COURT OF APPEAL FOR ONTARIO

CITATION: Fortress Real Developments Inc. v. Rabidoux, 2018 ONCA 686
DATE: 20180830
DOCKET: C63350

Doherty, Brown and Huscroft JJ.A.

BETWEEN

Fortress Real Developments Inc., Fortress Real Capital Inc., Jawad Rathore and Vince Petrozza

Plaintiffs (Appellants/Respondents in the Cross-Appeal)

and

Ben Rabidoux

Defendant (Respondent/Appellant in the Cross-Appeal)

Jeremy Devereux and Andrea Campbell, for the appellants/respondents in the cross-appeal

Gil Zvulony, for the respondent/appellant in the cross-appeal

Heard: June 27, 2017

On appeal from the order of Justice Andra Pollak of the Superior Court of Justice, dated January 11, 2017, with reasons reported at 2017 ONSC 167, 6 C.P.C. (8th) 373, and from the costs order, dated April 4, 2017.

Doherty J.A.:

A. OVERVIEW

[1] The appellants (sometimes collectively referred to as “Fortress”) sued the respondent, Ben Rabidoux, for defamation and breach of contract. Fortress alleged that Mr. Rabidoux made various defamatory comments about its

business operations and the personal appellants on his Twitter account. They further alleged that the comments breached an agreement that Mr. Rabidoux had made with the appellants in which he had promised to make no further comments about the appellants and their business operations. Fortress alleged that Mr. Rabidoux had agreed that if he breached the agreement, he would pay $10,000 for the legal costs incurred by Fortress in responding to Mr. Rabidoux's various allegedly defamatory comments.

[2] Mr. Rabidoux did not file a statement of defence. Instead, he moved for an order under s. 137.1 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 ("*CJA*"), dismissing Fortress's lawsuit.

[3] The motion judge found that Mr. Rabidoux's tweets that precipitated the lawsuit related to a matter of public interest, as that term is used in s. 137.1(3) of the *CJA*. She further held that Fortress had not satisfied her that the harm caused or likely to be caused to Fortress by Mr. Rabidoux's tweets was sufficiently serious that the public interest in permitting Fortress to proceed with its lawsuit outweighed the public interest in protecting Mr. Rabidoux's freedom of expression. Having determined that Fortress had failed to meet its onus under s. 137.1(4)(b), the motion judge dismissed the claims against Mr. Rabidoux.

[4] The motion judge, relying on s. 137.1(7), awarded costs to Mr. Rabidoux on a full indemnity basis in the amount of $129,106.61.

[5] There are three appeals before this court. Fortress appeals from the order dismissing its claims. If that appeal fails, Fortress seeks leave to appeal the costs order, arguing that costs should have been awarded on a partial indemnity basis. Mr. Rabidoux also seeks leave to cross-appeal the costs order. He submits that costs were correctly awarded on a full indemnity basis, but that the amount awarded does not constitute full indemnity, as it does not take into account HST or the costs arising out of an additional attendance before the motion judge.

[6] For the reasons that follow, I would dismiss Fortress's appeal from the order dismissing its action. I would grant leave to both Fortress and Mr. Rabidoux to appeal the costs order, but would vary the costs order only to the extent of adding HST.

B. THE FACTS

(i) The Parties

[7] Mr. Rabidoux operates his own "one-man" business. He provides market research and opinions to institutional investors and to various media outlets. Mr. Rabidoux focuses on the real estate market in Canada. In his affidavit filed on the motion, Mr. Rabidoux indicates that he is regarded as "a leading expert in Canadian housing and household credit trends". He holds the view that Canadian real estate is, generally speaking, overvalued and that some of those who promote certain kinds of real estate investments, such as some kinds of

syndicated mortgages, significantly underestimate the risks associated with those investments. In essence, Mr. Rabidoux sees the real estate investment market in Canada as overhyped and under-regulated.

[8] Mr. Rabidoux is not shy about expressing his opinions. He does so regularly through various forums, including his Twitter account. The evidence on the motion was that as of April 2016, he had about 3,880 followers. At least some of Mr. Rabidoux's followers are avid supporters. He and his supporters often retweet each other's tweets.

[9] The corporate appellants, Fortress Real Developments Inc. and Fortress Real Capital Inc., are in the real estate development business across Canada. They identify and develop large real estate projects, including condominiums and commercial properties. Their projects are mainly financed by large institutional lenders and by individuals through syndicated mortgage loans. Fortress also offers advice to other real estate developers.

[10] The personal appellants, Jawad Rathore ("Mr. Rathore") and Vince Petrozza ("Mr. Petrozza"), are senior officers and directors of the corporate appellants. They started the business together.

[11] Fortress operates a very successful business. Its projects are valued in the billions of dollars. At the time of the motion, Fortress had raised about $700 million in investments from syndicated mortgage loans.

(ii) The Tweets

[12] The alleged defamatory tweets were made in the course of an ongoing Twitter exchange between Mr. Rabidoux and his supporters on one side, and Fortress and its supporters on the other. Their exchanges have gone on for years. Many are referred to in the motion record. Some of the comments made by both sides take on the tone of what would be described in the sports world as "trash talk". Most of the tweets can be understood only by persons who are familiar with the prior Twitter exchanges and the subject matter of those exchanges. Some of the comments, coming from both sides, are sarcastic and seem more calculated to entertain or to embarrass than to enlighten.

[13] The Statement of Claim and the affidavits filed by both parties refer at length to many tweets between many parties going back to 2014. In the course of the proceedings, Fortress limited its claim for damages to tweets made by Mr. Rabidoux in December 2015 and early January 2016. The other tweets are offered as context for the tweets that are the subject matter of the claims.

[14] Mr. Rabidoux has expressed concerns about Fortress's marketing practices for some time, particularly as they relate to syndicated mortgages. In late September and early October 2014, he posted a series of tweets that attracted Fortress's attention.

[15] Fortress took these tweets to imply that it was misleading investors, or at least encouraging brokers to mislead investors on its behalf, and receiving improper payments from those brokers. Fortress also viewed one of the tweets as defamatory in that it compared Fortress's projects to "a product with Ponzi-like characteristics".

[16] Lawyers for Fortress wrote to Mr. Rabidoux demanding that he retract the statements he had made and not make any further such statements. After correspondence between counsel for Fortress and for Mr. Rabidoux, Mr. Rabidoux posted a retraction. In that posting, he "completely and without reservation" retracted "any and all" comments he had made about Fortress and promised not to repeat any of those comments. In exchange for the retraction, Fortress released Mr. Rabidoux from any further claims arising out of the comments.

[17] In February 2015, Mr. Rabidoux posted another set of tweets that again attracted Fortress's attention. These tweets made reference to an article that appeared in the Globe and Mail on September 10, 2014. The article referred to proceedings before the Ontario Securities Commission ("OSC") in 2011 and the British Columbia Securities Commission in 2014. Those proceedings related to the market manipulation of shares in the stock of OSE Corp., a small oil and gas exploration company. The proceedings had involved Mr. Rathore, Mr. Petrozza, a company they operated called Phoenix Credit Risk Management Consulting

Inc., and several other individuals. Clients of Phoenix had lost money investing in OSE Corp. Mr. Rathore and Mr. Petrozza, among other parties, had reached a settlement with the OSC in 2011 and agreed to make payments of over $3.3 million.

[18] Mr. Rathore and Mr. Petrozza regarded Mr. Rabidoux's comments as defamatory. In their view, he improperly implied, through selective and inaccurate references to the Globe and Mail article, that Mr. Rathore and Mr. Petrozza had been implicated in the market manipulation. According to Mr. Rathore and Mr. Petrozza, neither the Globe and Mail article nor the decisions of the respective securities commissions offered any support for that allegation.

[19] Once again, lawyers for Mr. Rathore and Mr. Petrozza contacted Mr. Rabidoux. They demanded an apology and an immediate retraction of his comments. They also served a libel notice on Mr. Rabidoux.

[20] In March 2015, Mr. Rabidoux agreed once again to publicly retract the impugned statements. He issued a retraction and an apology. He also indicated that he would not make any further "comments, suggestions, opinions or statements of any kind whatsoever about Messrs. Rathore, Petrozza or their businesses, subsidiaries, affiliates, directors, officers, employees, agents, representatives, business associates, partners, projects or in respect of any brokerage or EMD offering investment in any Fortress project in any forum."

[21] In his affidavit, Mr. Rabidoux indicated that he was afraid of being drawn into costly and drawn-out litigation. He elected to make the apology and promise in exchange for a release.

[22] In addition to the apology and retraction, Mr. Rabidoux agreed that if he breached his promise not to make further statements, he would pay damages of $10,000 “representing the legal fees incurred to date to address all of the defamatory comments made by [him]”.

[23] Mr. Rabidoux did not receive the promised release from Fortress until April 2016, about two months after this action was commenced.

[24] Mr. Rabidoux posted a third series of tweets in December 2015 and early January 2016. These are the allegedly defamatory tweets for which the appellants claim damages. These tweets did not refer specifically to Fortress or to the personal appellants. In the tweets, Mr. Rabidoux made sarcastic remarks about the impact of the downturn of the real estate market in Calgary on the value of real-estate-based investments in that city. Another tweet referred sarcastically to the suggestion, apparently made by unnamed sources, that the Winnipeg real estate market was attracting significant foreign investment. Fortress had substantial real estate projects in Calgary and Winnipeg.

[25] Mr. Rabidoux posted three tweets on December 13, 2015. In these tweets, he predicted that the OSC would soon assume responsibility for the regulation of

syndicated mortgage investments. He predicted that the OSC would “sla[m the] door on shadier operators”. The tweets went on to assert that some operators would be in immediate trouble with the OSC because they had previously been sanctioned by the OSC. Finally, Mr. Rabidoux tweeted, “all that’s assuming these guys don’t blow themselves up before that, which may very well happen”.

[26] Fortress alleged that, put in the context of Mr. Rabidoux’s earlier tweets, a reader would understand that the reference to “shadier operators” who had previous difficulties with the OSC was a reference to Mr. Rathore and Mr. Petrozza, who had been the subjects of the OSC proceeding in 2011. Fortress also alleged that the reader would understand that the reference in the third tweet to “these guys” was a reference to Fortress, Mr. Rathore, and Mr. Petrozza, and an assertion that Fortress’s developments could well fail in the near future.

[27] Fortress commenced this action in early 2016. It alleged that none of the representations or innuendo flowing from Mr. Rabidoux’s tweets were true. Fortress alleged that the assertions and implications defamed both Fortress and the personal appellants. Fortress further alleged that Mr. Rabidoux breached the March 2015 settlement agreement when he tweeted about the affairs of Fortress and the personal appellants in December 2015 and January 2016. Fortress claimed $150,000 in damages for defamation and $10,000 in damages for breach of the settlement agreement.

C. THE REASONS OF THE MOTION JUDGE

[28] The motion judge recognized that Mr. Rabidoux had the onus under s. 137.1(3) to demonstrate that the tweets that were the subject matter of the claims related "to a matter of public interest". If he failed to meet that onus, his motion had to be dismissed.

[29] After outlining the competing interpretations of s. 137.1(3) advanced by the parties, the motion judge adopted the broader interpretation set down by the motion judge in *Able Translations Ltd. v. Express International Translations Inc.*, 2016 ONSC 6785, 410 D.L.R. (4th) 380, aff'd 2018 ONCA 690. She concluded, at para. 21:

> I agree with the submissions of Mr. Rabidoux that, objectively considered, the subject matter of the communication as a whole relates to OSC violations, syndicated mortgages and condo developments in the context of the business of the Plaintiffs. Considered in their totality, a review of the Tweets that Mr. Rabidoux posted which are alleged to be defamatory and in breach of the settlement agreement in the Action can, in my view, be characterized as being matters of a "public interest".

[30] The motion judge then turned to s. 137.1(4) of the *CJA*. She indicated that s. 137.1(4)(a) put the onus on Fortress to show reasonable grounds to believe both that its claim had "substantial merit" and that Mr. Rabidoux had "no valid defence". She further noted, at para. 27, that s. 137.1(4)(b) also put the onus on Fortress to satisfy her that:

> The harm likely to be or have been suffered by the responding party [Fortress] as a result of the moving party's [Mr. Rabidoux's] expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression. [Emphasis omitted.]

[31] The motion judge appreciated that unless Fortress could meet its onus under both ss. 137.1(4)(a) and (b), she was obliged to allow the motion and dismiss the action against Mr. Rabidoux. The motion judge chose to proceed directly to a consideration of s. 137.1(4)(b). She did not consider s. 137.1(4)(a).

[32] In assessing the harm caused or likely to be caused to Fortress, the motion judge focused almost exclusively on the damages, if any, suffered or likely to be suffered by Fortress. She concluded that Fortress provided no evidence of any specific damage that it suffered and no evidence to support any reasonable belief that the impugned tweets had harmed the business reputation of Fortress or of the personal appellants. The motion judge determined that, absent any evidence of damages, Fortress had failed to show harm that would warrant allowing its action to proceed. The motion judge did not consider the public interest, if any, in protecting the tweets in issue.

D. THE MAIN APPEAL

[33] Fortress raises two grounds of appeal. First, it argues that the motion judge interpreted s. 137.1(3) too broadly and without regard to either the appellants' established right to sue for defamation, or the kind of expression s.

137.1 was designed to protect. Fortress submits that the phrase “matter of public interest” in s. 137.1(3) must, as a matter of statutory interpretation, be read narrowly to minimize the interference with a plaintiff’s established right to seek compensation for damages arising from defamatory statements. Fortress further argues that the legislation is only intended to protect “responsible” and “legitimate” expression on matters of public interest.

[34] Second, Fortress submits that the motion judge erred in her interpretation of s. 137.1(4)(b). Fortress argues that the motion judge wrongly limited her harm assessment to evidence of specific damages suffered as a direct consequence of the impugned expression. Fortress further submits that the motion judge erred in failing to consider the nature of the public interest engaged in protecting the actual expression found in the impugned tweets. Fortress refers to the tweets as “insults or invective intended to harm the Appellants” with no real public interest value.

[35] Fortress submits that had the motion judge properly weighed the harm it suffered against the nature of the public interest served by protecting Mr. Rabidoux’s tweets, she would have concluded that Fortress suffered significant harm and that there was virtually no public interest in protecting the contents of the tweets. According to Fortress, the balance clearly favoured allowing its action to proceed.

(i) The Interpretation of Section 137.1(3)

[36] The meaning of the phrase "relates to a matter of public interest" in s. 137.1(3) was considered in *1704604 Ontario Ltd. v. Pointes Protection Association*, 2018 ONCA 685, at paras. 50-66 (released concurrently with these reasons). Like the motion judge, this court has opted for a broad reading of the phrase, consistent with the analysis in *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640. In *Pointes*, at para. 65, this court said:

> In summary, the concept of "public interest" as it is used in s. 137.1(3) is a broad one that does not take into account the merits or manner of the expression, nor the motive of the author. The determination of whether an expression relates to a matter of public interest must be made objectively, having regard to the context in which the expression was made and the entirety of the relevant communication. An expression may relate to more than one matter. If one of those matters is a "matter of public interest", the defendant will have met its onus under s. 137.1(3).

[37] The arguments advanced by Fortress were considered and rejected in *Pointes*. I will, however, make brief reference to Fortress's principal argument.

[38] Fortress submits that s. 137.1(3) must be strictly construed because it restricts an individual's right to sue for defamation. Counsel refers to the well-known rule of statutory interpretation that explicit language is required to divest a person of existing rights: *Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 SCC 3, [2004] 1 S.C.R. 60, at para. 43.

[39] Section 137.1(3) does not restrict Fortress's right to bring an action for defamation. A finding under s. 137.1(3) that the expression in issue "relates to a matter of public interest" in no way prevents Fortress from pursuing its lawsuit. A finding that Mr. Rabidoux met his onus under s. 137.1(3) does no more than open the door to the two-pronged inquiry required under s. 137.1(4). The outcome of that inquiry determines whether Fortress's claim survives Mr. Rabidoux's s. 137.1 motion.

[40] Applying the analysis in *Pointes*, I read the tweets as intended to educate and caution the investing public about the risks associated with certain kinds of real estate-based investments. The identified risks include sudden downturns in the real estate market, false predictions of future investments, and "shady", inadequately regulated operators who understate the risks associated with certain kinds of investments. In my view, alerting the investing public to risks associated with the purchase of certain products in the public marketplace is a matter of public interest.

[41] I see no error in the motion judge's determination that the tweets related to a matter of public interest.

(ii) The Public Interest Analysis Under Section 137.1(4)(b)

[42] The operation of s. 137.1(4)(b) is considered in *Pointes*, at paras. 85-101. Fortress submits that, under s. 137.1(4)(b), it is required only to show "grounds to

believe" that the harm it has or will suffer because of the tweets is sufficiently serious to make the public interest in allowing its claim to proceed outweigh the public interest in protecting Mr. Rabidoux's freedom of expression. This submission misreads the section. The phrase "grounds to believe" appears in s. 137.1(4)(a) and not in s. 137.1(4)(b). Under s. 137.1(4)(b), Fortress must satisfy the judge that the harm it has suffered or is likely to suffer is "sufficiently serious" that the public interest in allowing Fortress to vindicate that harm through litigation outweighs the public interest in protecting the expression in issue. The word, satisfy, connotes the usual balance of probabilities standard.

[43] I agree with the submissions of counsel for Fortress that the motion judge's "public interest" analysis is deficient in certain respects. In my view, however, the motion judge correctly focused on the evidence of damages when considering what harm Fortress had shown that it had suffered or was likely to suffer as a result of the tweets. As explained in *Pointes*, at para. 88, harm under s. 137.1(4)(b) will usually be measured primarily, although not exclusively, by reference to monetary damages, special or general, suffered by the plaintiff as a result of the defendant's expression.

[44] The motion judge considered Mr. Rathore's evidence (adopted in Mr. Petrozza's affidavit) that Fortress, as well as he and Mr. Petrozza, had suffered damage to their reputation as a result of the tweets and that the tweets may have had a negative impact on Fortress's business fortunes. The motion judge was not

impressed with the evidence, mostly because it consisted almost entirely of Mr. Rathore's unsubstantiated opinion as to the effect of the tweets. I cannot say the motion judge was wrong in her assessment of this evidence.

[45] I also agree with counsel for Fortress that the motion judge should have considered potential general damages. Counsel correctly notes that general damages are assumed in libel cases: see *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 164; *Grant v. Torstar Corp.*, at para. 28. Those damages, however, may be nominal: see Raymond E. Brown, *Defamation Law: A Primer*, 2d ed. (Toronto: Carswell, 2013), at p. 321; Raymond E. Brown, *Brown on Defamation: Canada, United Kingdom, Australia, New Zealand, United States*, loose-leaf, 2d ed., vol. 8 (Toronto: Carswell, 1999), at pp. 25-46 to 25-48.

[46] Had the motion judge considered general damages in assessing the potential harm to Fortress, nothing in the motion record would support anything more than nominal general damages. As Mr. Rathore's cross-examination and some of the tweets from Fortress executives demonstrate, Fortress regards Mr. Rabidoux to be an inconsequential lightweight with no influence in its investment world. Mr. Rabidoux is treated more as a noisy irritant than a threat to Fortress's business or reputation. To the extent that the record offers any insight into the reach of Mr. Rabidoux's opinions concerning Fortress, that reach seems confined to persons who already share Mr. Rabidoux's views. A consideration of the

potential general damages flowing from the tweets would add little to the monetary harm caused or likely to be caused to Fortress.

[47] Counsel for Fortress submits, once again correctly, that the motion judge failed to consider its contract claim in assessing harm caused to Fortress. Fortress argues that the December 2015 and January 2016 tweets clearly breached the March 2015 agreement and that under the terms of the agreement, Mr. Rabidoux had agreed to pay $10,000 in damages. Fortress contends that the motion judge should have considered both the monetary consequences of the breach of the agreement, and the harm caused to Fortress's reasonable expectation that concerns about any future litigation with Mr. Rabidoux had been ended by the agreement. As observed in *Pointes*, at para. 89, a reasonable expectation of finality in litigation is an interest that warrants protection when considering harm to a plaintiff under s. 137.1(4)(b).

[48] However, a review of the language used in the agreement crafted by Fortress and signed by Mr. Rabidoux strongly indicates that Fortress was seeking much more than finality in litigation when it drafted this agreement. The agreement prohibited Mr. Rabidoux, under threat of a $10,000 penalty, from saying anything "of any kind whatsoever" about Mr. Rathore, Mr. Petrozza, or any of their businesses, projects, or investments. The agreement demanded total silence from Mr. Rabidoux on all business matters relating to Mr. Rathore and

Mr. Petrozza, regardless of the nature or content of any comment Mr. Rabidoux might make.

[49] The sweeping nature of the language in the agreement, and the requirement that Mr. Rabidoux pay $10,000 for any breach – regardless of whether the breach caused any harm – strongly suggests that this agreement was designed more to silence Mr. Rabidoux than to gain any finality for Fortress in relation to potential litigation with Mr. Rabidoux. Indeed, the terms of the agreement all but guaranteed further litigation unless Mr. Rabidoux found a different line of work or changed his opinions.

[50] The “gag” Fortress tried to place on Mr. Rabidoux by the terms of the agreement speaks to the potential damage done to the public interest in protecting Mr. Rabidoux’s freedom of expression if Fortress’s claim were allowed to proceed. By advancing a claim under the agreement, Fortress seeks to exclude Mr. Rabidoux from any public discourse relating to Fortress and its principals. In my view, that consequence sits firmly on the side of the public interest analysis in s. 137.1(4)(b) that favours Mr. Rabidoux’s position.

[51] Nor do I accept Fortress’s submission that the tone and content of the impugned tweets render them unworthy of any public interest protection. In keeping with the medium and the intended audience, the tweets are conclusory and, in some respects, sarcastic. There is, however, no basis upon which to

conclude that they are deliberately false or were intended to mislead. While the subject matter and tone may disentitle Mr. Rabidoux from claiming any special or added public interest in the expressions, the tweets retain the inherent value that most expressions on matters of public interest have: see *Pointes*, at para. 93.

[52] In summary, while the motion judge's public interest analysis was not as fulsome as it should have been, my analysis arrives at the same result. Fortress failed to show that the harm caused or likely to be caused to it by the impugned tweets is "sufficiently serious" to outweigh the public interest in protecting Mr. Rabidoux's right to freedom of expression.

[53] I would dismiss the main appeal.

E. THE COST APPEALS

[54] In their submissions on costs before the motion judge, counsel filed a document entitled "Costs Amounts Agreed by Counsel". It read:

Partial Indemnity:	$75,000 + HST
Substantial Indemnity:	$99,000 + HST
Full Indemnity:	$129,106.61 + HST

[55] The parties also agreed that in light of the motion judge's dismissal of the proceeding, s. 137.1(7) applied. It provides:

> If a judge dismisses a proceeding under this section, the moving party is entitled to costs on the motion and in the proceeding on a full indemnity basis, unless the judge determines that such an award is not appropriate in the circumstances.

[56] Fortress argued that it was appropriate in the circumstances to order that Mr. Rabidoux should have his costs on a partial indemnity basis. Mr. Rabidoux submitted there was no reason that he should not have his costs on a full indemnity basis, as provided for in s. 137.1(7).

[57] The motion judge, in a very brief endorsement, indicated that she agreed with Mr. Rabidoux's submissions. She held that:

> [T]he appropriate costs award should be on a full indemnity basis in the agreed to amount of $129,106.61 and I so order.

[58] The actual order reads:

> This court orders that the Plaintiffs shall pay to the Defendant costs of the motion in the amount of $129,106.61 *inclusive* of disbursements and HST. [Emphasis added.]

(i) Should Leave to Appeal be Granted?

[59] Fortress seeks leave to challenge the scale of costs awarded by the motion judge. Mr. Rabidoux seeks leave to challenge two aspects of the quantification of the costs ordered by the motion judge. Section 137.1(7) is a new provision that clearly takes a different approach to costs than is normally taken in civil proceedings. Both counsel have made submissions that have application

beyond the specifics of this case. I think this is an appropriate case to grant leave and offer some guidance on the operation of s. 137.1(7).

(ii) Section 137.1(7)

[60] Section 137.1(7) does two things. First, it creates a starting point for the motion judge's determination of costs when the defendant (moving party) has been successful in dismissing the action on a s. 137.1 motion. Section 137.1(7) directs that the motion judge start from the premise that the defendant should receive costs on both the motion and in the proceeding on a full indemnity basis.

[61] As counsel for Mr. Rabidoux argues, s. 137.1(7) and its companion provision in s. 137.1(8) are intended to impose cost consequences that will serve as a strong deterrent to SLAPPs and will encourage defendants to seek the quick termination of that kind of litigation by way of a s. 137.1 motion.[1]

[62] Section 137.1(7), however, goes on to confirm that the ultimate decision with respect to costs under s. 137.1(7), like the determination of costs generally, is a matter for the discretion of the judge. The presumed order of full indemnity costs to the defendant should not be made if "such an award is not appropriate in the circumstances".

[63] In my view, a motion judge, when deciding how he or she should exercise his or her discretion under s. 137.1(7), will be guided by the considerations that

[1] SLAPP refers to Strategic Lawsuits Against Public Participation.

guide the exercise of discretion with respect to costs in other civil proceedings. These include the factors identified in r. 57.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. They also include the overriding objective in any costs order that the award be fair and reasonable, having regard to all of the relevant factors including any applicable legislation: see *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.); *Neuberger v. York*, 2016 ONCA 303, 131 O.R. (3d) 143, at para. 17.

[64] In summary, s. 137.1(7) makes an important change to the starting point of the assessment of an appropriate costs order in cases to which the section applies. It maintains, however, the overriding judicial discretion to ultimately impose the order that is appropriate in all the circumstances.

[65] Fortress submits that the full indemnity costs provided for in s. 137.1(7) are reserved for those cases in which the motion judge is satisfied that the plaintiff has brought forward meritless litigation for strategic purposes. In effect, Fortress argues that a defendant should receive full indemnity costs under s. 137.1(7) only where the bringing of the action amounted to an abuse of process.

[66] The language of s. 137.1(7) offers no support for Fortress's narrow reading, nor does the legislative history of the provision. The language is clear. If the defendant is successful on the motion, the defendant should receive full indemnity costs, subject to the motion judge deciding that full indemnity is not an

appropriate award in the circumstances. The starting point is not predicated on the basis upon which the defendant succeeds on the motion.

[67] The motion judge, in determining whether the circumstances warrant an order other than costs on a full indemnity basis, will consider a variety of factors, including any determinations made under ss. 137.1(4)(a) and (b), any findings made as to the motivation of the parties, and the manner in which the parties have conducted the proceedings.

[68] While I do not accept Fortress's reading of s. 137.1(7), I also do not accept Mr. Rabidoux's submission that when the motion judge determines that the defendant should receive costs on a full indemnity basis, the amount awarded must reflect the amount that the defendant is "out of pocket". Even if costs are awarded on a full indemnity scale, those costs must be "reasonable full indemnity costs": *Romspen Investment Corporation v. 6711162 Canada Inc.*, 2014 ONSC 3480, 35 C.L.R. (4th) 193, at para. 3.

(iii) Did the Motion Judge Err in Awarding Costs on a Full Indemnity Basis?

[69] The motion judge's reasons are cryptic. It would appear that she agreed with Mr. Rabidoux's submission that Fortress had advanced "no reason to depart from the default cost provisions of the legislation": at para. 5. In the absence of any examination by the motion judge of Fortress's arguments, I propose to

address its submissions in this court on the merits rather than simply by reference to the reasonableness of the motion judge's ultimate assessment.

[70] For the reasons set out above, the fact that the motion judge did not find Fortress's claim to be meritless was no bar to an order for costs on a full indemnity basis. The motion judge did not address the merits of the claim because, on her analysis, Fortress had not shown any significant harm as a consequence of the alleged defamation. A defamation claim without any meaningful harm can be properly described as a technical claim.

[71] In the absence of any significant harm to Fortress, I think the inference can fairly be drawn that the litigation was brought to silence Mr. Rabidoux. The terms of the March 2015 agreement authored by Fortress add strong force to that inference. This lawsuit had the strong indicia of a true SLAPP. The full indemnity starting point for the assessment of costs established by s. 137.1(7) is intended to disincentivize this kind of litigation.

[72] Fortress also argued that Mr. Rabidoux unnecessarily complicated and lengthened the proceedings by introducing irrelevant and inaccurate allegations and material that improperly impugned the appellants' reputation. The motion record did, in some instances, go well beyond what was necessary for the proceeding. Each side aggressively pursued the other. To some extent, the litigation took on the same tone as the tweets that the parties had exchanged for

years. However, I do not think Mr. Rabidoux's conduct, any more than Fortress's conduct, lengthened the proceedings and resulted in higher costs.

[73] Having examined the arguments advanced by Fortress, I, like the motion judge, do not think Fortress has demonstrated that costs on a full indemnity basis is not the appropriate order in all of the circumstances.

[74] Mr. Rabidoux's cross-appeal can be dealt with in brief order. Mr. Rabidoux submits that he should have received costs in relation to an additional appearance that was required before the motion judge. The motion judge declined to order additional costs in respect of that hearing. In doing so, she exercised her discretion. There is no reason for this court to interfere.

[75] There is merit to Mr. Rabidoux's other argument. The amounts agreed upon by counsel in the document filed with the motion judge referred to costs "plus HST". The relevant paragraph in the motion judge's endorsement does not refer to HST. The order indicates that the amount is "inclusive of HST".

[76] I think the language in the order is a slip. The parties acknowledged in the document filed with the court that the amounts referred to in the document did not include HST, but that HST should be added to the amounts. The costs order should be varied to indicate that Mr. Rabidoux is entitled to full indemnity costs in the amount of $129,106.61 plus HST.

F. CONCLUSION

[77] I would dismiss Fortress's appeal from the order dismissing its action. I would grant leave to both parties to appeal costs, but would vary the costs order only to the extent of allowing HST on the amount ordered.

[78] Mr. Rabidoux should have his costs of the appeal on a partial indemnity basis. Taking into account his submissions on costs, I would fix those costs at $25,000, inclusive of disbursements and HST.

Released: "DD" "AUG 30 2018"

"Doherty J.A."
"I agree D.M. Brown J.A."
"I agree Grant Huscroft J.A."