

**FILE/DIRECTION/ORDER**

BEFORE JUDGE Nishikawa J.

ACTION # CV-19-618860

Heard May 27, 2019.

London Life Insur. Co + 12183763 Ont. Inc.  
Plaintiff(s)

-v-

Lloyd's Underwriters + Oliver + Bonacini 33 Yonge Ltd.  
Defendant(s)

CASE MANAGEMENT: YES [ ] NO []

COUNSEL: A. Gatensby PHONE NO. \_\_\_\_\_  
Carl PHONE NO. \_\_\_\_\_  
PHONE NO. \_\_\_\_\_

ORDER [ ] DIRECTION FOR REGISTRAR

[ ] REPORTED SETTLED ADJOURNED TO TRIAL SCHEDULING COURT \_\_\_\_\_  
[ ] NO ONE APPEARED ADJOURNED TO TO BE SPOKEN TO COURT \_\_\_\_\_

The Applicants commenced this application against the Respondents for a declaration that the Respondent Lloyd's has a legal obligation to defend the Applicants in the civil action commenced by Amber King (CV-15-526343) (the "Action"). The Applicants also sought a declaration that the Respondent O+B has an obligation to indemnify them pursuant to the terms of the lease between them.

May 30, 2019.  
DATE

Nishikawa  
JUDGE'S SIGNATURE

# FILE DIRECTION/ORDER - page 2 of 6

Court File Number: CV-19-618860

The Applicants also seek their legal costs to March 31, 2019, in defending the Action, for a total of \$39,330.33. As the Respondents have <sup>now</sup> ~~not~~ agreed to indemnify and defend, the only issue to be determined is the quantum of the reimbursement to which the Applicant is entitled.

The Applicant's position is that they are entitled to be reimbursed for the full amount of the costs to date. The Respondents oppose on the basis that: (i) they are not obligated to pay legal costs incurred before the Applicant gave notice of the claim; and (ii) the Applicant's costs to date are not reasonable. The Respondent relies upon the British Columbia Court of Appeal's decision in *Lloyds Underwriters v. Blue Mountain Log Sales Ltd.*, 2016 BCCA 352 to exclude coverage of "pre-tender" costs. In that case, however, the policy at issue contained a notice clause requiring prompt notice of any potential claim or litigation. There is no such clause in the policy here.

DATE: May 30, 2019

  
JUDGE'S SIGNATURE

# FILE DIRECTION/ORDER - page 3 of 6

Court File Number: CV-19-618860

As a result, the case is more akin to the decisions in Markham (City) v. Aetna Insurance Co., 2017 ONSC 3150 and College of Massage Therapists (Ontario) v. Frank Canon Co., (2010) OJ No 3264 (SCJ). In those cases, the Courts held that where there is an unqualified obligation to pay for the defence of claims covered by the policy, the insurer is required to pay all reasonable costs associated with the defence of those claims. The Respondent is thus required to pay the "pre-tender" costs to defend the claim as well as those incurred after notice was provided. As discussed by Ellis J. in Savage v. Beleogue, 2011 ONSC 5711, at para 3, the costs are awarded on a full indemnity basis, because they arise as a result of the breach of the insurance contract.

Similarly, the Respondent O+B is required to pay the Applicant's defence costs on a full indemnity basis. The obligation arises from the terms of the Lease between 121 and O+B, pursuant to which O+B agreed to indemnify and hold harmless the Applicant from "all claims of every kind and nature" including "all and every manner

DATE: May 30, 2019

  
JUDGE'S SIGNATURE

# FILE DIRECTION/ORDER - page 4 of 6

Court File Number: CV-19-618860

of costs, damages and expenses incurred "as long as the claim arises from the use and occupation of the leased premises."

Courts have interpreted such broad indemnification clauses as including ongoing litigation costs. *Stewart Title Guaranty Co. v. Peppieri*, [2009] OJ No. 329 at para 17 (SCJ).

On the issue of whether the costs incurred to date by the Applicants are reasonable, the question is not whether the

litigation could have been conducted differently or whether certain costs were unnecessary, but whether they are reasonable. The amount of \$39,330.33 was incurred over a period of three years during which the Applicants conducted various investigations leading to third party claims and produced an affidavit of documents. Moreover, the Applicants repeatedly warned the Respondents that defence costs were accumulating. While the Respondents' costs over the same time period were lower, this does not necessarily mean that the Applicants' costs were unreasonable. I therefore conclude that the Applicants are entitled to reimbursement for their

DATE: May 30, 2019

  
JUDGE'S SIGNATURE

# FILE DIRECTION/ORDER - page 5 of 6

Court File Number: CV-19-618860

legal expenses to date in the amount of \$39,330.33.

The Applicants seek costs of the Application on a full indemnity basis and rely upon *Swain*, *supra* and *College of Massage Therapists, supra*. The Applicants' costs total \$14,465.80 including disbursements. The Respondents' costs total \$7,435.21 including disbursements and HST. The Applicants offered to settle the application for \$25,000. and the ~~Def~~ Respondents offered to settle for \$5000. Based on the case law regarding the appropriateness of full indemnity costs on an application for coverage of defence costs, I award the applicants costs on a full indemnity basis in the amount of \$14,465.80. (see *Gordonroya v. Khatonbaksh*, (2000) 50 OR(3d) 417 (C.A.) at para 4.)

Based on the foregoing, I order as follows:

1. Lloyd's has a legal duty to defend the applicants in the action, in accordance with the terms of the Commercial general liability policy no. GL 1089438;
2. Lloyd's is obligated to reimburse all of the legal expenses

DATE: May 30, 2019

  
JUDGE'S SIGNATURE

# FILE DIRECTION/ORDER - page 6 of 6

Court File Number: CV-19-618820

incurred by the Applicants in connection with the defence of the Action in the amount of \$39,330.33

3. Pursuant to the terms of the Lease between the Applicants and O+B, O+B is obligated to indemnify and reimburse for and against all legal expenses and costs incurred by them in their defence of the Action as per s.12.4 of the Lease

4 The Respondents must pay The Applicants' legal Costs of this Application in the amount of \$14,465.80

DATE: May 30, 2019.

  
JUDGE'S SIGNATURE