

Financial Services Flash

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Even Under a Contractual Right to Indemnification, Fees Must be Reasonable

By Brett Kenworthy and Daanish Samadmoten*

On June 6, 2014, Justice Brown of the Ontario Superior Court of Justice (Commercial List) released additional reasons¹ to his decision in *Romspen Investment Corp. v. 6711162 Canada Inc.*, 2014 ONSC 2781, centred on the cost submissions made by counsel to Romspen Investment Corp. (“Romspen”). Despite a contractual provision in a mortgage agreement that gave the applicant, Romspen, a right to full indemnity costs from the respondents, Justice Brown found that the legal fees incurred by counsel to Romspen were unreasonable. Justice Brown ordered that the legal fees be reduced to an amount of \$53,393.50 from the original amount of \$86,135 reflected in the Bill of Costs submitted by counsel to Romspen.

Justice Brown wrote in his decision, at paragraph 3, that “... a contractual right to costs of enforcement proceedings is subject to the court’s over-riding duty to ensure that costs awarded are fair and reasonable.” Justice Brown went on to explain that a party relying on a contractual term to seek an award of full indemnity costs must demonstrate that its costs are “reasonable full indemnity costs.”

Agreeing in part with the submissions of the respondents, Justice Brown found that all legal work performed for the benefit of Romspen was performed by senior counsel at a rate of \$535 per hour, including work that did not require the skill and experience of such senior counsel. Justice Brown identified that the principle of indemnification for fees, even indemnification pursuant to a contractual obligation, requires the appropriate delegation of work. Accordingly, Justice Brown reduced the entire amount of the costs eligible for indemnity by 10 per cent. Moreover, Justice Brown found that senior counsel’s claim of 33.9 hours for research into tests for the appointment of a receiver and granting of an initial order under the *Companies’ Creditors Arrangement Act* was excessive. He significantly reduced the indemnification for such fees, allowing only five hours of such costs to be paid by the respondents. Additionally, Justice Brown reduced fees of counsel to Romspen for the

preparation of reply materials, allowing only 15 hours of the 31.2 hours reflected in its Bill of Costs to be indemnified.

Bankruptcy and insolvency professionals should keep in mind that applications and motions for the appointment of a receiver will attract public scrutiny, as was discussed by the Court of Appeal for Ontario in *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851, as a receivership may deal with assets of creditors and stakeholders not party to the application for the appointment of the receiver. While these additional reasons of Justice Brown focus on fees of counsel in the context of the appointment of a receiver, and not in terms of costs in the context of an ongoing receivership, the court has again demonstrated that it will uphold its duty to ensure that costs awarded are fair and reasonable. Accordingly, regardless of any contractual obligation for the indemnification of legal fees, a bill of costs submitted to the court for approval must demonstrate that the costs incurred are fair and reasonable.

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¹ *Romspen Investment Corp. v. 6711162 Canada Inc.*, 2014 ONSC 3480.