Case Name:

Darch Estate v. Farmers' Mutual Insurance Co.

RE: The Estate of E. Brenton Darch, deceased and John Darch and David Darch, Executors of the Estate of E. Brenton Darch, deceased and the Estate of Joyce Darch, deceased and John Darch and David Darch, Executors of the Estate of Joye Darch, deceased, and Farmers' Mutual Insurance Company (Lindsay)

[2012] O.J. No. 3006

2012 ONSC 3788

Court File No. 41634/05

Ontario Superior Court of Justice

M.L. Lack J.

June 26, 2012.

(28 paras.)

Counsel:

Alastair H. Simeson, for the Plaintiffs.

Martin P. Forget, for the Defendant.

ENDORSEMENT

1 **M.L. LACK J.**:-- The defendant, Farmers' Mutual Insurance Company (Lindsay), seeks its costs of this action on a partial indemnity scale.

The Principles

2 The court's discretion to award costs arises under s. 131 of the Courts of Justice Act[1]. The discretion must be exercised taking into account the provisions of rule 57.01[2]. The specific factors set out in that rule, which are applicable to the determination in this case, are the result achieved, the complexity of the proceedings, the importance of the issues, the conduct of any party that tended to

shorten or to lengthen unnecessarily the duration of the proceedings, the principle of indemnity, including the experience of the lawyer for the party entitled to costs, as well as the rates charged and the hours spent by that lawyer, and the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed. As well, the court may consider any other matter relevant to the question of costs.

3 The now fundamental principle in the fixing of the proper quantum of costs was articulated by the Court of Appeal for Ontario in Boucher v. Public Accountants Council (Ontario)[3]. The objective is to fix an amount that is fair and reasonable for the unsuccessful party to pay rather than to fix an amount for the actual costs of the successful litigant. To decide what is fair and reasonable a relevant factor is the expectations of the parties, objectively determined. This is a principle of proportionality, essentially a principle of common sense, and is fundamental to any decision of what constitutes a fair and just order of costs.

The Nature of the Proceeding

4 In this case, the plaintiffs claimed indemnity under a homeowners' insurance policy for property loss caused by a fire. The fire was set by Donald Darch, son of the owners of the property. The defendant insurer denied the claim on the basis that coverage was excluded by the "intentional act exclusion" provision in the policy. The trial was essentially bifurcated, on consent, so that the issue of liability was tried first. It took place before me over seven days. The issues were whether the exclusion clause in the policy applied; whether Donald Darch was an "insured" as defined in the policy and whether the fire loss was the result of an act excluded under the policy.

The Amount Claimed and Recovered

5 In the statement of claim, the plaintiffs sought $500,000 for breach of contract and failure to honour a fire claim submitted under the policy of insurance. They also sought punitive damages in the amount of $1,000,000. By trial, it was clear that they had withdrawn their claim for punitive damages.

The Importance of the Issues

6 The issues were important to the plaintiffs who were seeking indemnity for what was the complete destruction of a home. The issues were also important to the defendant since they focused on the interpretation of a standard provision in its homeowners' insurance policy. As well, the claim for punitive damages must have been of significant concern to the defendant until it was withdrawn.

The Complexity of the Proceedings

7 The facts were not complex. There was little dispute about them. The plaintiffs conceded that Donald Darch had set the fire. Much of the evidence at trial was presented through the notes of the investigating officer and the video-tape of Donald Darch's statement to police. This was done by agreement and alleviated the need to call a number of witnesses.

8 The issue of whether Donald Darch was an "insured" was primarily a factual one. The law respecting "intentional act exclusion" appeared settled. Nevertheless, the plaintiffs maintained that each component of the exclusion must be read conjunctively, a position that was ultimately rejected.

9 The issue of Donald Darch's mental condition at the time of the fire made the proceedings relatively complex. Production had been ordered of his mental health file which included clinical notes and records compiled in a psychiatric institution and transcripts of proceedings before the

Ontario Review Board. There were also records from the police investigation and from the criminal proceedings in connection with a charge of arson arising from the fire, for which Donald Darch was found "not criminally responsible" ("NCR").

10 The plaintiffs intended to call Donald Darch's psychiatrist to testify at trial to repeat the opinions that he had given in the criminal proceedings where Donald Darch was found NCR. This made it necessary for the defence to retain its own medical expert. At trial an issue arose regarding the compellability of Donald Darch's psychiatrist, who appeared with his own counsel. The plaintiffs had failed to secure Donald Darch's consent under the Mental Health Act to the psychiatrist testifying and failed to put Donald Darch on notice of their intention to compel the testimony. This issue lengthened the trial and could have been avoided or simplified by proper advance planning by the plaintiffs. Ultimately, Donald Darch did consent and his psychiatrist testified. The defence psychiatric medical expert also testified. There were significant differences in their opinions.

The Result Achieved

11 The defendant was successful on all issues and the action was dismissed.

The Bill of Costs

12 There really is no issue here that costs should follow the event and the defendant is entitled to its costs on a partial indemnity basis. The dispute centres on a number of aspects of the bill of costs, which was submitted on behalf of the defendant.

13 The defendant initially sought partial indemnity costs in the amount of $139,651.04 comprised of $106,107 fees; $2,479.40 GST on fees (at 5% from January 17, 2005 to June 30, 2010); $7,347.47 HST on fees (at 13% from July 1, 2010) and $23,717.17 disbursements (inclusive of tax). The bill of costs outlines the work that four lawyers and a law clerk did on the file. The rates claimed are well within the usual range of those typically sought for the work of legal counsel of similar experience.

14 The time spent on the file is detailed in 57 pages of dockets. It includes time spent before the litigation began. I will have more to say about that. There is also the usual review and drafting of pleadings, including an affidavit of documents and schedules. There were examinations for discovery; follow-up on undertakings; preparation of a motion to compel undertakings. There were attendances at a status hearing and at trial scheduling court. A motion was brought for production of mental health and other records pertaining to Donald Darch. There was preparation for and attendance at a pre-trial. The defence retained and briefed a medical expert. There was preparation of a document brief for trial. Defence counsel prepared extensively for trial. The defence researched and drafted detailed statements of law used during argument. The trial took place over seven days.

The Time Before the Litigation Began

15 The dockets begin January 17, 2005. The chronology, about which there is no dispute, is that in February 2005 the plaintiffs consulted counsel and made the defendant aware of their claim. On April 11, 2005 the defendant's counsel advised the plaintiffs that the defendant would probably deny their claim but they should submit a Proof of Loss to formalize the matter. The plaintiffs then provided the defendant with Dr. Waisman's report and a transcript of the criminal proceedings leading to the NCR finding. On May 24, 2005 the plaintiffs submitted their formal Proof of Loss to the defendant. On June 21, 2005 the defendant formally denied coverage. On December 23, 2005 the plaintiffs issued the statement of claim.

16 In oral submissions, counsel for the plaintiffs took the position that the defendant was not entitled to costs for the period before the proceedings were initiated. I asked counsel to provide me with written submissions on the point. I have now received and reviewed them.

17 In Erco Industries Ltd. v. Allendale Mutual Insurance Co.[4], Rosenberg J., as he then was, dealt with the issue of whether costs incurred after the insurer was put on notice of a claim, but before a statement of claim was issued, were recoverable in a case where the action was ultimately dismissed. He held that the court must distinguish between expenses incurred by an insurer to investigate the claim or to aid in settlement negotiations, which are not recoverable, and expenses incurred for the purpose of defending the action, which are recoverable. He wrote:

> Some expenses for the purpose of defending the action may pre-date the actual issuing of the writ if, in fact, the defendant knew that the settlement negotiations are fallen through and a writ is being issued.

18 In light of that decision, counsel for the defendant voluntarily reduced the claim for costs by abandoning those incurred before April 11, 2005. An amended bill of costs was filed. It is the defence position that after April 11, 2005 it was clear that the plaintiffs would challenge the denial of the coverage. The result is that the claim for costs has been reduced to a total of $129,786.56 comprised of $96,859 fees; $1,923.60 GST on fees (at 5% from April 11, 2005 to June 30, 2010); $7,347.47 HST on fees (at 13% from July 1, 2010) and $23,656.49 disbursements (inclusive of tax).

19 Counsel for the plaintiffs takes the position that no costs should be awarded for the period before June 21, 2005 the date when the defendant denied coverage after the plaintiffs had submitted their Proof of Loss. Counsel for the defence takes the position that the costs for the period April 11 to June 21, 2005 fall within the category of expenses incurred to defend the action.

20 I agree with the plaintiffs' position. On April 11, 2005 counsel for the defendant told the plaintiffs that their claim would most likely be denied. It was not until June 21, 2005 that the defendant notified the plaintiff that their claim actually was denied. In the intervening period Dr. Waisman's report and a transcript of the criminal proceedings leading to the NCR finding became available to the defence for review. I do not see how the defendant could have adequately investigated the plaintiffs' claim for the purpose of deciding whether to deny coverage without that review and in the context of the applicable legal authorities. Consequently, I find that the expenses up to June 21, 2005 relate to investigation of and consideration of the claim and not to defence of the claim Therefore, the fees should be reduced by 23.93 hours or $4,944 and the disbursements by $32.93 (with appropriate reduction to tax), as the plaintiffs contend.

Examinations for Discovery

21 In his summary of the proceedings, counsel for the defendant indicated that examinations for discovery took place over three days. It appears that counsel for the plaintiffs was correct that they took place only over two days. In any event, he also argues that the expense of having two lawyers on behalf of the defendant attend the first day of discoveries was not merited. In my view, a second lawyer at the examination is not an expense that the unsuccessful parties would reasonably expect. Consequently, I would reduce the bill of costs by 8 hours or $1,240 (with appropriate reduction to tax).

Motion

22 The bill of costs also includes time spent by the defendant's counsel for a motion to compel answers arising out of the examinations for discovery. It appears that motion was not argued and the defendant ultimately paid the plaintiffs costs in connection with it of $500. The $500 has been included in the disbursements in the bill of costs. It should not have been included. As well, I would deduct $1,000 from the fees, which is approximately the amount relating to the motion.

Report to Client

Counsel for the plaintiffs also objects to defence counsel including in the bill of costs the time spent preparing a report to the defendant - approximately 30 hours over a one-month period starting October 2006. An unsuccessful party would not reasonably expect that outlay of time for a report to a client. I would reduce it by half, meaning a reduction of $3,226.75 (with appropriate reduction to tax).

Junior Counsel

23 At the trial, the defendant was represented by lead counsel and an associate. Counsel for the plaintiffs objects to the additional time of co-counsel being included in the bill of costs. In my view, that is an expense that was within the expectations of the plaintiffs since they were also represented at trial by lead counsel and an associate.

Defendant's Expert

24 As a disbursement in the bill of costs, the defendant claims $3,000 being what its counsel paid Dr. Ross, a psychiatrist, for preparing a report setting out his opinion of Donald Darch's mental condition at the time that he set the fire. Dr. Ross testified at trial. For that attendance, he billed the defendant and was paid $13,348.51, which is also claimed as a disbursement on the bill of costs. Counsel for the plaintiffs submits that these costs are excessive and should be significantly reduced. I do not agree. Donald Darch's mental condition was the most significant issue at trial. The assessment of that condition was by necessity retrospective and had to be based on a review of extensive records and recordings. Dr. Ross obviously did that review. He was well prepared. He testified over two days. His evidence was very helpful. The amount that he charged for his expert report is actually less than that generally charged by medical specialists. The cost of his attendance at trial is greater than what is generally charged, however he testified over two days, while most medical experts are usually required to attend for only one day. In light of the background, the issues at trial, the testimony of the psychiatrist called by the plaintiffs in this case and the two-day attendance, an unsuccessful litigant would have anticipated accounts from the defence medical expert approximately in the amounts billed and paid.

Other Factors

25 There were no offers to settle.

26 The claim for punitive damages in the amount of $1,000,000 was not withdrawn until shortly after the pre-trial.

27 The fixing of costs does not begin or end with the calculation of hours multiplied by the appropriate hourly rates. A consideration of the expectations of the unsuccessful parties regarding costs requires that I consider what amount of time was reasonably warranted by these proceedings. The bill of costs shows the time spent. After the deductions I have made, I find that the time spent was not excessive in light of the nature of this case and the level of experience of those working on it. It was justified. Objectively, it was within the reasonable expectations of the plaintiffs.

Conclusion

28 Taking all of these factors into consideration, I fix the defendant's partial indemnity costs of the proceeding at $96,000 for fees (inclusive of tax and inclusive of costs of this hearing, which I have fixed at $1,000) and $23,096.92 for disbursements (inclusive of tax).

M.L. LACK J.

cp/s/qlcct/qlpmg

1 Courts of Justice Act, R.S.O. 1990, c. C-43.

2 Rules of Civil Procedure, R.R.O. 1990, Reg. 194, as amended.

3 Boucher v. Public Accountants Council (Ontario), [2004] O.J. 2634, 2004 CanLII 14579 (C.A.).

4 Erco Industries Ltd. v. Allendale Mutual Insurance Co. (1984), 47 O.R. (2d) 589 (Ont. H. Ct.)

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