CITATION: Dufferin Construction Company Inc. v. The Dominion of Canada General Insurance Company, 2016 ONSC 1159
COURT FILE NO.: CV-15-529203
DATE: 20160219

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Dufferin Construction Company Inc., A Division of Holcim (Canada) Inc., Applicant

– and –

The Dominion of Canada General Insurance Company, Respondent

BEFORE: Carole J. Brown, J.

COUNSEL: *Martin Forget* and *Eric Boschetti* for the Applicant

Neil Colville-Reeves for the Respondent

COSTS ENDORSEMENT

[1] The applicant, Dufferin Construction Company Inc. ("Dufferin "), which was successful in its application for determination of whether a duty to defend arose under a policy of insurance issued by the respondent, the Dominion of Canada General Insurance Company ("Dominion"), seeks its costs of the application.

[2] Of the issues involved, the parties were able to agree that if the court determined that a duty to defend arose, there would be an inherent conflict of interest due to the fact that Downsview and Dufferin had crossclaims against one another, and Dufferin would be entitled to retain its own independent counsel at Dominion's expense.

[3] The applicant seeks its costs on a substantial indemnity basis. It submits that the principal issue of whether a duty to defend arose was clear, based on the jurisprudence, and Dominion's position ran contrary to well-established law and was unjustified and unsupported by jurisprudence. It further submitted that Dominion delayed over a long period of time in providing a copy of the certificate of insurance, and significantly delayed stating its position as regards the duty to defend, which prolonged proceedings. It seeks its substantial indemnity costs of the application in the amount of $26,846.54 including HST and disbursements of $1,167.19, for a total of $28,013.73.

[4] The respondent submits that there was no undue delay, that in fact Dufferin waited four years before bringing their application, that the matter was not complex and the time claimed by the applicant is excessive. It further argues that the application did not merit the work of a counsel and three juniors.

[5] In exercising the court's discretion under section 131 of the *Courts of Justice Act* to award costs, the factors set forth in 57.01(1) are to be considered.

[6] The general principle is that the successful party is entitled to costs. In this case, there is nothing to suggest that this general rule should be departed from.

[7] While it appears that there were some delays in obtaining the position of the respondent and the certificate of insurance, I am not satisfied that this warrants an award of costs on a substantial indemnity basis.

[8] It is clear that the issue of whether the applicant was entitled to a defence provided by the respondent pursuant to the policy of insurance was important to the applicant, and that the application had to be brought given the respondent's position.

[9] The application was of medium complexity.

[10] In exercising my discretion, the reasonableness of the costs and the amount of costs that an unsuccessful party could reasonably expect to pay are to be considered. The applicant has provided its bill of costs, with breakdown of time, but only calculated at a substantial indemnity rate. The respondent has not provided a bill of costs, but has indicated the amount of time that its counsel spent on the application and a range of their billing rates. In reviewing the amount of time spent by the various lawyers on each side, there is not a great discrepancy in the amount of time spent by each side.

[11] Taking into account the parties' submissions and the factors set forth at Rule 57.01(1), I am of the view that applicants are entitled to their costs payable forthwith by the respondent on a partial indemnity scale in the amount of $18,000.00 inclusive of disbursements and HST.

Carole J. Brown, J.

Date: February 19, 2016