

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: ENGLELAKE LIMITED v. VALERIE SIMONS and DERIK SIMONS

BEFORE: DALEY J.

COUNSEL: Michael Panacci, for the Plaintiff

Derek A. Schmuck, for the Defendant

C O S T S E N D O R S E M E N T

Re: Security for Costs Motion

[1] The plaintiff was successful in responding to the defendants' security for costs motion. That motion was argued at the same time as the defendants' motion in respect of unanswered undertakings and refused questions from the plaintiff's discoveries.

[2] The time spent in court on these two motions was by far largely spent in dealing with the defendants' motion on undertakings and refused questions.

[3] The issues on the security for costs motion were moderately complex.

[4] The time spent on the security for costs motion was significantly increased as a result of the failure of the plaintiff's counsel to have properly prepared to argue this motion.

[5] During the motion, counsel for the defendants indicated that he wished to rely upon an Affidavit of Bill Huinink, however, counsel for the plaintiff indicated that the affidavit had not been received by his office.

[6] Following the release of my Reasons in respect of the security for costs motion, counsel for the plaintiff indicated that he had determined that the Huinink Affidavit had in fact been received by his office. As a result, leave was granted to both counsel to file supplementary submissions following which my Supplementary Reasons were issued in respect of this motion.

[7] Counsel for the plaintiff has filed a Costs Outline wherein it is indicated that approximately 35 hours were spent in preparation for and attendance on the security for costs motion. Three lawyers at the plaintiff's solicitor's law firm were involved in the matter.

[8] Included in these hours were 9.8 hours spent by a senior lawyer, namely Gregory Hersen with an hourly rate of \$400.00.

[9] In my view, given the nature of the motion, the evidence involved, the arguments presented and taking into account the complexity of the issues, the time spent was excessive in the circumstances.

[10] At the conclusion of the companion motion relating to the plaintiff's undertakings and refusals, costs were awarded to the defendants at \$6,500.00 plus GST in respect of fees.

[11] On a partial indemnity basis, the plaintiff seeks costs in the sum of \$10,326.50 plus GST along with disbursements in the sum of \$694.50 plus GST for a total of \$11,682.26.

[12] I have reviewed the Costs Outline and dockets submitted by counsel for the plaintiff. As the dockets submitted do not clearly break out the time spent exclusively on the security for costs motion from other activities, it is impossible to accurately assess which hours were directly related to that motion. Further, in many instances, the photocopying of the docket was virtually illegible and as such could not be properly reviewed in detail.

[13] Further, as noted, as a result of counsel's failure to properly review and consider the materials served by the defendants' solicitor in respect of the security for costs motion and in particular the Affidavit of Bill Huinink, some of the

time spent would have been needlessly duplicated when the motion was reargued by way of filing of written argument. Of the 35 hours of docketed time recorded by the plaintiff's solicitor concerning the security for costs motion, in my view, less than one hour was spent in total in argument of the security for costs motion, thus leaving approximately 34 hours with respect to preparation of responding material and preparation upon the motion. In my view, in these circumstances, this is excessive.

[14] Taking into account the factors referred to in Rule 57.01 and in particular subsection (e), I am of the view that the plaintiff's solicitor's conduct tended to unnecessarily lengthen the duration of this motion for the reasons I have indicated.

[15] Considering the time which should have been reasonably devoted to the motion, the costs award that might have been expected by the defendants, if unsuccessful, the complexity of the motion and the amount at stake, I am of the view that costs on a partial indemnity basis of \$3,500.00 plus GST, plus disbursements of \$736.17 inclusive of GST would be a fair and reasonable award in these circumstances. As such, an order shall issue in these terms.

DALEY J.

DATE: October 25, 2007

COURT FILE NO.: 1454/01 (Milton)
DATE: 20071025

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COSTS ENDORSEMENT

Re: Security for Costs Motion

DALEY J.

DATE: October 25, 2007