

Case Name:

CEJ Poultry Inc. v. Intact Insurance Co.

**RE: CEJ Poultry Inc., and
Intact Insurance Company and The Dominion of Canada General
Insurance Company**

[2012] O.J. No. 3005

2012 ONSC 3790

Court File No. 68523/10

Ontario Superior Court of Justice

M.L. Lack J.

Heard: February 24, 2012.

Judgment: June 26, 2012.

(17 paras.)

Counsel:

Martin P. **Forget**, for the Plaintiff/Responding Party, CEJ Poultry Inc.

David Cheifetz, for the Defendant/Moving Party, Intact Insurance Company.

ENDORSEMENT

1 M.L. LACK J.:-- The defendant Intact Insurance Company brought a motion under rule 20 for summary judgment asking that this action be dismissed against it. On December 13, 2011, I dismissed the motion. The parties then appeared before me on February 24, 2012 to make submissions on the costs of the summary judgment motion. This is my ruling on costs.

The Issues

2 The issues are: (a) should costs be awarded to the responding party CEJ; and if so, (b) on what scale - partial or substantial indemnity; (c) in what amount and (d) when payable.

The Positions of the Parties on Costs

3 CEJ, the responding party on the motion, asks me to award it costs of the summary judgment motion on a substantial indemnity basis in the amount of \$21,271.80 payable within 30 days.

4 Intact submits that substantial indemnity costs should not be awarded. If any costs are awarded to CEJ, they should be on a partial indemnity basis, not exceeding \$7,500 and they should be payable to CEJ only in the cause.

The Jurisdiction to Award Costs

5 The court's discretion to award costs arises under s. 131 of the Courts of Justice Act¹. The discretion must be exercised taking into account the provisions of rule 57.01². Any relevant consideration may be taken into account. 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 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. Another factor is 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. That principle was articulated by the Ontario Court of Appeal in *Boucher v. Public Accountants Council (Ontario)*³. The court wrote that the objective is to fix an amount that is fair and reasonable for the unsuccessful party to pay rather than an amount fixed for the actual costs by 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.

Application of Principles

6 The underlying claim in this action is a subrogated one. The plaintiff CEJ secured a judgment against Deena Calderone. The judgment has not been paid. Under s. 132 of the Insurance Act⁴, Farmers' Mutual (Lindsay), the insurer of the nominal plaintiff CEJ, seeks to recover that judgment from one or both of the defendants on the basis that Ms Calderone is an insured under a policy issued by one of them - Intact and/or Dominion. In the case of the defendant Intact, such a finding is contingent on the plaintiff CEJ (Farmers') proving either that Ms Calderone was a member of her father's household or that she was attending school full-time at the relevant time. Intact brought the motion for summary judgment. Its position was that there were no genuine issues requiring a trial and therefore the action against it should be dismissed.

7 There was extensive material filed on the motion for summary judgment by each side. Intact filed two affidavits. In one, references were made to excerpts from the examinations for discovery of Ms Calderone and others. CEJ (Farmers') filed responding material. Intact moved to strike CEJ (Farmers') responding affidavit. Consequently, Intact filed two factums and briefs of authorities. CEJ (Farmers') prepared a comprehensive factum on summary judgment. It also dealt with the law on the meaning of "household". It also responded with a factum on the motion to strike. The summary judgment motion required argument centring on the recent decision of the Ontario Court of Appeal in *Combined Air Mechanical Services Inc. v. Flesch*⁵ dealing with the interpretation and application of the amendments to rule 20. The motion was argued for a half day. In the circumstances, the motion was relatively complex.

8 The motion was important because, as both sides knew, if Intact were successful on the motion, it would have ended the litigation between them.

9 Intact's summary judgment motion was dismissed because there were numerous inconsistencies in the various versions of events that Ms Calderone related over time. The full appreciation of the evidence of Ms Calderone's home life and school life that is required to make dispositive findings in this case could only be achieved at trial. In the result, CEJ (Farmers') was successful.

10 There is no reason that costs should not follow the result. CEJ (Farmers') should be awarded costs of the motion.

11 Rule 20.06(a) provides that the court may fix costs of an unsuccessful motion for summary judgment on a substantial indemnity scale if it was unreasonable for the moving party to have brought the motion.

12 In my view, it ought to have been obvious to Intact that in light of Ms Calderone's different versions of events over time and the findings of Salmers J. on a prior motion that a motions court could not make dispositive findings here in the circumstances and a trial would be required.

13 Two other aspects of Intact's conduct of the motion bear comment. It chose to deliver an affidavit from Ms Calderone on the day before the motion was heard. Also, Intact sought to rely on transcripts by appending them to a lawyer's affidavit but moved to strike CEJ's (Farmers') affidavit for doing essentially the same thing. That request was a tempest in a teapot. As a consequence of these actions, the costs of responding to the motion were unnecessarily increased.

14 In all of the circumstances, the bringing of this motion was unreasonable. It was unreasonable to think that the difficult issues of Ms Calderone's membership in a household and attendance at school could be resolved without a trial. CEJ (Farmers') is entitled to its costs on a substantial indemnity basis.

15 I have reviewed CEJ's (Farmers') bill of costs. It is in line with the rates generally charged by lawyers at the experience levels noted. The time is also in line with what was required, given the issues under consideration. Intact is a sophisticated litigant and must have known what to expect in terms of the time required to respond to and argue this matter as it was presented and in terms of the associated legal costs. In the result, the amount being sought by CEJ (Farmers') for costs on a substantial indemnity basis is within the amount of costs that an unsuccessful party such as Intact could reasonably expect to pay in relation to a motion of this type.

16 Rule 57.03(1) provides that on the hearing of a contested motion, unless the court is satisfied that a different order would be more just, the court shall fix the costs of the motion and order them to be paid within 30 days. There is nothing in the circumstances here that I see that would make it more just for me to order the costs to be paid outside the usual 30 day period.

Conclusion

17 Taking all of these factors into consideration, I order Intact to pay CEJ (Farmers') its costs of the motion on a substantial indemnity basis fixed at \$21,271.80, all inclusive, and payable within 30 days.

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 Insurance Act, R.S.O. 1990, c. 1.8

5 Combined Air Mechanical Services Inc. v. Flesch, 2011 ONCA 764, [2011] O.J. No. 5431 (Ont. C.A.).

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