Bob Aaron bob@aaron.ca

December 13, 2008

In litigation cases, often only the lawyers win

In 1997, James and Barbara Dinsmore bought a new townhouse in Windsor for $177,000 from Masterpiece Homes. On taking possession, they noticed dampness on the basement floor, which raised concerns about potential drainage problems.

After investigation, the builder acknowledged that the cement slab in the basement did not meet the three-inch-depth (7.6 centimetres) requirement specified in the Ontario Building Code, but did not agree with the Dinsmores about the alleged drainage problem. The issue became how to resolve it, and the Dinsmores and the builder could not agree on the solution.

Following a series of failed negotiations, the Dinsmores in early 2002 sued the builder, the Ontario New Home Warranty Plan (Tarion), and representatives of the City of Windsor, claiming general and aggravated damages of $350,000 for breach of contract and negligence and $150,000 in punitive damages.

After 14 days of trial in May 2006, Justice John Brockenshire ordered the builders to pay the owners only $29,700 for breach of the terms of the building contract and for breach of the builder's warranty.

The judge "sadly" concluded that the Dinsmores were "the authors of their own misfortune" because they finished the basement knowing that there were moisture problems, and they took no steps to fix the problem and mitigate their damages before trial.

Based on expert testimony, the judge concluded that a reasonable course of action would have been to treat the basement floor with a specific sealant and topping, obtain an engineer's certificate of compliance with the Building Code and regrade some of the land sloping toward the house.

The Dinsmores felt that the sealant solution was unacceptable since the basement slab would not be the regulation three inches thick, but the judge rejected this position.

The judge dismissed the claim against the warranty program on the basis that the owners refused the builder's "reasonable solution," despite assurances that the new work would enjoy an extended warranty under the legislation.

Combined legal fees and court costs claimed by all of the lawyers in the wake of the trial exceeded $400,000 out of all proportion to the true value of the underlying claim. The Dinsmores' lawyer's bill for fees, expenses and GST came to more than $205,000, while the builder's lawyers claimed a total of $98,000. Lawyers for the warranty program asked for $101,000.

In awarding costs to the homeowners, the judge ordered the builder to pay $67,045, including fees of $36,000, expenses of $26,681, and GST. Since the warranty program succeeded at trial and all claims against it were dismissed, the Dinsmores were ordered to pay Tarion $67,497.

In effect, the costs the Dinsmores recovered against the builder had to be handed over to Tarion, leaving the homeowners and the builder responsible for their own heavy legal bills.

In October, an appeal by the homeowners reached the Ontario Court of Appeal. After considering the arguments of all parties, a three-judge panel dismissed the appeal and ordered the homeowners to pay appeal costs of $15,000 to the builders and $6,500 to the warranty program.

Several lessons may be gained from this court case.

Litigation is a very expensive pastime. Frequently, nobody wins except perhaps the lawyers if they get paid.

Court costs and fees for expert witnesses can easily exceed the value of the claim at issue by a factor of five, 10 or 20.

It's always a good idea to be reasonable and realistic at pre-trial mediations and in the face of pre-trial settlement offers (which were rejected in this case). Litigants who refuse to settle before trial do so at their own risk.

Access to justice for a growing proportion of the population is becoming increasingly out of reach due to the costs involved. Citizens need to have access to the courts without bankrupting themselves or mortgaging their future.

Bob Aaron *is a Toronto real estate lawyer and a director of the Tarion Warranty Corporation. He can be reached by email at bob@aaron.ca, phone 416-364-9366 or fax 416-364-3818.* ***Visit the column archives at http://aaron.ca/columns/toronto-star-index.htm for articles on this and other topics.***

Costs decision:

Dinsmore v. Southwood Lakes Holdings Ltd., 2007 CanLII 1861 (ON S.C.)

Print: PDF Format

Date: 2007-01-26

Docket: 02-GD-53338

URL: http://www.canlii.org/en/on/onsc/doc/2007/2007canlii1861/2007canlii1861.html

Noteup: Search for decisions citing this decision

Reflex Record (related decisions, legislation cited and decisions cited)

Related decisions

- **Court of Appeal for Ontario**

  Dinsmore v. Southwood Lakes Holdings Ltd., 2008 ONCA 689 (CanLII)

Decisions cited

- Amherst Crane Rentals Ltd. v. Perring, 2004 CanLII 18104 (ON C.A.) (2004), 241 D.L.R. (4th) 176 (2004), 50 C.B.R. (4th) 1 (2004), 58 D.T.C. 6584 [2004] 5 C.T.C. 5 (2004), 187 O.A.C. 336

- Boucher v. Public Accountants Council for the Province of Ontario, 2004 CanLII 14579 (ON C.A.) (2004), 71 O.R. (3d) 291 (2004), 188 O.A.C. 201

COURT FILE NO.: 02-GD-53338

DATE: January 26, 2007

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
JAMES DINSMORE & BARBARA DINSMORE	)))	Raymond G. Colautti and Owen D. Thomas, for the Plaintiffs
	)	
Plaintiffs	)	
	)	
- and -	)	
	)	
	)	
SOUTHWOOD LAKES HOLDINGS LTD., MASTERPIECE HOMES (1997) LTD., THE CORPORATION OF THE CITY OF WINDSOR and the ONTARIO NEW HOME WARRANTIES PLAN	))))))))	Gino Morga, Q.C., for the Defendant Southwood Lakes Holdings Ltd. and Masterpiece Homes (1997) Ltd. Montgomery Shillington for the Defendant Ontario New Home Warranties Plan No one representing the Defendant the Corporation of the City of Windsor
	)	
Defendants	))	
	)	
	)	**HEARD:** Written submissions

Brockenshire J.

COSTS DECISION

[1] This action was tried in May of 2006. The 40 page long reserved judgment was released July 12, 2006. At the end I asked counsel, if the issues of costs and pre-judgment interest could not be resolved, to make submissions to me. I have now received submissions from Mr. Morga, counsel for Southwood and Masterpiece, from Mr. Shillington, counsel for the Ontario New Home Warranty Program, and from Mr. Colautti, counsel for the plaintiffs.

[2] The claim herein related to a damp basement in a new townhouse purchased from, and constructed by the defendants Southwood and Masterpiece. The purchase was completed in 1997. There was no question but that there was dampness in the basement, and that the basement floor was not as thick as it should have been under the Building Code provisions. The issue was how the defects should be dealt with. The evidence, which I accepted, was that Southwood and Masterpiece, with the help of their co-defendant the Warranty Program, had tried to negotiate or mediate these issues. However, despite the input from a number of experts, differences of opinion continued to exist through to the end of the trial, when plaintiffs counsel sought $200,000, and counsel for the developers suggested $20,000 was more appropriate.

[3] I ordered damages of $29,700. I concluded that the damages should be assessed as of 2004, when the reasonableness of using sealants on the floor had been confirmed. My

award covered the estimated costs of sealing the floor, removing standpipes various engineers had put through the floor, putting clay plugs in the utility trenches, grading the lot away from the foundation walls, pumping out standing water under the basement floor, and $14,000 for engineering investigations prior to litigation. I dismissed the claims for loss of enjoyment of life, emotional upset, reduction in the resale value of the home, and for aggravated and punitive damages.

[4] I now find that the defendants Southwood and Masterpiece had made settlement offers of $20,000 on January 31, 2005 and $30,000 on April 26, 2006. The defendant Warranty Program offered to let the plaintiffs off without costs if they dismissed against it on April 11, 2003, and then on May 3, 2006 offered to contribute a $15,000 payment to the plaintiffs as part of any global settlement of the proceedings.

[5] I find that although the earlier offers by both defendants were individual, the later offer of $30,000 on behalf of the developers was a general offer to settle this proceeding , which generality was fleshed out by the later offer to contribute $15,000 from the Warranty Program. Mr. Morga argued in his submissions that the damages of $29,700 were substantially less than the combined offer, and the provisions of rule 49.10 should apply. Mr. Colautti, for the plaintiffs, argues however that costs and pre-judgment interest should be added to the plaintiffs judgment, and that the totality of damages, costs and interest would greatly exceed the $45,000 offered.

[6] The statement of claim claimed general and aggravated damages, punitive damages, costs, and interest. All of those claims were alive through the trial. The offer to settle of the builders was to pay $30,000 on account of all claims . The offer of the Warranty Plan was to contribute a $15,000 payment to the plaintiffs as part of any global settlement of the proceedings. That offer further provided terms that all parties to the proceedings would exchange mutual releases, and that the action, cross-claims and third party claim would be dismissed without costs. Clearly the offer was not to settle the damage claims only. The offer was on an all in basis, to absolutely end the action, including the continuance of any claims for pre-judgment interest, costs and disbursements. It is clear from the detailed dockets of plaintiffs counsel that by May of 2006 the plaintiffs claim for fees and disbursements, and indeed for disbursements alone, because a lot of the investigative engineering work was done early, would, when added to the damage award, bring the figure well over the $45,000 offered.

[7] I therefore find that the offers, and Rule 49, have no effect on the cost issues before me.

[8] Further, Mr. Morga raises an issue under rule 76.13, namely that this action proceeded to trial under the ordinary procedure, the monetary judgment was less than $50,000 and therefore, under rule 76.13(3), the plaintiff cannot recover any costs unless the court is satisfied that it was reasonable for the plaintiff to have commenced and continued the action under the ordinary procedure.

[9] This was an action seeking general damages, including the cost of remedying an admitted problem with the townhouse basement, which the plaintiffs experts put at well over $50,000, plus general, aggravated and punitive damages. The issue of Rule 76 was not raised before me during the trial. In the circumstances I do not think it was unreasonable for the plaintiffs counsel to have commenced and continued this as an ordinary action. I therefore do not see rule 76.13 as being an issue when dealing with these cost claims.

GENERAL COMMENT ON QUANTUM

[10] This action started with a claim for $350,000 for breach of contract and negligence, and $150,000 for punitive damages. It ended with a judgment for $29,700 for damages against the builders, a complete dismissal of the claim for punitive damages, and a dismissal of the action as against the Warranty Program. Plaintiffs counsel have put forth a claim for $148,464.50 in fees plus $45,403.40 in disbursements plus GST of $11,611.85, totalling $205,479.75 on a substantial indemnity basis. Mr. Morga, for the builder, claims fees of $86,700 plus disbursements of $5,184.64 plus GST of $6,414.21, totalling $98,299.75, on a substantial indemnity basis. Mr. Shillington, for the Warranty Program, claims fees of $67,424.25 plus disbursements of $27,027.61, plus GST of $6,583.55, totalling $101,035.41 on a substantial indemnity basis.

[11] I do not know whether bills in those amounts have actually been given to, and paid by the respective clients. Even if they had been, it would seem to me that in this case the principle of indemnity under rule 57.01 would be completely overridden by the principle of the consideration of what an unsuccessful party could reasonably expect to pay. I am very mindful of the statements in *Boucher v. Public Accountants Council* 2004 CanLII 14579 (ON C.A.), (2004), 71 O.R. (3d) 291 (C.A.) to the effect that the fixing of costs does not begin or end with the calculation of hours times rates since the overall objective is to fix an amount that is fair and reasonable, having regard to the broad range of factors in rule 57.01, for the unsuccessful party to pay, rather than an amount fixed by the actual costs incurred by the successful party.

[12] I am also cognizant of the statement, quite telling in this case, of Madam Justice Feldman in the Court of Appeal, in paragraphs 36 through 39, of *Amherst Crane Rentals Ltd. v. Perring* 2004 CanLII 18104 (ON C.A.), (2004), 241 D.L.R. (4th) 176, 187 O.A.C. 336 (C.A.). This involved an application by a creditor against a bankrupt estate, and so presumably did not involve all of the procedural work that goes into an ordinary action. However, the claim included one for $1.27 million in life insurance, as well as a claim for over $50,000 of RRSP proceeds. The application judge awarded fees of $30,000. In the Court of Appeal Madam Justice Feldman noted that the claim for life insurance was abandoned shortly before the hearing, and so should not have counted directly in fixing the amount of costs and that:

> the first factor to be taken into account in considering the appropriate amount to award for costs is the amount in issue. The rule reflects the principle that the cost must be commensurate with the value of the lawsuit to the parties.

She therefore concluded that the $30,000 award constituted an error in principle, and reduced the award to the estate, against the unsuccessful applicant, to $15,000. This was in a case where, as the court noted in the first paragraph, the issue of the proper treatment of RRSP proceeds following the death of the owner was being addressed for the first time by the Court of Appeal.

[13] Here, the townhouse was purchased for $177,000. It, and many others in the same development, were constructed on a production basis, in which it was anticipated that there could and would be problems, which the builders would rectify on a systematic basis. Although some years went by trying to determine exactly why this basement was damp, and in determining definitively what would fix the dampness and what if anything had to be done about the basement slab not being as thick as it should have been, I fail to see why anyone, at any stage in this proceeding, would see it as justifying legal bills in the amounts that have now been presented. Further, while uncertainty continued for many years as to why the problem existed and precisely what to do about it, it seemed clear to me at trial that the reports of Construction Control Inc., the last of which was billed out in February of 2005, left the plaintiffs with an uphill battle to try to recover anything anywhere close to the plaintiffs estimate of their damages. Unfortunately this action was not settled, and the evidence at trial indicated it was not for lack of trying by both the builders and the home warranty plan.

THE COST CLAIM OF THE HOME WARRANTY PLAN

[14] The position of the Plan from the beginning was that it had no direct responsibility at all to the plaintiffs. It would have been directly involved if the builders absconded, could not pay for repairs, or refused to carry out appropriate repairs. None of these happened. While it might have made some sense, as a precaution and for tactical reasons, to have involved the Plan in the beginning, it seemed to me there was little point in holding the Plan into the action until the bitter end. In fact the Plan, through the experts it retained, provided the answers to the issues that I accepted. The claims made against the Plan by the plaintiffs of negligence, failure to fulfill statutory duties, offending community standards, and of acting in a high handed and insulting manner were not supported by the evidence, and in my view would have, at the discovery stage, been found to be obviously baseless.

[15] The Plan succeeded completely at trial, with all claims against it being dismissed.

[16] Mr. Shillington claims firstly for costs throughout on a substantial indemnity basis. He indicates an hourly rate of $157.50, a special reduced rate for this client, until April of 2006 when it increased to $171. Other counsel have not objected to those rates and neither do I. However, the general entitlement of a defendant who succeeds at trial is to costs on a partial indemnity basis. Mr. Shillington argues that the allegations of improper conduct, above referred to would raise this to entitlement to substantial indemnity costs. I do not agree. As above indicated, it seems to me that it would have been clear very early in the game that the plaintiffs had nothing to substantiate those allegations except personal, and unsupported, perceptions of entitlement and of being somehow wronged.

[17] I accept most of the number of hours docketed by Mr. Shillington. A lot of time was spent with his experts, but as above indicated that was time well spent. My concerns are with the preparation time and trial time that was docketed. I do not doubt that the hours recorded were actually spent in connection with this case. However, I see that while Mr. Shillington docketed 121 hours in trial preparation, Mr. Morga, who had in my view a more difficult case, docketed only 63 hours for trial preparation. Mr. Shillington docketed 160.3 hours for attending at trial and preparation during trial. Mr. Morga docketed only 140 hours. I appreciate Mr. Morga has many more years of trial experience, but here, in my view, he had the more difficult case. I also appreciate Mr. Shillington would have had considerable travel time included in his amounts, but the usual practice is to bill travel time at half rates. My conclusion is that Mr. Shillington s preparation time should be reduced by 30 hours, at $157.50, and his trial time by 15 hours at $171.00. Those deductions, at 60% of the substantial indemnity basis would total $4,374, bringing his partial indemnity fees, claimed at $40,454.55, down to $36,080.55, with the GST thereon to be $2,525.64. The total, which I fix as partial indemnity costs is $38,606.19.

[18] His taxable disbursements total $26,626.61, with GST of $1,863.86 plus non-taxable disbursements of $401. The principle disbursements were to his experts from Construction Control Inc., for reports and witness fees of over $16,000. Other counsel have not objected to that and as they had to be brought in from Toronto, repeatedly, I do not either. Mr.

Shillington himself claims for mileage and 16 nights in a hotel in Windsor. Other counsel did not raise the question of why out of town counsel was retained to defend this action. In my view, if one sues a governmental or quasi governmental agency, it would be reasonably expected that counsel from out of town would appear and I accept the disbursements as put forth, which together with GST total $28,891.47. The resulting total of fees and disbursements would be $67,497.66.

COST CLAIM OF THE BUILDERS

[19] Mr. Morga presented bills of cost prepared on a substantial indemnity and partial indemnity basis, as well as bills of cost based on Rule 49.

[20] The arguments in relation to Rule 49, and rule 76.13 have been dealt with above.

[21] Additionally, Mr. Morga argued that the builders should have costs from the commencement of this action because the plaintiffs failed to mitigate, failed to cooperate with the defendants to find solutions to their problems, elected a significantly more expensive trial procedure, and made serious allegations of improper conduct against he builders.

[22] I have commented above on the reasonability of proceeding with an ordinary action, and the obvious impossibility of the plaintiffs succeeding on their allegations of impropriety and wrongdoing. The figures of the plaintiffs to proceed on their own to do repair work, should not reflect on their claim for costs, but is a factor I will consider later re the claim for interest. It seems to me, with the advantage of hindsight, that it was indeed unfortunate that the plaintiffs did not come to some co-operative agreement with the builders to remedy their problems. However, I know of no principle of law which would require a person, alleging to have been wronged, to cooperate with the alleged wrongdoer, or suffer cost consequences.

[23] I find that the builders are not entitled an award of costs against the plaintiffs.

COST CLAIMS OF THE PLAINTIFF

[24] Plaintiffs counsel filed, as a bill of costs, a detailed list of disbursements, and a complete listing of all docketed hours by everyone in the law firm that was involved with the file. The total fees claimed, at rates ranging from Mr. Colautti s at $350 per hour to law students and clerks at $60 per hour is $148,464.50. No attempt was made to group the hours spent into the usual recognizable items in litigation, as both Mr. Morga and Mr. Shillington had done. However, a cursory examination of the detailed dockets would indicate that most of the work done on the file was by Mr. Colautti and Mr. Thomas. Mr. Colautti has over 29 years of experience. Mr. Thomas has nine, and claims fees of $200 per hour. It appears that in the preparation for trial, as well as the trial itself, Messrs. Colautti and Thomas worked together, so that at that time the client was purportedly being billed $550 per hour, plus, at trial, disbursements of some $1,635 to a Catherine Colautti for clerical assistance . For a case which I found in the end was worth less than $30,000, this is massive overkill.

[25] I have no intention of going through, in detail, what appears to be over 20 pages of dockets. The case law is replete with statements that a trial judge is called upon to fix costs, not to assess costs. I would however observe that this is the sort of case which I would expect would be handled by one lawyer, so that generally time docketed for discussions between various lawyers in the law office should be excluded. So should repeated administrative actions between law students, clerks, etc., which in my view should be treated as simple office overhead and not billed out to the client, much less to opposing parties. As an example, I note with interest an entry of October 18, 2004 for office conference with Mr. Colautti in efforts to locate file and bring downstairs and instructions received to prepare settlement conference brief . This was billed out at .4 hours by Pat Boyd, apparently a law clerk in the office, at $90 per hour. She later, after finding the file spent 12 hours to prepare a settlement conference brief.

[26] In my view, the overriding principles in a case such as this are those laid down in the two Court of Appeal decisions above cited. In addition to those, there are many decisions frowning upon billing for two counsel representing a party at trial, including recent ones under the grid system where only one counsel fee would be allowed. I feel it is commendable if a senior counsel takes on a case of this kind, and the Bench is grateful for the assistance of such counsel, but such counsel have to clearly understand that no one, including of course the trial judge, would expect such counsel to bill in a $30,000 case as he or she would in a $3 million case.

[27] *Amherst Crane Rentals, supra,* made clear that the legal costs have to be commensurate with the value of the lawsuit. In this case, I do not find the dockets filed by plaintiffs counsel to be helpful in arriving at a fair and proper figure. That is especially true here, where the plaintiffs lost against one defendant, but won against the builders, and the dockets do not distinguish between the defendants. What I find to be most helpful is the billing of Mr. Shillington. He worked at a special reduced rate, which I think would be appropriate in this case, he worked alone, and he had to deal, at least indirectly, with all of the issues raised in the case. He was completely successful in his position. Plaintiff s counsel were partially successful. I fixed Mr. Shillington s costs at just over $36,000. I see no reason why plaintiff s counsel should be entitled to more.

[28] For all of the reasons above listed, I conclude that plaintiffs counsel are not entitled to costs on a substantial indemnity basis, but are entitled to costs on a partial indemnity basis. I fix the partial indemnity costs of the plaintiffs, payable by the defendant builders, at $36,000. GST thereon would be $2,520, and the total for costs would be $38,520.

[29] Plaintiffs counsel filed a three-page list of disbursements, totalling $45,403.40, $337. dollars of which are indicated to be non-taxable. Some of them are obviously overhead expenses of the law office. I reject the computer legal searches, the lunches, miscellaneous expenditures during trial and the charges for clerical assistance at trial. I also disallow the fax charges, courier charges and long distance telephone charges. There is a charge of $2,147.50 for photocopies. For the purpose of fixing costs I simply reject $1,000 of that. I would accept the expert reports in full, except for that of Boscariol & Associates Limited, shown here as $14,152.35. In the damage judgment I awarded $14,000 on account of engineering work for Mr. Boscariol, and would deduct that $14,000 from the disbursements claimed here. Those deductions, on my account, total $18,721.89. When that is subtracted from the $45,403.40 claimed, I get $26,681.51. Three hundred and twenty-seven of that is shown as non-taxable. GST on the balance would be $1,844.12. The total allowed for disbursements is $28,525.62.

Prejudgment Interest

[30] Mr. Morga, in his submissions, argues that the court should disallow any prejudgment interest, as it is entitled to do under s.130(2) of the *Courts of Justice Act*. He argues that the defendants offered viable solutions to the plaintiff s problems that were unreasonably refused. They made a claim for half a million dollars and received a judgment for only 6% of that. The purpose of prejudgment interest is to compensate for the loss of the use of the money. Up to the trial the plaintiffs had not made any repairs. The damage award made by the court was based on the current costs of repair and not the cost at the time claim arose.

[31] Plaintiff s counsel argues that prejudgment interest should commence from the date the cause of action arose, October of 1997, at the then prevailing rate of 3.5%. The whole cause of the problem was faulty design, and faulty work by the builder s sub-trades. The builders admitted liability but failed to pay over, or pay into court at an amount appropriate to remedy the problem and had the use of those funds over a period of 8 years.

[32] The background history of this litigation, as it was unfolded before the court, was quite unusual. The builders admitted liability for the problem early on. However, their obligation was not to pay money it was to fix the problem. They immediately offered to tear out and replace the entire basement floor. The plaintiffs did not want that for personal reasons concern over dust etc., during the work. At the time the builders could have had the sub-trades who caused the problem, come back and replace the basement floor at minimal cost. The plaintiffs wanted a less intrusive repair, and the builders sought one out in the form of various sealants and floor coverings which the plaintiffs rejected. The plaintiffs then wanted the basement floor, and all of the partitions etc., they installed after they were aware of the problems replaced on a custom construction basis. The builders now did not now have the former sub-trades available and argued the plaintiff s proposal was out of line for a reasonable repair to the problem. During all of those negotiations, neither side knew exactly what caused the problem or what would solve it, but throughout the warranty s plan was indicating that if a builder s proposal did not work, the obligation would be on the builders to try again, with the warranty s plan backing up the cost of a second repair effort.

[33] In my view, during that entire negotiating period, although an action had been commenced sometime before, the claim had not turned into one for money. The plaintiffs did not put out any money of their own in attempting to get repair work done and the builders could not do anything because the plaintiffs would not let them into the home. When the reports of Construction Control Inc., had all arrived, the parties could or should, have seen the nature of the work required to remedy the problem, and could quantify the reasonable cost thereof. I would fix the date for this as January 31, 2005, by which time the final report of the Engineers was on hand.

[34] I find in the special circumstances of this case that prejudgment interest should not start to run until February 1, 2005 and that it should run from that date to the reasonable date for judgment which I would fix as the end of July 2006 as my reasons issued on July 12th. The prejudgment interest should be at the rate for the first quarter of 2005 which was 2.8%. The figure I get is $1,178.10.

Conclusion

[35] For the foregoing reasons I conclude that the plaintiffs are entitled to judgment against the defendant s Southwood Lakes Holdings Ltd., and Masterpiece Homes (1997) Ltd. for costs in the total amount of $67,045.62, made up of fees of $36,000.00, disbursements of $26,681.51 and the applicable G.S.T. thereon. The plaintiffs are also entitled to judgment against those defendants for prejudgment interest in the amount of $1,178.10.

[36] The defendant the Ontario New Home Warranty s Plan is entitled to judgment against the plaintiffs for costs in the amount of $67,497.66 made up of fees of $36,080.55, disbursements of $27,027.61 plus applicable G.S.T.

[37] The claim by the builders for costs is dismissed.

(original signed by Brockenshire J.)

John H. Brockenshire, Justice

Released: January 26, 2007

COURT FILE NO.: 02-GD-53338

DATE:

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

JAMES DINSMORE & BARBARA DINSMORE

Plaintiffs

- **and**

SOUTHWOOD LAKES HOLDINGS LTD., MASTERPIECE HOMES (1997) LTD., THE CORPORATION OF THE CITY OF WINDSOR and the ONTARIO NEW HOME WARRANTIES PLAN

Defendants

COSTS DECISION

Brockenshire J.

Released: January 26, 2007

Appeal

Dinsmore v. Southwood Lakes Holdings Ltd., 2008 ONCA 689 (CanLII)

Related decisions

- **Superior Court of Justice**

CITATION: Dinsmore v. Southwood Lakes Holdings Ltd., 2008 ONCA 689
DATE: 20081010
DOCKET: C45801
COURT OF APPEAL FOR ONTARIO
O Connor A.C.J.O., Simmons and Lang JJ.A.
BETWEEN:
James Dinsmore and Barbara Dinsmore
Plaintiffs (Appellants)
and
Southwood Lakes Holdings Ltd., Masterpiece Homes (1997) Ltd., The Corporation of the City of Windsor and the Ontario New Home Warranty Program
Defendants (Respondents)
Raymond G. Colautti, for the appellants
Gino Morga, Q.C., for the respondents Southwood Lakes Holdings Ltd. and Masterpiece Homes (1997) Ltd. and Montgomery Shillington, for the respondent Ontario New Home Warranty Program
Heard: October 6, 2008
On appeal from the judgment of Justice John Brockenshire of the Superior Court of Justice dated February 7, 2007.

By The Court:

[1] In 1997, the appellants purchased a townhouse built by Southwood Lakes Holdings Ltd. and Masterpiece Homes (1977) Ltd. (the builders) for $177,000. After taking possession of their new home, the appellants noticed dampness on the basement floor, which raised concerns about potential drainage problems. After investigation, the builders acknowledged that the cement slab in the basement did not meet the depth requirement of 3 inches specified in the *Ontario Building Code*, but did not agree with the appellants regarding the alleged drainage problem. The issue became how to resolve the problem.

[2] Following a series of failed negotiations between the appellants, the builders, the respondent Ontario New Home Warranty Plan (the Plan), and representatives of the City of Windsor, the appellants commenced this action in February, 2002, claiming general and aggravated damages of $350,000 for breach of contract and negligence and $150,000 in punitive damages.

[3] After almost three weeks of trial, the trial judge ordered the builders to pay the appellants damages in the amount of $29,700 for breach of the express and implied terms of the building contract and for breach of the builders warranty. The trial judge assessed damages on the basis that a reasonable course of action would be to treat the basement floor with a specific sealant and topping, obtain an engineer s certificate confirming effective compliance with the *Ontario Building Code*, re-grade some of the lands sloping towards the house, and install clay plugs in the service trenches of the sanitation system.

[4] The trial judge dismissed the claim against the Plan, finding that the appellants refused a reasonable solution offered by the builders despite assurances that the new work would enjoy an extended warranty under the *Ontario New Home Warranties Plan Act* (the Act).

[5] On appeal, the appellants do not directly challenge the trial judge s findings of fact. Rather, they allege that the trial judge made errors of law that affected his perception of the evidence. These errors include the appellants arguments that the trial judge erred in his application of the principles of mitigation by failing to appreciate that the appellants were not required to accept a solution that contained a risk of failure; by failing to recognize that the proposed solution did not meet the minimum requirements of the *Ontario Building Code*; and by failing to consider that the warranties provided by the Act guaranteed that there would be no water penetration for two years.

[6] In support of their argument that the sealant solution impermissibly failed to foreclose any risk of recurrence of the dampness, the appellants rely in part on two letters written to them early in the dispute by Fabrice Forte to the effect that the sealant would not work. However, Mr. Forte testified at trial that the sealant would work. Mr. Forte explained the content of his earlier letters to the appellants, and his refusal to provide them with a quote or guarantee about the sealant solution, on the basis that he did not want to be involved with Mr. Dinsmore. The trial judge accepted Mr. Forte s explanation and his evidence that the sealant and topping would provide an effective solution. Moreover, there was other expert evidence that the sealant solution would solve the problem.

[7] In our view, the appellants other challenges about the risk factor, including the evidence about the neighbour s attempts with a sealant, also amount to no more than challenges to the trial judge s factual findings. In our view, the trial judge s factual findings were supported by the evidence.

[8] The appellants also argued that the sealant solution was unacceptable because it did not result in a slab that was 3 inches thick, exclusive of the topping, or meet the *Ontario Building Code* requirements for drainage. However, the City undertook a complete investigation of the drainage and was satisfied that it complied. It was also satisfied that the proposed sealant and topping provided satisfactory and substantial compliance with the *Ontario Building Code*.

[9] Finally, the trial judge did not fail to consider the warranties provided by the Act. He found the builders liable in part based on breach of those warranties. In fact, the builders admitted such liability.

[10] Next, we see no error in the trial judge s approach to the liability of the Plan. The trial judge found that the builders were prepared throughout to implement a remedy recommended by their experts as well as those of the City and the Plan. The appellants refused to implement that remedy or allow entry so that the work could be done. The appellants continued to withhold their approval despite the assurance that the work would enjoy an extended warranty under the Plan. In these circumstances, we agree with the trial judge that ss. 14(2) and (3) of the Act provide the Plan with an answer to the appellants claim.

[11] The appellants raised two objections with respect to the trial judge s award of damages. First, they claim that the trial judge erred in failing to award general and non pecuniary damages for interference with lifestyle and for loss of enjoyment of life. We disagree. The trial judge found as a fact that any such damages suffered by the appellants

were minimal and that, in any event, the appellants actions contributed to any such damages. We see no basis to interfere with these findings.

[12] The appellants also argued that the trial judge erred in failing to include in the damage award the full amount of the fees and disbursements for the experts retained by the appellants. We so no error in the trial judge limiting the amount of this award to the investigative pre-litigation expenses. The trial judge took the balance of the experts fees into account in his costs award.

[13] Finally, we do not accept the appellants ground of appeal regarding the detail sheet. The appellants failed to establish at trial that this document related to the specifications for their home.

[14] The builders cross-appealed the trial judge s costs award, arguing that the trial judge erred in failing to take into consideration the appellants election not to proceed under the simplified rules procedure and the respondents' offers to settle. The trial judge considered each of these matters. We see no error in his decision that neither point dictated a different result.

[15] Accordingly, we would dismiss the appeal and cross-appeal. We direct that the appellants pay the respondent builders costs fixed in the amount of $15,000 and the costs of the respondent Plan in the amount of $6,500, both amounts inclusive of disbursements and G.S.T.

RELEASED: October 10, 2008 DRO

D. O Connor A.C.J.O.

J. Simmons J.A.

S. E. Lang J.A.
