditor of the Party City Ltd. group of companies ("Party City") brings a motion on an urgent basis that this Court's orders of March 5 and 15, 2002 be amended, varied or set aside, or in the alternative be suspended, or in the further alternative, be stayed pending appeal.

2 The motion at hand is brought under Rule 59.06(2) which provides that a party may seek to set aside or vary an order on the ground of fraud or because of facts arising or discovered after the order was made.

Background

3 KPMG was appointed as Receiver in respect of the assets of Party City February 4, 2002. Mr. Blair Davidson of the Toronto office of KPMG is the principal person acting on behalf of KPMG in its role as Receiver. Prior to being named Receiver, KPMG through Mr. Davidson had acted as a consultant to Congress Financial, the banker to Party City, and its main secured creditor.

4 The Receiver moved March 5, 2002, *inter alia*, for an order approving the sale of Party City's assets to Eques Capital Corporation ("Eques"), resulting in the approval order dated March 5, 2002. The basis for this order is set forth in my Endorsement dated March 6, 2002.

5 Party on Eh! opposed the sale to Eques on the basis that Party Mania, an unsuccessful bidder, had been treated unfairly because of the bid process followed by the Receiver and because the Party Mania offer was substantially higher than the successful Eques offer.

6 This Court held the sale to have been made pursuant to a fair and proper bidding process. The allegations and claims of Party on Eh! and Party Mania were held to have no merit.

7 A further Endorsement dated March 15, 2002 deals with subsequent, follow-on matters. The authority of KPMG as Receiver was expanded pursuant to the provisions of s. 47 of the *Bankruptcy and Insolvency Act*. KPMG was authorized as Trustee in Bankruptcy to enter into an "Occupancy Agreement" to facilitate dealing with leased premises of Party City in the context of the pending sale to Eques. The Trustee's proposal in this regard had been objected to by four of the five Inspectors, one of the objectors being the nominee of Party on Eh!.

8 Another opposing Inspector, Ronald Sluyters, put forward an affidavit opposing the Trustee's motion heard March 15. The thrust of Mr. Sluyters' opposition was that Party Mania continued to be prepared to offer a higher purchase price than seen in the successful Eques offer.

9 Again, this Court found that the opposition to the successful Eques offer was without merit. It was reiterated that the bidding process conducted by the Receiver was fair. As well, it was again also found that in all events the Party Mania bid was inferior to the successful Eques offer.

10 The sale to Eques was completed and a vesting order issued. This brings us to the motion at hand.

The allegations of Party on Eh!

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11 Mr. Andre Turk, a consultant to Party Mania and a co-investor with respect to Party Mania's proposed purchase of the assets of Party City, provides three affidavits in support of the motion to undo the orders of March 5 and 15, 2002.

12 Mr. Turk raises again the two issues dealt with in the prior orders. First, Party on Eh! says that the process adopted by KPMG for the sale of Party City's assets was unfair. Second, it submits that the Party Mania offer was a "substantially higher offer" than the successful Eques offer.

The allegation that the sale process was unfair

13 Party on Eh! disputes the fairness of the sale procedures adopted by KPMG on the basis that Party Mania did not have the same opportunity to obtain and review information as was provided to Eques.

14 This Court found, as set forth in the March 6, 2002 Endorsement, that

> [t]he Receiver has considered *objectively* the best interests of all the parties, including landlords, creditors, and *prospective bidders or purchasers*. The process by which the offers have been obtained is demonstrably objective and fair. (emphasis in original)

15 At the March 15, 2002 hearing, concerns had been raised by Mr. Sluyters as to a possible conflict of interest on the part of KPMG. It was stated that Michael Pesner, a senior partner of KPMG in Montreal, was on the board of directors of Eques.

16 Counsel for the Receiver/Trustee, KPMG, responded to these concerns on March 15, 2002 by stating that Mr. Pesner was never a director of Eques and had resigned from an advisory board to Eques in January, 2002 upon learning that KPMG in Toronto was involved in respect of Party City's assets and that Eques might be seeking to purchase the assets of Party City.

17 Counsel for the Receiver further advised that there had been disclosure of Mr. Pesner's terminated advisory relationship to Eques and that a "Chinese wall" had been constituted within KPMG so as to avoid any appearance of impropriety. The Court found in the March 15, 2002 Endorsement that the "concerns [of Mr. Sluyters] were satisfactorily answered...."

18 Mr. Turk states in one affidavit sworn April 3, 2002 that information now available to him establishes that Mr. Pesner in fact remains on the advisory board of Eques, as indicated by the Eques website.

19 More significantly, in a second affidavit dated April 3, 2002 Mr. Turk states that he retained the services of a private detective who obtained the cell phone records of Ken Kadonoff, the principal of Eques, for the periods ending February 20, 2002 and March 20, 2002.

20 I leave aside without comment the ethical and legal issues relating to obtaining surreptitiously a person's private cell phone records.

21 The cell phone records establish that Mr. Kadonoff, who resides in Toronto, did make telephone calls to Mr. Pesner's telephone in Montreal January 21, 23 and 26, February 2, 3, 4 and 16, March 2, 15 (three calls) and 19, 2002. Most calls were for only a couple of minutes and probably some were not answered as the record indicates a minimum time charged of one minute. The cell phone records indicate that Mr. Kadonoff uses his cell phone extensively on a daily basis as a means of communication.

22 Mr. Kadonoff called Mr. Pesner January 23, 2002. Mr. Michael Shneer, President of Party City, states in his affidavit that Eques made an offer January 23, 2002 directly to Party City for its assets. This offer was for $3,900,000 for the purchase of 80% of the shares of Party City. Mr. Shneer states that Eques withdrew that offer the next day, January 24, 2002, during the Court hearing under the *Companies' Creditors Arrangements Act*.

23 Mr. Pesner is named in the website of Eques as one of its seven person advisory group. Mr. Pesner serves in an unpaid personal capacity but he is, of course, named in the context of his position with KPMG. Mr. Kadonoff states in his affidavit of April 4, 2002 that he spoke with Mr. Pesner in connection with his resignation from the board of advisors and that Mr. Pesner

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resigned January 21, 2002 when he was told by Mr. Kadonoff of the interest of Eques in Party City's assets and that KPMG was involved in the matter. Mr. Kadonoff stated that the website has not been brought up to date to reflect the resignation.

24 Mr. Kadonoff, now 53, states that Mr. Pesner became his step-brother by the marriage of his father to Mr. Pesner's mother in the early 1980's. He states that they "speak often regarding family matters and other matters completely unrelated" to the proceeding at hand.

25 Mr. Kadonoff in his oral testimony denied that Mr. Pesner gave him any information or assistance in respect of the Eques purchase of Party City's assets. Mr. Pesner in an April 4, 2002 communication faxed to the Receiver states that upon learning that KPMG had become a consultant to Congress Financial, the banker of Party City, he told Mr. Kadonoff that he could no longer give advice to Eques. He states further that "at no time did I have any discussions, meetings or telephone conversations with Mr. Blair Davidson or other members of KPMG in regard to Eques' proposed acquisition of Party City." He says that after resigning his advisory role to Eques that his further telephone conversations with Mr. Kadonoff did not relate "to giving advice or consultations in regard to the proposed acquisition of Party City." This evidence is not before the court in affidavit form. The Trustee had difficulty reaching Mr. Pesner given the short notice of the motion. The letter from Mr. Pesner indicates it was faxed some 12 minutes before the commencement of the hearing.

26 Mr. Pesner's resignation from his advisory role January 21, 2002 was prior to KPMG being appointed Receiver February 4, 2002. Whether or not Mr. Pesner may have given any advice on any business matter unrelated to the Eques purchase of the Party City assets after that point in time, I accept Mr. Kadonoff's sworn testimony that there were not any communications at all after January 21 that related to the Eques purchase of the assets of Party City.

27 The tender process for Party City's assets closed February 18, 2002. Mr. Blair Davidson testified that he has had no contact with Mr. Pesner with respect to any matter pertaining to the proceedings at hand, or with respect to any matter at all over the relevant time period (other than just saying hello to him at a conference in Toronto in February, 2002) until April 4, 2002, when it was necessary to get information to enable KPMG to respond to the allegations of Party on Eh! raised by the motion at hand.

28 I accept the testimony of Mr. Kadonoff and Mr. Davidson. I reiterate my findings of fairness and objectivity on the part of the Receiver in respect of the bidding process and sale to Eques as set forth in my previous Endorsements of March 6 and 15, 2002. There is no merit to the allegations made in the motion at hand as to unfairness and impropriety.

The allegation by Party on Eh! that the offer of Party Mania is superior to the accepted offer of Eques.

29 Party on Eh! again repeats the allegation that was previously made and rejected in my Endorsements of March 6 and 15, 2002. The allegation now made is that the Court was misled by the counsel for the Receiver and by the Receiver with respect to an asset valued at $703,945. relating to credit card receipts prior to March 1, 2002. Accordingly, Party on Eh! asserts that based upon "a misapprehension of the facts, the Court made the erroneous finding of fact" that Party Mania's purported offer of $4 million was less than the Eques offer.

30 The explanation in respect of this alleged issue was definitively dealt with in the March 6 and March 15 Endorsements. Mr. Davidson reiterated the explanation again in his testimony relating to the present motion. The simple fact, as seen from the Trustee's reports, is that the $703,945. remains an asset of the Receiver and was not included in the assets purchased by Eques for some $3.5 million, whereas this asset has been included in the assets intended to be purchased by Party Mania in its purported offer of $4 million. I say "purported offer" because there was *not* any offer of $4 million made *prior* to the closing of bidding and it remains questionable whether any later, out-of-time offer was in reality made as a firm offer by Party Mania.

31 Party on Eh! requested an order during the course of the hearing on the motion at hand to compel Eques to release further telephone records and for KPMG to release its phone records. This request was refused. In my view there was no proper foundation made for this evidence being required. The request amounted to no more than the proverbial fishing expedition and would mean further delay and unnecessary expense and uncertainty for the affected parties.

Disposition

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32 For the reasons given, the motion is dismissed. The parties were advised at the conclusion of the hearing April 4 as to this disposition of the motion. I advised that an endorsement would follow. Oral submissions as to costs were made at the time and the opportunity was given for written submissions which have been received.

33 Costs normally follow the event. In my view, the allegations made by Party on Eh! are allegations tantamount to allegations of fraud. The allegations attack the integrity of the tendering process followed by the Receiver. The allegations attack the integrity of KPMG and Mr. Davidson. In essence, the allegation is that the Receiver acted fraudulently in representing that the sale process was to be conducted fairly and impartially. In essence, the allegation is that Mr. Davidson acted unlawfully in breach of the Receiver/Trustee's fiduciary duties so as to give an unfair advantage by providing information to Mr. Pesner who in turn communicated such information so as to assist Mr. Kadonoff in making the Equus bid. These allegations have no merit. In my view, any suspicions inferred because of the cell phone records could and would have been answered quickly by counsel for Party on Eh! contacting counsel for the Trustee. If doubts persisted, a statutory declaration(s) from Messrs. Davidson and/or Pesner could have been requested. The continuing concern in respect of the $703,905. would also have been easily explained, once again, by a simple telephone call to counsel for the Trustee.

34 In my view, and I so find, costs are to be awarded on a solicitor and client or substantial indemnity basis. I have been asked to fix costs,

35 Several interested parties, beyond the Trustee and Receiver, were potentially significantly affected by the motion at hand, necessitating appearances to make submissions, as was foreseen by Party on Eh!. All these parties were served late April 3 or on April 4 with the moving parties' motion record pursuant to Rule 37.07(1) as persons who would be affected by the order sought. The interested parties who appeared and made submissions have rights and obligations that would be adversely affected by the relief being sought by the moving party. The hearing commenced at 1:00 p.m. and concluded at 6:00 p.m.

36 I fix the costs payable to the Trustee at $7000. plus G.S.T. and applicable disbursements. I fix the costs payable to KPMG as Receiver at $1200. plus G.S.T. I fix the costs payable to Eques at $3000. plus G.S.T. I fix the costs payable to Party City Corp. (the U.S. franchisor) at $3000. plus G.S.T.

37 It is apparent that in reality Party on Eh! brings this motion as a nominee and surrogate for Party Mania. This is seen from the history of these proceedings as set forth in my previous Endorsements of March 6 and 15, 2002. The main affiant for Party on Eh!, Mr. Turk, refers to himself in his affidavits in the motions at hand as "a consultant to Party Mania ... and a co-investor with respect to the proposed purchase of some or all of the assets of Party City...." All of the allegations raised and repeated pertain to the alleged unfairness in respect of Party Mania's purported offer to purchase the assets of Party City. I conclude from the record that Party Mania is the real moving party to the motion at hand. It may also be that Party on Eh! is simply a shell corporation and not financially able to pay an adverse costs award, although there is no evidence to suggest this.

38 In my view, this is one of those exceptional cases where the court should exercise its discretion to hold a person who is not formally a party accountable for the costs. See *Dallas/North Group Inc., Re*, [2001] O.J. No. 2743 (Ont. C.A.) Accordingly, I exercise my discretion under s. 197(1) of the *Bankruptcy and Insolvency Act* and s. 131(1) of the *Courts of Justice Act* to make Party on Eh! and Party Mania jointly and severally responsible for all of the above costs awards, said costs to be paid within 30 days. Party Mania has the right to obtain indemnity from Party on Eh! for any costs paid by Party Mania pursuant to this order.

Motion dismissed.

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2403177 ONTARIO INC.
Applicant

and

BENDING LAKE IRON GROUP LIMITED
Respondent

Court File No.: CV-14-274

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Thunder Bay

BOOK OF AUTHORITES OF
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(Returnable May 30, 2016)

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