

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

IN THE MATTER OF SECTION 60 OF THE TRUSTEE ACT, RSO, 1990, C. T.23,
AS AMENDED, AND RULE 10 OF THE ONTARIO RULES OF CIVIL
PROCEDURE, R.R.O. 1990, REG. 194, AS AMENDED

AND IN THE MATTER OF HI-RISE CAPITAL LTD. AND IN THE MATTER OF
ADELAIDE STREET LOFTS INC.

REPLY COSTS SUBMISSIONS OF 263 HOLDINGS INC.

(Motion Re. Distribution of Sale Proceeds)

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Representative Counsel for the Investors

1. Representative Counsel advances two arguments in support of its position that 263 Holdings Inc. (“263”) should receive partial indemnity costs of \$42,313.64 for the motion:
 - (a) The “standard” rule for costs is to award them on a partial indemnity scale, and there is no reason to depart from that rule here; and
 - (b) There were no allegations of bad faith or other conduct that justify elevated costs in this case.
2. Neither of these arguments justifies an award of only \$42,313.64 in this case.
3. *First*, Representative Counsel’s strict adherence to partial indemnity as the default rule, irrespective of what the actual costs are, is unreasonable and inconsistent with the discretionary nature of cost awards under Rule 57.¹
4. Representative Counsel does not take issue with the amount of money 263 spent on the motion. They do not suggest that the amount 263 spent is unreasonable or excessive. Representative Counsel has notably failed to provide its costs outline to the Court. But they do not dispute that their actual costs were \$106,543.30, and that if successful on this motion, they would have sought costs of at least \$69,214.70. There is no reason why 263 should be entitled to less.
5. According to Representative Counsel’s reasoning, if 263 had spent \$107,000 on this motion then it would be entitled to partial indemnity costs of \$70,000. But because 263 spent only \$70,000 for the same amount of work, it is entitled to only \$42,000 in costs. This argument is unreasonable. If accepted, it would simply promote inefficiency and penalize litigants who successfully keep their costs down.

¹ [Courts of Justice Act](#), R.S.O. 1990, c. C.43, s. 131(1); [Rules of Civil Procedure](#), R.R.O. 1990, Reg. 194, r. 57.

6. Representative Counsel relies on *Whitfield v. Whitfield*, in which the Court of Appeal held: “**Unless full indemnity costs are warranted**, it would be an error in principle to grant an award of costs said to be on a partial indemnity basis that is virtually the same as an award on a substantial or full indemnity basis.”² That case has no application here. In this case, full indemnity costs **are** warranted having regard to the factors listed in Rule 57, the overriding principle of reasonableness, and the amount that Representative Counsel expected to pay.

7. Representative Counsel also relies on *Marcus v. Cochrane*, where the Court of Appeal reversed the trial judge’s award of full indemnity costs. But in *Cochrane*, the trial judge awarded full indemnity costs on the basis that the appellant’s conduct was “reprehensible.”³ The Court of Appeal reversed that finding and therefore reduced the amount of costs owing. 263 is not seeking costs solely or even primarily on the basis of any reprehensible conduct.

8. Notably, in *Cochrane*, the successful party spent \$160,706.99 litigating a case worth \$80,000.⁴ Here, 263 spent \$70,522.74 litigating a case worth \$914,743.40.

9. **Second**, Representative Counsel claims that it did not engage in any conduct on the motion that justifies elevated costs. Specifically, it claims that it did not make any allegations of bad faith against 263; it only alleged that 263 breached its duty of good faith. This is semantics. Good faith and bad faith are binary. To breach the duty of good faith is to act in bad faith. Indeed in its factum on the motion, Representative Counsel

² *Whitfield v. Whitfield*, [2016 ONCA 720](#), at para. [22](#). (emphasis added).

³ *Marcus v. Cochrane*, [2014 ONCA 207](#), at paras. [12-15](#).

⁴ *Marcus v. Cochrane*, [2014 ONCA 207](#), at para. [15](#).

quoted the following passages from *Bhasin* and *Callow* in support of its argument that 263 breached its duty of good faith:

There is a general duty of honesty in contractual performance. This means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract.... ***[This] requires that a party not seek to undermine those interests in bad faith.***⁵

The requirement of honesty in performance can, and often do, go further than prohibiting outright lies. Indeed, the concept of “misleading” one’s counterparty... will in some circumstances capture forms of silence or omissions.... ***To me these are close cousins in the catalogue of deceptive contractual practices.***⁶

10. Representative Counsel clearly alleged – without any supporting evidence, and in the face of evidence to the contrary – that 263 knowingly misled/deceived investors about the property tax arrears. This is precisely the kind of allegation that, if unsuccessful, justifies elevated costs.⁷

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of June, 2021.



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Lawyers for 263 Holdings Inc.

⁵ *Bhasin v. Hrynew*, [2014 SCC 71](#), at paras. 65, 71 (emphasis added); Representative Counsel’s Factum at para. 56.

⁶ *C.M. Callow Inc. v. Zollinger*, [2020 SCC 45](#), at para. 90 (emphasis added); Representative Counsel’s Factum at para. 57.

⁷ *Sienna v. State Farm*, [2015 ONSC 786](#), at para. 29.

**SCHEDULE “A”
LIST OF AUTHORITIES**

1. *Bhasin v. Hrynew*, [2014 SCC 71](#)
2. *C.M. Callow Inc. v. Zollinger*, [2020 SCC 45](#)
3. *Marcus v. Cochrane*, [2014 ONCA 207](#)
4. *Sienna v. State Farm*, [2015 ONSC 786](#)
5. *Whitfield v. Whitfield*, [2016 ONCA 720](#)

**SCHEDULE “B”
LEGISLATIVE PROVISIONS**

Courts of Justice Act, R.S.O. 1990, c. C.43

131 (1) 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.

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

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,

- (0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;
- (0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;
- (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 lawyer;
- (h.1) whether a party unreasonably objected to proceeding by telephone conference or video conference under rule 1.08; and
- (i) any other matter relevant to the question of costs.

**IN THE MATTER OF HI-RISE CAPTIAL LTD.
and
IN THE MATTER OF ADELAIDE STREET LOFTS INC.**

Court File No.: CV-19-616261-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at TORONTO

COSTS SUBMISSIONS OF 263 HOLDINGS INC.

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