

**CITATION:** Crystal Lakes Developments Inc. v. Dongab Co. Inc., 2023 ONSC 2009  
**COURT FILE NO.:** CV-22-00691633-0000  
**DATE:** 20230329

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** CRYSTAL LAKES DEVELOPMENTS INC., ACCU II DEVELOPMENT CORPORATION and RIVERWOOD HILL FARMS INC., Plaintiffs

– AND –

291171 ONTARIO INC., DONGAB CO. INC. and NETWORK SEWER AND WATERMAIN LTD., Defendants

**BEFORE:** E.M. Morgan J.

**COUNSEL:** *Keith Guerts, Ellen Snow, and Wietske Felmore*, for the Plaintiffs

*Maria Konyukhova, Lee Nicholson, and Philip Yang*, for the Defendants, Dongab Co. Inc. and Network Sewer and Watermain Ltd.

**HEARD:** Cost submissions in writing

**COSTS ENDORSEMENT**

[1] I released my reasons for decision in this injunction motion on February 24, 2023, denying the Plaintiffs’ request for an injunction that sought to prohibit the Defendant, Dongab Co. Inc. (“Dongab”), from exercising its power of sale in respect of two mortgages on the Plaintiffs’ property.

[2] Dongab and its affiliated company, the Defendant, Network Sewer and Watermain Ltd. (“Network”), both advanced the mortgage funds to the Plaintiffs. A third Defendant, 291171 Ontario Inc. (“291”), is named in the style of cause but took no part in the motion; no findings were made in respect of 291 except to state that they no longer have an interest in the mortgages in issue.

[3] Dongab and Network together seek costs on a full indemnity basis in the amount of \$269,353.44, or, alternatively, \$242,773.27 on a substantial indemnity basis or \$163,032.74 on a partial indemnity basis. The mortgage documentation calls for full indemnity. Counsel for Dongab and Network also note that, generally speaking, mortgage clauses calling for full indemnification of legal fees are enforceable as a matter of contract. That said, “the agreement of the parties cannot

exclude the court's discretion; it is open to the court to exercise its discretion contrary to the agreement”: *Bossé v. Mastercraft Group Inc.*, 1995 CanLII 931 (Ont CA).

[4] A brief survey of recent case law shows that, at least where the mortgage calls for substantial indemnity costs, such provisions are enforced where a mortgagee has been forced to defend the enforcement of its security: *Argiris (In Trust) v Mihtis*, 2007 CarswellOnt 7048, at para 4 (SCJ), citing Orkin, *The Law of Costs*, 2nd ed. (Canada Law Book, 1995). Section 8 of the Standard Charge Terms of Dongab’s mortgage provides that the Plaintiffs, as mortgagor, are responsible for all legal costs incurred by the mortgagee on a solicitor-client (i.e. substantial indemnity) basis, including such steps as negotiating the mortgages and generally the legal fees incurred in any proceedings taken to realize upon the mortgage security.

[5] The Plaintiffs submit that costs should be determined on a partial indemnity scale, as is generally the case in motions practice. Alternatively, they submit that the substantial indemnity request be significantly discounted, as it contains steps that were not part of the motion itself but rather are preliminary or tangential to the motion.

[6] As indicated, the mortgage documentation calls for substantial indemnity. On one hand, Dongab and Network had a right to enforce their mortgage and did so in the usual way, which included taking various steps toward enforcement as well as fending off the injunction motion brought by the Plaintiffs. On the other hand, the amounts sought by counsel for the successful parties strikes me as extraordinarily high. While Dongab’s and Network’s counsel did an excellent job for their clients, the team included two high-priced partners charging over \$1,000.00 per hour as well as three mid-level lawyers charging from the \$500’s to \$800 per hour.

[7] The kind of legal fire power that Dongab and Network brought to bear on this case is worth paying for if one is a client of the firm; the lawyers did an excellent job and were entirely successful. But fees at this level are a bit much to impose on the opposing side in a costs request.

[8] Rule 57.01(1)(0.b) of the *Rules of Civil Procedure* guides me to take into account, among other things, the extent to which a cost request might reflect or exceed the other side’s expectations. Plaintiffs’ counsel make it clear in their submissions that the costs sought in this case are at a level that well exceeds the Plaintiffs’ reasonable expectations. I will therefore exercise my discretion under section 131 of the *Courts of Justice Act* to award costs on what Dongab and Network identify as their partial indemnity scale.

[9] Using rounded figures as a matter of convenience, the Plaintiffs shall pay Dongab and Network costs in the all-inclusive amount of \$163,000.00.

Date: March 29, 2023

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Morgan J.