

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: RON COLES HOLDINGS LTD.

Plaintiff

v.

THE CORPORATION OF THE TOWN OF MONO

Defendant

BEFORE: Belleghem J.

COUNSEL: R.S. Sleightholm, for the Plaintiff

Jeffrey J. Wilker, for the Defendant

ENDORSEMENT RE COSTS

The Application

[1] At issue in the present hearing is which, if either, party is entitled to costs, and on what scale, as a result of the settlement entered into between the parties.

The settlement specifically reserved the issue of costs to the court.

[2] Section 131(1) of the *Courts of Justice Act* reads as follows:

Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid. R.S.O. 1990, c. C.43, s. 131 (1).

[3] Rule 57.01(1) governs the exercise of the discretion referred to in s.131 and reads as follows:

Factors in Discretion

57.01 (1) In exercising its discretion under section 131 of the *Courts of Justice Act* to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,

- (a) the amount claimed and the amount recovered in the proceeding;
- (b) the apportionment of liability;
- (c) the complexity of the proceeding;
- (d) the importance of the issues;
- (e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
- (f) whether any step in the proceeding was,
 - (i) improper, vexatious or unnecessary, or
 - (ii) taken through negligence, mistake or excessive caution;
- (g) a party's denial of or refusal to admit anything that should have been admitted;
- (h) whether it is appropriate to award any costs or more than one set of costs where a party,
 - (i) commenced separate proceedings for claims that should have been made in one proceeding, or
 - (ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different solicitor; and
- (i) any other matter relevant to the question of costs. R.R.O. 1990, Reg. 194, r. 57.01 (1); O. Reg. 627/98, s. 6.

[4] Because the thrust of the plaintiff's argument that it is entitled to costs was that it "won" the proceedings, given the settlement reached, Rule 57.01(2) is arguably relevant, and reads as follows:

Costs Against Successful Party

57.01 (2) The fact that a party is successful in a proceeding or a step in a proceeding does not prevent the court from awarding costs against the party in a proper case. R.R.O. 1990, Reg. 194, r. 57.01 (2).

Background

[5] The plaintiff is a developer who entered into a development contract with the defendant municipality in July of 1989. Pursuant to the agreement, the

plaintiff paid the defendant \$100,000, which was to be used by the defendant as part of the cost of constructing a water storage reservoir to service the plaintiff's lands. The agreement between the parties did not contain a commencement date for construction of the reservoir. When the reservoir had not been started by 1999, this action was commenced by the plaintiff for return of the \$100,000 paid.

[6] Subsequent to the action being started, a number of events occurred, which I will detail later, which resulted in the parties entering into a settlement. The parties agreed that the \$100,000 with accrued interest would be returned, if the water tower, the ultimate object contemplated in the original agreement, was not constructed before November 30, 2004, subject to delays beyond the defendant's control.

[7] The plaintiff argues that the defendant may never have gotten around to building the water tower but for the plaintiff's lawsuit, and that the action, therefore, resulted in the decision to construct the water tower. The plaintiff argues that it, therefore, "won", and should be entitled to its costs.

[8] The defendant points out that there was never any time frame stipulated in the development contract for the construction of the water reservoir. It argues that it was only the intervening events, particularly the turnaround in the

economy, coupled with the utilization of the adjacent lands and the superimposition of regulations following the Walkerton Inquiry, that dictated the ultimate timetable, rather than the plaintiff's lawsuit. The defendant submits, therefore, that the defendant should be entitled to its costs for having had to defend the needless action against it, or alternatively, that neither party should recover costs.

Result

[9] For reasons which I will detail later, I find that there is indeed some merit to the plaintiff's argument - it may have "accelerated" the process. Nevertheless, I am more inclined to adopt the position of the defendant, that the water tower would likely have been slated for construction approximately around the time that the parties have now agreed that construction should take place, regardless of the pressure applied to the defendant by the plaintiff by bringing the action.

[10] While it is, therefore, arguable that the plaintiff "won", the extent to which the plaintiff required the defendant in this lawsuit to respond to the action, while the defendant was dealing with the larger issue of the development area, which would have resulted in the plaintiff getting what it asked for, (i.e. construction of the water tower), suggests that the bulk of the legal endeavours undertaken by both parties was, in the final analysis, unnecessary, but prompted by the

plaintiff's lawsuit. While it is arguable that the lawsuit "accelerated" this process, it was likely a "pyrrhic victory". The tower would likely have been built. In fact, post Walkerton, it was inevitable. The plaintiff would still have been required to contribute, perhaps even more, given the viability of an argument by the defendant that the post Walkerton regulations "frustrated" the original contribution agreement as to the amount required.

[11] In these circumstances, it would not be appropriate to penalize the plaintiff, or reward the defendant, or vice-versa, for the unnecessary work to which the plaintiff put the defendant in this lawsuit, regardless of the arguable merit in rewarding the plaintiff for getting the process "accelerated". In the end, I am satisfied that this is a proper case to deny both sides their costs. My reasons follow.

Analysis

[12] On July 13, 1989 the plaintiff and defendant, the Township of Mono, entered into an agreement respecting development of lands owned by the plaintiff north of Highway #9 and east of Highway #10. This was to be an industrial development.

[13] Part of the agreement required the plaintiff to deposit the sum of \$100,000 with the defendant. The agreement said that the money was to be

used by the Township “towards the cost of locating and constructing an off-site water storage reservoir” and was “to be paid before the commencement of construction of any of the roads and services”.

[14] The agreement did not provide for any specific date by which the reservoir was to be built.

[15] From 1989 to 1999 the owner asked the defendant when it was going to get around to constructing the reservoir. In 1999 the plaintiff wrote the Township asking for a return of its money with the accrued interest. According to the plaintiff, the defendant did nothing and the plaintiff therefore brought this action.

[16] Examinations for discovery were held and the action was ultimately set down for trial in 2001. The plaintiff argues that it was after the lawsuit was commenced, and particularly after the actual set down for trial, that the defendant eventually began producing documentation. Much of the documentation, the plaintiff argues, was produced by the Township shortly before each trial date. (It was originally scheduled for trial in September 2002, then May 26, 2003, not reached and then eventually came up December 1, 2003, by which time it had been settled.)

[17] The plaintiff, therefore, argues that it was its legal action that brought about the work by the Township. The Township, according to the plaintiff, never made any commitment to have the work done by any particular time until the settlement was entered into on November 24, 2003.

[18] To put the plaintiff's argument in perspective, some of the history referred to by the plaintiff is essential. For example, on March 22, 1989 the Township engineer wrote to the Ministry of the Environment in reference to the plaintiff's property and pointed out that "the Township has recognized that fire flows will not be available to the Cole development until the proposed water tower is constructed". Counsel pointed out that as of the date of the settlement there were fire hydrants without the pressure to operate them absent the water tower.

[19] Plaintiff's counsel points out that as of May 4, 1994, five years after the agreement, that the Township was advised that, "the availability of public water supply is a very major factor in the marketability of the property and the potential of having the property become active for some future use in providing jobs". However, at that stage the Township added that, "the system does not provide volume flows for fire protection and we are uncertain as to when that capacity might be available in the future". The issue was obviously an ongoing and live one.

[20] A month later, Mr. Cole expressed his timing concerns to the Township council, who took the position at that time that the plaintiff's \$100,000 contribution towards a water storage reservoir did not oblige the Township "towards the timing factor requiring this in the near future". It added that "a number of factors have changed", and that the fire protection would have to await development of adjacent property. Therefore, while the issue was an ongoing concern for the plaintiff, and one to which the Township was live, the Township was not intentionally dragging its feet, but rather attempting to address the larger issue of development which included, but was not exclusive to, the plaintiff's property.

[21] It should be noted that the plaintiff's \$100,000 contribution was only part of the total 1.3 million dollar cost of the water tower. The water tower construction would, of course, greatly enhance the value of the plaintiff's property, a fact, which as indicated above, was forefront in the mind of the plaintiff at that time, and not unknown to the Township, who was obliged to obtain funding from other developers as time went on, so as not to unduly burden all of the Township taxpayers in order to feed profit into the plaintiff's property. Part of the price to be paid by the developer, in addition to the \$100,000 to enhance his property value, was patience and perseverance.

[22] The development did not get final acceptance until 1994. By the time the examinations for discovery were held it appeared that there were only two buildings in the development. It could hardly be argued, therefore, that the plaintiff should have been required at that time to erect a water reservoir.

[23] The plaintiff argues that in August of 1996, i.e. seven years after payment, that the Township was letting the “Purple Hills” development go ahead without the requirement for additional storage. In fact, “Purple Hills” already had a water reservoir on its lands, which took up valuable space, while the plaintiff’s property did not, and was to be serviced from funds jointly submitted by other developers. The plaintiff’s property, in fact, was allowed to go ahead without fire protection in place.

[24] The Mono Township official plan required council to be satisfied that it had the necessary water flows for the Cole development, but the development of the system itself depended on the going ahead of the “Island Lakes” development. It is clear from the Township engineer’s letter of August 29, 1996 respecting “Island Lakes Estates”, that “Island Lakes” would be required to deliver its “proportionate contribution to the overall system”, which contribution would benefit not only “Island Lakes”, but also the plaintiff.

[25] It is notable that in August 2003 “Island Lakes” delivered a cheque for \$384,000, of which \$330,000 was a contribution to the water reservoir system. In fact, the only property that was allowed to go ahead without such a contribution was the “Stanrue” property, east of the plaintiff’s property, which had its approvals in place prior to the plaintiff. The plaintiff took the issue to the Ontario Municipal Board, who ruled against the plaintiff, while the Township, in accordance with its policy, did not take a position in the matter.

[26] As pointed out by defence counsel, the “Island Lake” development was the key to the entire development, including the need to build the water reservoir. Nevertheless, the plaintiff because of its approval in 1994, was able to start selling lots. However, while it was anticipated that the “Island Lake” development would “take off”, in fact a real estate recession kicked in in the mid 90’s and development slowed down.

[27] I accept the argument of counsel for the defendant, that the plaintiff was treated no differently than any of the other major developers in the area, who were interdependent upon each other for contribution to the mutually beneficial water tower storage system, which the Township has now given a timely commitment to build.

[28] The cost of building the tower according to the newer regulations was not something that could have been foreseen. However, as counsel points out, not only did a recession intervene, but the Walkerton Inquiry case impeded expeditious resolution of the plaintiff's concerns, by way of new restrictive and comprehensive regulations respecting the potability issue.

[29] The effect that the new regulations had on the "Purple Hills" water system precluded any ability to expand it.

[30] While the Province provided a grant program to assist municipalities in the situation that Mono found itself, post Walkerton, as pointed out by counsel getting the grant was a difficult process. The Province was not prepared to contribute to the water tower, even though the water tower would be replacing the "Purple Hills reservoir", which had become a concern post Walkerton.

[31] The municipality was faced, throughout the period in dispute, with obligations beyond those of the plaintiff. As defence counsel points out, from March 2002 through to the settlement of November 2003, the Township in its documents and action demonstrated many times that it was already committed to building the tower. The offers submitted by the Township set out reasonable construction timelines, given the difficulties faced by the Township as a result of the intervening recession and the Walkerton fiasco.

[32] The material filed before me demonstrates numerous actions which the Township had to take in order to arrive at the point where it was able to comply with all of the regulatory bodies. At the same time, Mono had to minimize the cost to its taxpayers, and honour its commitments to the developers.

[33] The Township was involved in obtaining easements, and expropriating and trading property, in addition to trying to obtain Ministry of the Environment certificate of approval. These activities were complicated by the need to shut down the “Purple Hills reservoir”, while doing what was necessary to get approval and funds for building the water tower. All of this was in turn complicated by having to deal with the “Hands” property, which required expropriation, property exchange, a severance and sale of unneeded land in order finally to obtain the water tower site.

[34] All of the steps to which I have referred, had to be taken in progression, i.e., “sequentially”, as the success of each one was dependent upon the completion of the one before. Many of the procedures, in turn, required public meeting as well as committee meetings, in addition to consultations with counsel, engineers, surveyors and other involved professionals.

[35] The certificate of approval for the water tower could not be applied for at the Ministry until the location of the site had been determined. The site could not

be determined until it had in fact been obtained, through the complicated process to which I have only fleetingly adverted to above. The criteria for acceptance, in turn, required geotechnical information.

[36] All of this was done in a “post Walkerton environment”.

[37] The plaintiff’s argument for costs rests on the theory that the Township would not have undertaken any of the work set out above, or would not have done it in as timely a fashion, absent the “prodding” of the Township by the plaintiff’s \$100,000 lawsuit. I have no doubt that this “prodding” was a painful annoyance to the Township, keeping in mind all of the other responsibilities it was addressing over the years leading up to the final approval and commitment to build. I am dubious, however, as to whether this \$100,000 lawsuit played any significant role in expediting the process to any great degree, let alone being the main catalyst for the Township’s action, as suggested by plaintiff’s counsel.

[38] The claim was issued in February 2000. The Walkerton fallout began the spring of 2000. By August 2000 regulations were promulgated under the *Ontario Water Resources Act*, which had a far greater impact on the Township than did the litigation before me, and which proceeded parallel with the Township effort to obtain the site and approval to build the tower.

[39] In addition, the real estate market had turned around, and developers were now prepared to contribute to the construction. Such was not the case in the mid 90's.

[40] As pointed out by defence counsel, there were only, as of the date of the settlement, five users on the plaintiff's property, and only 17 of the 20 lots had been sold as of the date of the examinations for discovery. All of the owners were commercial groups. I agree with counsel for the defendant that it was not the lawsuit that motivated the defendant but the renewed economic development and new regulations.

[41] The plaintiff attended many meetings throughout the 90's, on into the new century, leading to the final obtaining of approval for the tower. He was at all times aware of the difficulties which the Township was facing. At some point during the litigation, as defence counsel points out, the plaintiff should have accepted that the Township was committed to building the tower, but was not as yet in a position to commit to a particular time. As a result, much of the litigation, including a lot of the time spent in preparing, producing and discovering on the documents arising out of the tower project, was manifestly unnecessary. It would be unfair to require the defendant to pay for what, in the end, was arguably needless litigation.

[42] On the other hand, I have already, early on in my reasons, referred to the fact that the lawsuit provided but another impetus to the Township to get on with rationalizing the water system in the development area which included the plaintiff's property.

[43] The amount in dispute has always been the \$100,000 plus interest. The cost of the water tower is 1.3 million dollars. The construction of the tower would greatly enhance the value of the plaintiff's lands, probably far in excess of the amount in dispute.

[44] While the Township has always been liable to use the funds for the construction of the tower, and to construct the tower as soon as reasonably feasible, it always had to answer to more parties than the plaintiff.

[45] Some of the "Rule 57 factors" are relevant to the above analysis. The legal proceedings were themselves not inherently complex. However, the issues were important to both parties, and in particular, the need for "sequencing", was important to the defendant. While the speed with which the defendant carried out the project would no doubt impact upon the degree of benefit to the plaintiff, the defendant was obliged to follow a new complex set of regulations, and at the same time consider the plaintiff's interests in the context of the other developers

and, in particular, its taxpayers. The main economic beneficiaries of all of the actions undertaken by the defendants were the developers, including the plaintiff.

[46] I do not find in the conduct of the defendant anything that tended to shorten or lengthen unnecessarily the duration of the proceeding.

[47] None of the steps taken by either parties in the course of the litigation was “improper, vexatious or unnecessary”, or taken through “negligence, mistake or excessive caution”.

[48] I am unable to find any unreasonable denial of, or refusal to admit anything that should have been admitted, even on a timely basis.

[49] As a result, when I consider the factors suggested in Rule 57 to be taken into account in exercising the discretion under s.131 of the *Courts of Justice Act*, there is simply nothing that would warrant rewarding or penalizing either side in this litigation for the course that it has taken.

[50] The plaintiff may argue that it “won”, by getting a time commitment from the Township. On the other hand, the defendant may argue that it “won”, because the time commitment it gave was nothing more than a function of influences beyond that of added pressure put on by the plaintiff’s litigation.

[51] In truth, there is some merit to both positions.

[52] I am satisfied, upon consideration of all of the arguments advanced by counsel, that this is a proper case in which there should be no order as to costs. I order accordingly.

Belleghem J.

DATE: April 7, 2004

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ENDORSEMENT RE COSTS

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