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Case Name:

York Region Condominium Corp. No. 890 v. RPS Resource Property Services Ltd.

**RE: York Region Condominium Corporation No. 890,
(Plaintiff), and
RPS Resource Property Services Ltd., William Garland Karyn
Garland Kandiah Sivaneswaran, Brett Matus, Eric Schraibman,
Richard Taylor, James Wilson, W.H. Bosley & Co. Ltd. and Royal
Bank of Canada, (Defendants)**

[2011] O.J. No. 1185

2011 ONSC 1509

Docket: 05-CV-295767PD2

Ontario Superior Court of Justice

L.A. Pattillo J.

March 18, 2011.

(26 paras.)

Counsel:

Bruce R. Jaeger, for the Plaintiff.

Catherine Francis, for the Defendant, Royal Bank of Canada.

COSTS ENDORSEMENT

L.A. PATTILLO J.:--

Introduction

1 On January 19, 2011, I released reasons for decision allowing the Plaintiff's action against the Defendants RPS Resource Property Services Ltd. ("RPS") and William Garland and dismissing it against the defendant Royal Bank of Canada ("RBC").

2 At the conclusion of those reasons I indicated that in the event that the parties were unable to agree on costs they should provide brief written submissions.

3 I have now received and reviewed cost submissions and Costs Outlines from each of the Plaintiff and RBC. Although Mr. Garland was present and participated at the trial, I have received nothing from him in respect of costs, either on his own behalf or on behalf of RPS.

The Plaintiff's Costs

4 The Plaintiff was successful in its claim against RPS and Mr. Garland and is therefore entitled to its costs of the action against them.

5 The Plaintiff submits that it should be awarded substantial indemnity costs on the basis of the conduct of RPS and Mr. Garland which gave rise to the action. The Plaintiff relies on Newbould J.'s decision in *Ontario Realty Corp. v. P. Gabriele & Sons Ltd.*, [2009] O.J. No. 5278 (S.C.J.).

6 As I held in my reasons for decision, by transferring monies from the account it opened at the RBC on behalf of the Plaintiff without the Plaintiff's authorization, RPS was not only in breach of contract but it engaged in a clear breach of trust. Further, such breach of trust was fraudulent and dishonest. I further held that Mr. Garland, who was the directing mind of RPS, knew that the monies were trust monies and enabled RPS' breach of trust to occur by authorizing and directing it.

7 Conduct that is reprehensible, scandalous or outrageous, either giving rise to the action or in the proceedings themselves, is grounds for costs on a substantial or complete indemnity basis: *Ontario Realty Corp.*, *supra* at para. 14. In my view, the breach of trust by RPS and Mr. Garland supports an award of substantial indemnity costs.

8 The Plaintiff has submitted a Costs Outline claiming substantial indemnity costs in the total amount of \$113,267.80 inclusive of disbursements and applicable taxes. The fees claimed are \$100,207 plus taxes of \$6,012.42. The disbursements are \$7,048.38 inclusive of GST.

9 The costs claimed appear to me to be reasonable in respect of hourly rates claimed and time spent having regard to the issues in the action, the amount claimed and the fact that the trial lasted four and a half days.

10 Accordingly, the Plaintiff is awarded its substantial indemnity costs of the action against RPS and Mr. Garland in the amount of \$113,267.80.

RBC's Costs

11 RBC seeks its costs of the action against the Plaintiff on a substantial indemnity basis on the basis that the Plaintiff persisted in allegations of conversion/breach of trust against RBC with no factual foundation for such allegations. RBC also relies on an offer to settle which was not accepted by the Plaintiff.

12 In the normal course, having succeeded in the action, RBC would be entitled to its costs against the Plaintiff on a partial indemnity basis.

13 The fact that the Plaintiff advanced claims against RBC that in the end were unsuccessful does not, by itself, give rise to an award of substantial indemnity costs. While allegations of breach of trust are very serious, I do not consider that they were inappropriate in the circumstances of this case. Nor do I think that alleging conversion or third party breach of trust should give rise to an award of substantial indemnity costs.

14 As noted, substantial indemnity costs are awarded only where there is reprehensible, scandalous or outrageous conduct either giving rise to the claim or during the course of the action. I do not consider the Plaintiff's actions in pursuing its claims against RBC, unsuccessful as they were, to amount to the type of reprehensible, scandalous or outrageous conduct necessary to justify an award of substantial indemnity costs.

15 On April 19, 2010, approximately six weeks before trial, RBC offered in writing to settle the Plaintiff's action against it upon payment of \$25,000 to the Plaintiff and the Plaintiff providing RBC a release. The offer remained open until five minutes after the trial commenced and was neither withdrawn nor amended before trial. The offer complied with Rule 49.

16 There is no provision in the Rules entitling RBC to receive substantial indemnity costs based on its offer. Rule 49.10(2) is not engaged given that the Plaintiff's action was dismissed against it: *Rooney (Litigation guardian of) v. Graham* (2001), 53 O.R. (3d) 685 (C.A.) at para. 11. Even if Rule 49.10(2) applied, it does not entitle a defendant to substantial indemnity costs from the date of the offer on the basis of the offer alone: *St. Elizabeth Home Society v. Hamilton (City)*, [2010] O.J. No. 1515 (C.A.) at para. 90. While Rule 49.13 does enable a court when exercising its discretion with respect to costs to take into account any offer to settle made in writing, in my view RBC's offer would not, by itself, justify an award of substantial indemnity costs in the action, particularly for the whole of the action as has been claimed here.

17 Accordingly, RBC is entitled to its costs of the action on a partial indemnity basis.

18 The Plaintiff submits that any costs awarded to RBC should be ordered to be paid by RPS and Mr. Garland directly to RBC. In the alternative, the Plaintiff submits that if RBC's costs are ordered against it, such costs should be added to the costs awarded in favour of the Plaintiff against RPS and Mr. Garland. The former order is referred to as a "Sanderson Order", the later as a "Bullock Order."

19 The awarding of a Sanderson Order or a Bullock Order generally arises in circumstances where the allocation of responsibility for a plaintiff's damages is uncertain on the facts, making it reasonable for the plaintiff to advance its claim against more than one defendant. When the action is ultimately unsuccessful against one of the defendants, a Sanderson or Bullock Order does not penalize the plaintiff for having proceeded with the action in circumstances where it was reasonable to do so. Fairness is an important consideration. Each case must, however, be considered in its context. See: *Rooney (Litigation guardian of)*, supra, at para. 6 - 8.

20 In my view, neither a Sanderson Order nor a Bullock Order should be made in this case. The Plaintiff asserted distinct causes of action against RPS and Mr. Garland on the one hand and RBC on the other. While it was RPS' breach of contract and trust which gave rise to the claims against Mr. Garland and RBC, those claims were based on totally different facts and were in no way dependant on each other. The Plaintiff elected to pursue RBC in a separate claim in the absence of any uncertainty as to who was responsible for the breach of trust. In the circumstances, I do not think it is appropriate that RPS and Mr. Garland be required to pay RBC's costs.

21 RBC submits that a Sanderson Order would be unfair to it because there is a real risk that it might not receive the costs because "there is good reason to believe" that Mr. Garland is impecunious" and will be unable to pay its costs. While such a consideration may be relevant to the determination of whether a Sanderson Order should be made, I give no effect to it because there is no evidence before me to support such a belief.

22 RBC has submitted a Costs Outline claiming partial indemnity costs of \$78,594.60 inclusive of disbursements and taxes.

23 The Plaintiff does not dispute the hours and the rates claimed. It points out that some of the costs incurred by RBC were in defence of a cross-claim asserted against RBC by Mr. Garland. It also takes issue with the costs claimed for a law clerk performing administrative duties and a law student who accompanied counsel to the pre-trials and trial. The Plaintiff submits that the appropriate amount for RBC's costs should be \$65,000 inclusive of disbursements and taxes.

24 I accept RBC's submission that the cross-claim was pro-forma and that no material time was spent dealing with it. In any event, it was precipitated by the Plaintiff's claim against RBC. Nor do I consider that the time or amounts claimed for either the law clerk or the law student to be inappropriate. The cost grid envisages the involvement of such individuals.

25 Based on the issues in the action and the amount in dispute, I do not consider the amount claimed on behalf of RBC to be excessive. Nor do I consider it to be out of line with what the Plaintiff would have reasonably expected to pay based on the Plaintiff's partial indemnity cost submission against RPS and Mr. Garland.

26 Accordingly, RBC is entitled to its costs of the action on a partial indemnity basis, fixed at \$78,594.60 and payable by the Plaintiff.

L.A. PATTILLO J.

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