CITATION: Moosa v. Hill Property Management Group Inc. 2010 ONSC 13
COURT FILE NO.:07-CV-336872PD2
MOTION HEARD: December 8, 2009
RELEASED: February 4, 2010

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Abu Moosa and Naiyara Rahman
Plaintiffs

Hill Property Management Group Inc. and Pilot Insurance Company
Defendants

BEFORE: Master D.E. Short

COUNSEL: Al Burton, for the Plaintiffs: Fax 416 868-3134

Susan Lindsay, for the Defendant Pilot Insurance (moving party) Fax: 416-594-9100

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HEARD: December 8, 2009

REASONS FOR DECISION

Preamble to Proportionality

domus sua cuique tutissimum refugium

[1] The English jurist Sir Edward Coke (1552-1634) recorded in the *Third Institute Institutes of the Lawes of England* the source of the maxim, 'For a man's house is his castle, et domus sua cuique tutissimum refugium' ('One's home is the safest refuge for all').

[2] Coke's reputation as one of the most influential jurists in our legal history rests to a significant extent on the central role that his legal writings have had in the development of the modern common law including his four volume *Institutes* which are a series of legal treatises first published, in stages, between 1628 and 1644. They are widely recognized as a

foundational document of the common law. Chapter 73 which contains the above quotation in context at page 161, is available online by way of *Google Books* at this URL : www.google.ca/books?id=0PJBAAAAYAAJ.

[3] Now almost 400 years later, Ontario has introduced changes to the *Rules of Civil Procedure* calling for the implementation of a concept of "proportionality" in the interpretation of all applicable rules, such that the orders made and directions given "are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding."

[4] Because of the point in time that these reasons came to be considered, they will of necessity, be more wide ranging than might otherwise be the case in the future, after caselaw has developed from this Court, to better define the boundaries of the court's power within the common law by virtue of the direction contained in new Rule 1.04 (1).

[5] What needs to be addressed is the impact of the enhanced "General Principle" found in that rule:

> **1.04** (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.
> (1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

I. Motion

[6] This is a motion brought by the defendants for an order under Rule 56.01 directing the posting of security for costs by the plaintiffs, through to the completion of trial, with respect to the costs of two separate defendants. Counsel for the plaintiff conceded at the hearing of the motion, that his clients are not currently residents of Canada.

[7] While the motion was brought in 2009, it is my view that the relief sought relates to security for costs primarily to be incurred after January 1, 2010, and thus it is appropriate to decide this matter under the new rules regime.

Factual Background

[8] In 1999 Mr. Abu Moosa and his wife purchased a townhouse on Mariner Court in Mississauga for $199,000. They lived in the home until 2004.

[9] In 2003, the couple refinanced their home by way of a mortgage on the property for $135,000. At present, there remains owing on that mortgage approximately $103,000.

[10] In early 2004, Mr. Moosa accepted employment with a petroleum company based in Qatar, on the Persian Gulf and the plaintiffs began planning to rent these premises while they were absent from Canada.

[11] The Mississauga property is the only real estate owned by the couple in Ontario.

[12] When they were preparing to go overseas, the couple took what would seem to be two prudent steps. They hired a property manager to manage their property on their behalf during their absence. They also sought and obtained property insurance in order to protect their home and their investment.

[13] The property was rented to tenants by the property manager on behalf of the owners. In 2005, the property manager leased the premises to Jason White and his wife.

[14] There apparently were no problems from early 2004 until 2006.

[15] In July of 2006, a serious fire occurred in the townhouse which caused the death of Mr White. Newspaper stories at the time indicated that the Peel Regional Police said they discovered a “large sophisticated working” crystal methamphetamine drug lab operating in the basement of the residence when they responded to the fire at the home.

[16] The Fire Marshal’s extensive Fire Investigation Report into the fire concludes that, while there are a number of potential sources of ignition which were identified throughout the structure:

> "It is the opinion of the investigator that the fire inside 5032 Mariner Court was directly related to the operation of the clandestine lab inside the structure which was being used to illegal [sic] produce methamphetamine. In fires such as these where a diffused fuel has been confirmed to be present inside the structure the isolation of a specific area of origin and/or the determination of one ignition source to the exclusion of all others cannot always be

> established. Regardless, the determination that this fire was an incendiary cause can be directly attributed to the presence of a clandestine lab being operated inside the structure to illegally produce methamphetamine"

[17] Rather than being kept the "safest", this man and woman's "castle" had been destroyed.

[18] Understandably, they looked to those to whom they had made payments to protect their investment and their home.

[19] The defendant property manager and the defendant property insurer both denied that they had any responsibility whatsoever to the plaintiffs and this litigation is the result.

IIA. Contractual Background: Hill Property Management

[20] Because they would be living a significant distance from Canada, the plaintiff determined to retain the services of a property management company to rent, manage and operate the premises on their behalf.

[21] By virtue of a Property Management Contract dated March 3, 2004 the defendant Hill Property Management Group Inc. ("Hill") was hired to manage the Mariner Court property in their absence.

[22] Some of the terms of that contract are relevant to this dispute:

> 2. (a) THE MANAGER accepts the employment and agrees to and with the Owner to manage and operate the property in accordance with the policies and directions from time to time established by the Owner including, but without limiting the generality of the foregoing, the following:
> (b) The Manager shall carry out its duties in an honest and diligent manner, and the Manager's obligation is to procure tenants on a "best efforts" basis and administer the property in an efficient and profitable manner;

[23] Under the Heading "insurance" the following appears:

> "a) unless otherwise agreed in writing by both parties, the owner agrees to arrange, maintain and pay all premiums for insurance coverage for the lands and improvements thereon (including fire, extended perils, liability coverage, and any other coverage deemed necessary by his Insurance Broker.
> b) The owner shall indemnify and save harmless the Manager from any and all liabilities, damages, costs, claims, suits or actions growing out of:
>
> - any damage to property occasioned by use and occupation of the demised premises or any part thereof by any tenant, or his guests or agents
> - any injury to any person or persons including death resulting at anytime there from, occurring in or about the demised premises
> -any breach, violation or non performance of any covenant condition or agreement in the residential lease, between tenant and manager."

[24] There may still be some relevance to the provision found under the heading "Supervision":

> "…to supervise and regulate the conduct of various tenants of the property in conduct and use of the common areas (if a condominium)"

[25] The Owner's obligations under the form provided by the property manager agreement include:

> (c) to indemnify the Manager from any and all liability, damages, and expenses whatsoever which it may incur or be subject to in acting as the Manager for the Owner and to save it harmless from all damage suits in connection with the management and operation of the property except where such

> damage suits arise from the gross negligence of the Manager.
> (d) that the Manager shall not be liable for loss of rental by vacancies or through default of the tenant to pay the rental, nor for damages to, or destruction of the premises or property leased or to the contents thereof, nor for the removal of articles by the tenant or others, or for misappropriation or theft, nor be liable in any circumstances except for the Manager's gross negligence.

[26] In its pleading the property manager specifically denies that it owed a duty of care to the plaintiffs, either as an agent or as a fiduciary and asserts that it was to carry out its duties in an honest and diligent manner, procure tenants on a "best efforts" basis and administer the property in an efficient and profitable manner.

[27] This defendant further pleads:

> 7. Hill Management states that it regularly inspected and maintained the Premises and took steps, when necessary, to terminate the tenancy as a result of the Tenants falling into arrears in payment of rent.

[28] The Plaintiffs' pleading however alleges that, although the Tenants were regularly behind in payment of their rent throughout their tenancy, Hill Property Management took no steps to terminate the tenancy or otherwise evict the Tenants prior to the date of the Fire. Rather, it is asserted that Hill Property Management "assured the Plaintiffs that the Premises was [sic] being well maintained and that the Tenants would pay their back rent."

[29] Paragraph 21 of the claim asserts that the tenant who was killed in the fire "had earlier lived in Texas, in the United States, where he was being sought by law enforcement agencies." The pleadings of both defendants assert no knowledge of this allegation.

[30] The Plaintiffs further plead that Hill Property Management has acted arbitrarily, capriciously and with wanton disregard for the Plaintiffs' interests and has acted in bad faith, and seek an award of punitive and/or aggravated damages.

IIB. Contractual Background Pilot Insurance

[31] The Statement of Claim alleges:

> 27 As noted above, Pilot Insurance at all material times insured the Premises pursuant to the Policy. Under the Policy, Pilot Insurance agreed to insure the Plaintiffs, in exchange for premiums paid, against all risk of direct physical loss or damage to the Premises, except as explicitly excluded by the terms of the Policy.
>
> 28. The Policy specifically provided, in part:
>
> (a) property coverage of $168,000 for the Premises, as adjusted for inflation; and
>
> (b) coverage for the cost of debris removal and fire department charges.

[32] The policy contains this provision:

> "If the fire department attends at your rented premises in response to an insured event, they may bill you for these services. If this happens, your policy will pay for such expenses. This coverage is not subject to the deductible."

[33] On or about March 15, 2007, Pilot Insurance notified the Plaintiffs that it was denying coverage under the Policy for their losses sustained in connection with the Fire on the basis of exclusions under the Policy.

[34] The Plaintiffs further plead:

> "31. In particular, Pilot Insurance informed the Plaintiffs that their loss would not be covered on the basis of exclusions under the Policy, suggesting the Plaintiffs' loss resulted from:
>
> (a) The growing, manufacturing, processing or storing by anyone of any drug, narcotic or

> illegal substances or items of any kind the possession of which constitutes a criminal offence; and/or
> b) the Tenants' intentional or criminal acts."

[35] The Plaintiffs state that Pilot Insurance is in breach of the terms of the Policy by denying coverage under the Policy and failing to pay amounts properly owed to them.

[36] They further assert that it was an implied term of the Policy that Pilot Insurance would act in good faith in responding to and adjusting the Plaintiffs' loss and determining the Plaintiffs' entitlement to payment under the Policy, and that Pilot Insurance would pay promptly all amounts to which the Plaintiffs were entitled.

[37] Exhibit "C" to the affidavit sworn by the counsel of record for the insurer purports to be "a true copy of the Pilot insurance policy". The last page bears a notation "Page 19 of 19". Perhaps only one side of some two sided pages were copied, as I note the exhibit contains only 16 single sided sheets.

[38] Regardless, of what may be missing, the first page of what is identified as the policy by the affidavit, is a letter on the letterhead of Pilot addressed to the plaintiffs dated September 19, 2005 from "Jim Hewitt President and Chief Executive Office [sic]". That letter begins:

> "Pilot Insurance is pleased to introduce a re-designed format of your insurance policy. This new policy design provides you with a user friendly document and creates a consistent look to all Pilot policies."

[39] The Certificate of Property Insurance issued by Pilot under the heading "Property Coverages" indicates an amount for the "dwelling building" of $168,000 (subject to a $500 deductible). This certificate is found as "Page 5 of 19" as noted at the bottom of the certificate. Nowhere on this page is any indication that the stated coverage is "subject to the terms and conditions" on any other pages. This Certificate for some reason identifies the "Mortgagee" as "Abu Moosa" rather that the Toronto-Dominion Bank as reflected on the title search filed by the insurer.

[40] The page that follows page 5 in the exhibit bears the printed notation "Page 7 of 19". This Page 7 appears to be the first place any indication is given in the "user friendly" document that the coverage is not unlimited. That page commences with the following language:

> "POLICY WORDINGS – These forms describe information that is unique to your insurance policy. Together with the declaration page(s), these represent the legal contract of indemnity that exists between you and us."

[41] None of subsequent pages produced bear any page numbers until a sheet numbered "Page 15 of 19" on which is set out the "STANDARD MORTGAGE CLAUSE". Paragraph 1 of that clause deals with "Breach of Conditions by Mortgagor Owner or Occupant" and provides in part:

> "**This insurance** …- AS TO THE INTEREST OF THE MORTGAGEE ONLY THEREIN - is and **shall be in force notwithstanding any act**, neglect, omission or misrepresentation attributable to the mortgagor ,owner or occupant of the property insured, **including…the occupancy of the property for purposes more hazardous than specified in the description of risk**;" [my emphasis]

[42] Oddly neither pleading refers to this mortgagee coverage.

[43] However, on this motion the factum of Pilot asserts:

> "5. According to the title search, the plaintiffs purchased the property on the 23rd of December 1999 for $197,000. The plaintiffs mortgaged the property on the 11th of September 2003 for $135,000, leaving a net equity in the home of approximately $62000."

[44] Pilot's factum bases all its arguments on the plaintiffs' home for the purposes of the examination of available Canadian assets being "not an asset but actually a liability of $60,000.00" by virtue of the mortgage debt

and a municipal building department lien amount. If there is in fact insurance to address the Mortgage debt the calculation of real property assets changes significantly. This possibility was not addressed before me.

[45] I leave it for others to determine the impact of identifying the Plaintiff as the "Mortgagee" in these circumstances which on their face might arguably vitiate Pilot's entire position on the question of coverage.

[46] Of significance to this case is the content at the top of the final page of the 19 said to be in the policy. The font set out below approximates the lay out and size of the text:

"When you need to make a claim, we will be there for you every step of the way…

Taking care

of what's

important to

you

[47] This is to be contrasted with Section I "Insurance on your Property" which sets out, in approximately 8 point font, on the third (unnumbered) page under that heading, as the 19th and 20th of 24 items identified under the subheading "Loss or Damage Not Insured" the following:

"…Regardless of the peril involved, we do not insure….

19. any damage arising directly or indirectly from the growing, manufacturing, processing or storing by anyone of any drug, narcotic or illegal substance or items of any kind the possession of which constitutes a criminal offence. This includes any alteration of the premises to facilitate such activity whether you have any knowledge of such activity;
20. resulting from an intentional or criminal act by:

a) any person insured by this policy; or
b) any other person at the direction of any person insured by this policy ;
c) any tenant, tenants' guests or boarders, employee(s) or any member of the tenants' household whether you have knowledge of these activities or not."

[48] Against this contractual background the plaintiffs' Statement of Claim asserts:

> "35. The conduct of Pilot Insurance and its failure to indemnify the Plaintiffs for their loss pursuant to the Policy was taken arbitrarily, capriciously and with wanton disregard for the Plaintiffs' interests. In this regard, Pilot Insurance has acted in bad faith and is in further breach of the Policy.
>
> 36. The Plaintiffs state that Pilot Insurance owed to them good faith obligations and a duty of care to undertake a comprehensive, informed, impartial and competent review and adjustment of their loss resulting from the Fire. The Plaintiffs state that Pilot Insurance was negligent and in breach of such obligations, particulars of the alleged negligence are as follows:
>
> (a) It failed to adequately investigate the evidence available to it for the assessment of the loss in question and its origin and cause, and the Plaintiffs' entitlement to coverage under the Policy;
> (b) It acted upon allegations without first ascertaining reasonably that such allegations were accurate and true;
> (c) It failed to obtain relevant advice or information from professional and government authorities, or obtained such advice or information and ignored it;
> (d) It denied coverage to the Plaintiffs under the Policy based on unfounded allegations, in particular without first having obtained any or final investigation reports from the Police."

III. The Motion and the "New" Rules

[49] By notice of motion dated October 2, 2009, and originally returnable Monday, October 19, 2009, the defendant Pilot Insurance sought an order ordering that the plaintiffs post security in the amount indicated in the bill of costs, which formed part of the exhibits to the affidavit in support of Pilot's motion. The amount of security requested was $63,881.32

[50] It is not surprising that the other corporate defendant saw fit to launch a parallel notice of motion on November 6, 2009, which resulted in both motions coming before me in December of 2009. Hill's motion sought $59,416.10

[51] Rule 56 deals with security for costs. The applicable portions of the rule are:

> 56.01 (1) The court, on motion by the defendant or respondent in a proceeding, may make such order for security for costs as is just where it appears that,
>
> (a) the plaintiff or applicant is ordinarily resident outside Ontario;
>
> …
>
> (e) there is good reason to believe that the action or application is frivolous and vexatious and that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent; or
>
> (f) a statute entitles the defendant or respondent to security for costs.
>
> ….
>
> 56.04 The amount and form of security and the time for paying into court or otherwise giving the required security shall be determined by the court.
>
> 56.05 A plaintiff or applicant against whom an order for security for costs (Form 56A) has been made may not, until the security has been given, take any step in the proceeding except an appeal from the order, unless the court orders otherwise.

> 56.07 The amount of security required by an order for security for costs may be increased or decreased at any time.

[52] Counsel for Pilot delivered a Request to Admit dated December 3, 2008 which required in the plaintiffs to admit that they resided in Qatar and that they "have no assets in Ontario with which to satisfy any potential judgment against them for costs".

[53] By e-mail, sent the next day counsel for the plaintiff advised, “The house and property that your client insured would represent an asset that is available to satisfy any potential award of costs against them."

IV. “AVAILABLE ASSETS”

[54] In their factum the plaintiffs concede that they do not allege impecuniosity and they assert that as a result there is no reason to inquire into the merits of their action. Nevertheless as will be outlined below, I still believe there is now a need to examine the circumstances of cases such as this.

[55] The plaintiff asserts that in 2008 the Municipal Property Assessment Corporation (MPAC) established a then current market value of the property for assessment purposes of $318,000. However, I suspect from the property assessment details filed on the motion, that this assessment did not take into account the present condition of the property.

[56] Moreover, if the policy does not respond at all, there is a first mortgage debt secured against the property for an amount in excess of $100,000 together with a registered municipal lien for the anticipated costs of repairing the property to conform with applicable municipal standards for $126,260. I doubt the latter amount reflects the necessary costs to restore the property to its previous state and the evidence before does not really assist in calculating the ultimate net value available to meet a costs award after trial when expenses associated with an ultimate sale of the property are taken into consideration.

[57] Mr Moosa also provided information regarding RRSP and non-registered savings accounts where funds have been invested over time, having an aggregate value totalling in excess of $90,000.

[58] The defendants say the registered funds could be deregistered and moved off shore without any notice to them and thus are not adequate

security for their potential costs entitlements. They rely up on *Dion v. CIBC World Markets Inc.* ,a decision of Master Polika found at [2002] O.J. No. 1494, where he held that although the plaintiff in that case had a substantial balance in his securities account, he had easy access to the funds such that he could withdraw them at any time. Therefore the Master held that the plaintiff "failed to meet the test for having sufficient assets in Ontario". On appeal Justice Somers held at [2002] O.J. No.5515:

> In my view, the quality of assets for the purposes of determining whether or not security for costs should be ordered is dependent upon a number of factors, one of which would be the ease with which that asset could be transferred outside the jurisdiction to an area where it could not be executed against. That is not the only factor but it is one that was taken into account by Master Polika. I can see no error in his placing some reliance on that factor.

[59] There is also the potential issue of the availability of the registered funds to execution together with the potential withholding amounts payable on any de-registration. These issues were not canvassed in any detail on the motion. Nevertheless I am not satisfied that there will be "adequate" security in place if security for costs is ordered and no restraints in force to prevent the liquidation of various stock funds.

V. APPROPRIATE SECURITY AMOUNTS IN LIGHT OF "PROPORTONALITY"

[60] The recent decision of the Court of Appeal in *Zeitoun v. Economical Insurance Group* [96 O.R. (3d) 639] provides confirmation that even if the plaintiffs reside out of Ontario there is still no prima facie "right" to a security for costs order. As well as considering the history of that case and the Court of Appeal's guidance, I now also must evaluate the impact of the requirement of "proportionality" in a case such as this.

[61] The judge hearing the appeal from the Master in *Zeitoun* held that in the circumstances security was not required. The Court of Appeal restored the Master's decision holding in part in its endorsement:

> "There is no reasoned basis to distinguish between the decision of a master and that of a judge for the purposes of the standard of review on appeal. A decision of a master will be interfered with only if the master made an error of law or exercised his or her discretion on wrong principles or misapprehended the evidence such that there was a palpable or overriding error…
>
> There was no basis upon which to interfere with the master's analyses of the evidence or her application of the relevant principles. The result reached by the master was not unreasonable."

[62] However, I am troubled by how long it took that matter to reach the stage of resolving an issue of security for costs.

[63] In *Zeitoun* the plaintiff's claim related to claim for uninsured automobile coverage for personal injuries suffered in a motor vehicle accident which occurred on July 19, 1992, in which he was a passenger. He sued the driver and obtained a default judgment. Mr. Zeitoun was a passenger in a motor vehicle that was insured by the defendant/respondent Economical Insurance Group .

[64] However, the existence or lack thereof of insurance coverage for the tortfeasor gave rise at a much later date to a lawsuit against Mr. Zeitoun's original counsel.

[65] The allegation is that the injuries the Mr. Zeitoun suffered were severe and the defendant was at an early date aware of the accident.

[66] The Zeitouns commenced their action on June 6, 2003, some 11 years after the accident. Mediation was conducted in June 2005 and examinations for discovery were scheduled in June 2006. The motion for security of costs was heard on May 16, 2006.

[67] In my decision in *Jimenez v. Romeo*, 2009 CanLII 68472 (ON S.C.), I lamented the predicament of a plaintiff based on a May 1994 accident that still has not got to trial list.

[68] I hope that the fact that two such cases have crossed my path in my first year in this position is simply an unfortunate co-incidence.

[69] My check of the Case History for *Zeitoun* discloses that more than three years elapsed before the Court of Appeal dealt with the resolution of

the issue in the original motion *and* that a fresh motion was brought before the same master who heard the original application, this time in December of 2009 seeking a variation of the original order based (perhaps not surprisingly) on "changed circumstances".

[70] This is not my view of appropriate "Access to Justice". The system has to do better. All participants in the process have to do better.

[71] How can a focus on proportionality advance this process?

VI. THE AMOUNTS SOUGHT BT THE DEFENDANTS and "PROPORTONALITY"

[72] The Costs Outline originally filed on behalf of Pilot described as a draft bill of costs to take the matter through the trial in the supporting affidavit seeks the sum of $63,881.32 on what was represented to be a "Partial Indemnity" basis. While counsel having a total involvement in the matter of point 4 of an hour, with 39 years of experience, is shown as having an "actual rate" 10% above his partial indemnity rate. I was surprised to note that in the case of all other counsel involved in the file, a partial indemnity rate of $25 per hour *above* their *actual* rate was sought from their sometime insureds.

[73] I say "sometime" because counsel acknowledged on the argument of the motion that upon the determination that coverage was being denied, it was the policy of the insurer to refund the premium paid to their customer.

[74] It had been my anticipation that the approach to claiming higher partial indemnity rates as compared to actual rates charged to a lawyer's client was an anomaly based on a misunderstanding of the intent of partial indemnity by a single counsel.

[75] Thus, I was surprised and disappointed that the rate claimed on a partial indemnity basis by counsel for Hill with carriage of this matter and virtually all have his colleagues *also* sought to obtain what I regard as an inflated partial indemnity rate. In Hill's case, the excess over and above their actual hourly rate ranged from $15-$40 per hour, accumulating to a total proposed bill through to the completion of trial of $49,416.10 inclusive of GST.

[76] At the hearing, I found the total claimed as security for costs was $113,297.42 to be unduly high and questioned the methods of calculation employed. As a result I requested revised calculations based on security only being posted at this stage for events up to the completion of the pre-

trial conference and as well instructed counsel to consider the methods of calculation previously employed by them. In addition, I undertook a review of the history of partial indemnity claims and the guidance of our courts on this issue.

[77] In *Stellarbridge Management Inc. v. Magna International (Canada) Inc*., [2004] O.J. No. 2102; 71 O.R. (3d) 263; at a point in time when the former "costs grid" was in place for civil matters, the Ontario Court of Appeal held that the hourly rates and fees actually charged to the client are relevant to partial indemnity costs and reduced an award where the grid based partial indemnity rate established had the effect of awarding costs considerably in excess of the amounts actually charged to the client .

[78] Justice Cronk writing for the Court held:

> **"97** The costs grid under the Rules of Civil Procedure came into effect in January 2002. The trial judge's reasons in support of her costs award were released on September 23, 2002. At that time, the jurisprudence regarding the costs grid was in an early state of evolution. Since that time, this court has confirmed that the costs grid is not intended to provide windfall costs recovery to a litigant. In addition, a critical controlling principle for the fixing of costs under the costs grid is to ascertain an amount that is a fair and reasonable sum to be paid by the unsuccessful litigant, rather than any exact measure of the actual costs to the successful litigant: *Zesta Engineering Ltd. v. Cloutier*, [2002] O.J. No. 4495 (C.A.).
>
> **98** In arriving at an amount that is a fair and reasonable sum to be paid by an unsuccessful litigant on the partial indemnity scale, the hourly billing rates actually charged and the fees actually billed to the successful litigant are relevant considerations. In this case, information concerning the fees and rates charged was before the trial judge and should have been taken into account.
>
> **99** Although there is no evidence of a special fee arrangement in this case similar to the arrangement

> discussed in *Lawyers' Professional Indemnity Co. v. Geto Investment Ltd.*, [2002] O.J. No. 921 (S.C.), this court has held that it is not appropriate for a litigant to seek or receive an award of costs in excess of those amounts actually charged to it: *TransCanada Pipelines v. Potter Station Power Limited Partnership*, [2003] O.J. No. 2440. In the case at bar, the trial judge's costs award had the effect of awarding to Stellarbridge costs considerably in excess of the amounts, when calculated on a partial indemnity basis, actually charged to it by its counsel."

[79] In *Wasserman, Arsenault Ltd. v. Sone* (2002) 164 O.A.C. 195, 38 C.B.R. (4th) 119; Justices Weiler, Abella and Goudge reviewed a submission by counsel seeking a costs award on behalf of their clients where is was argued that based on the low hourly rate they had negotiated with their solicitors (which was less than the maximum hourly rate then allowable under the partial indemnity costs grid), they should be awarded full indemnity. They asserted that this amount would still be less than the appellants might otherwise expect to pay under the partial indemnity costs grid which was then in place.

[80] The Court rejected this argument and held:

> **"…**There is no principled basis arising from the conduct of the parties in this case which could justify a costs award on the basis the respondents submit.
>
> **4** The costs grid scheme, which came into force on January 1, 2002 pursuant to O. Reg. 284/01, includes two scales of costs: partial indemnity and substantial indemnity. Partial indemnity means just that - indemnification for only a part, or a proportion, of the expense of the litigation. In *Lawyers' Professional Indemnity Co. v. Geto Investments Ltd.*, [2002] O.J. No. 921 (S.C.J.), Nordheimer J. wrote at para. 16:

> As a further direct consequence of the application of the indemnity principle, when deciding on the appropriate hourly rates **when fixing costs on a partial indemnity basis, the court should set those rates at a level that is proportionate to the actual rate being charged to the client** in order to ensure that the court does not, inadvertently, fix an amount for costs that would be the equivalent of costs on a substantial indemnity basis when the court is, in fact, intending to make an award on a partial indemnity basis. [my emphasis added]"

[81] It is extremely troubling that in the face of this clear re-affirmation of a simple principle by the Court of Appeal eight years ago, two firms of defence counsel would seem to evidence a "normal" practice of seeking to claim and recover costs on a basis that is not equal to full indemnity, let alone *less* than full indemnity, but rather *greater* than full indemnity for the fees charged to their client, while labelling their requests on documents submitted to the court as being based upon a "Partial Indemnity Rate".

[82] The submission by both defence counsel that their proposed rates reflect the former minimum end of the range on the now discontinued Cost Grid for lawyers having the various numbers of years experience at the bar is in my mind inappropriate and disingenuous.

VII. CALCULATION OF PROPOSED BILLS OF COSTS

[83] In fact, the *Courts of Justice Act* provides under the heading "Costs":

> **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.

[84] Part I of Tariff A to the present form of the rules addresses "Lawyers' Fees and Disbursements Allowable Under Rules 57.01 and 58.05" as follows:

> "The fee for any step in a proceeding authorized by the Rules of Civil Procedure and the counsel fee for motions, applications, trials, references and appeals shall be determined in accordance with section 131 of the *Courts of Justice Act* and the factors set out in subrule 57.01 (1)."

[85] The factors set out in 57.01 are numerous and were amended to add two new sub paragraphs *in 2005* by virtue of Ontario Regulation 42/05 made under *the Courts of Justice Act*. That regulation contained a number of amendments relevant to my analysis including revoking and replacing the previous "grid related" definitions of partial and substantial indemnity costs. The regulation added these provisions in particular :

> 4.(1) Subrule 57.01 (1) of the Regulation is amended by adding the following clauses:
> (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;

[86] The format for Form 57B as required by the regulation came into force July 1, 2005. In particular I extract the following portions:

"The following points are made in support of the costs sought with reference to the factors set out in subrule 57.01(1):….

- the experience of the party's lawyer

- the hours spent, the rates sought for costs and the rate actually charged by the party's lawyer

FEE ITEMS	PERSONS	HOURS	PARTIAL INDEMNITY RATE	ACTUAL RATE*
(*e.g., pleadings, affidavits, cross-examinations, preparation, hearing, etc*.)	(*identify the lawyers, students and law clerks who provided services in connection with each item together with their year of call, if applicable*)	(*specify the hours claimed for each person identified in column 2*)	(*specify the rate being sought for each person identified in column 2*)	

* Specify the rate being charged to the client for each person identified in column 2. If there is a contingency fee arrangement, state the rate that would have been charged absent such arrangement."

[87] There are number of factors identified with requests for information on Form 57B . the above extracts are to assist in a comparison with what was filed by counsel before me.

[88] After I identified the costs rate issue during oral argument, I requested "corrected" proposed bills of costs. Those submitted on behalf of Pilot for the motion and for the estimated future costs for the purposes of the security for costs request I believe are still deficient. The Costs Outline filed after the motion under the heading "Partial Indemnity" still contain no appropriate "partial indemnity" calculations and instead now have deviated from the columns noted above and added have a double asterisked footnote:

FEE ITEMS	PERSONS	HOURS	ACTUAL RATE*	TOTAL

> "** **The rate listed above is the <u>lesser</u> of either the <u>actual rate</u> charged to the client or the <u>partial indemnity rate as listed in the Rules</u> of Civil Procedure**" [My emphasis]

[89] Obviously my reading of those Rules shows no such "rate listed". It would seem that a claim is being asserted based on a comparison between a repealed grid, partial indemnity rate and the full actual rate being charged to Pilot.

[90] Pilot's counsel proposes on the document filed after the motion an amount described on the first page of the costs outline as "Partial Indemnity" now totalling $33,482.96. No calculations showing how that amount was reached in detail are included.

[91] Hill's counsel does not include such a "double asterisk" in his chart. However, Hill too uses a similar form of table entirely omitting a partial indemnity column. Their amount claimed on their revised filing now is $28,349.12. Nowhere do they claim a partial indemnity amount but rather describe this amount as "Actual Rates". Again such an approach is decidedly unhelpful to this process.

[92] I was concerned that my interpretation might somehow be misguided and so returned to the text of Rule 57.01 as it now stands as required by the preamble to Tariff A. I have highlighted some portions of the following extracts which I found of assistance.

> **GENERAL PRINCIPLES**
> ***Factors in Discretion***
> **<u>57.01</u>** <u>(1)</u> In exercising its discretion under section 131 of the ***<u>Courts of Justice</u>*** *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; and

(i) **any other matter relevant to the question of costs**.

….

Fixing Costs: Tariffs

(3) When the court awards costs, it shall fix them in accordance with subrule (1) and the Tariffs….

Authority of Court

(4) Nothing in this rule or rules 57.02 to 57.07 affects the authority of the court under section 131 of the *Courts of Justice Act*,
(a) to award or refuse costs in respect of a particular issue or part of a proceeding;

> (b) to award a percentage of assessed costs or award assessed costs up to or from a particular stage of a proceeding;
> (**c) to award all or part of the costs on a substantial indemnity basis;**
> **(d) to award costs in an amount that represents full indemnity; …**
>
> ***Costs Outline***
> (6) Unless the parties have agreed on the costs that it would be appropriate to award for a step in a proceeding, every party who intends to seek costs for that step shall give to every other party involved in the same step, **and bring to the hearing, a costs outline (Form 57B)** not exceeding three pages in length. [my emphasis]

[93] In light of the approach taken by both counsel for the defendants, I feel obliged to comment onrule 57.01 (0.a) and (0.b) above**.**

[94] Indemnity can be no more than full. Subparagraph (0.b) is a one way street. It can be used in my view to reduce the amount claimed by a very expensive counsel but not to claim an entitlement to an amount more than the actual amount paid by a client. This I believe *must* be the case, regardless of the amount of costs that an unsuccessful party might reasonably expect to pay in relation to the services of a counsel whose client had not been able to negotiate as attractive an hourly rate.

[95] The definition set out in Rule 1.03 provides that "partial indemnity costs" mean costs awarded in accordance with Part I of Tariff A, and "on a partial indemnity basis" has a corresponding meaning.

[96] Importantly for this analysis, "substantial indemnity costs" mean costs awarded **in an amount that is 1.5 times what would otherwise be awarded in accordance with Part I of Tariff A**, and "on a substantial indemnity basis" has a corresponding meaning.

[97] While not defined in the rules, *Full Indemnity* must be more than substantial indemnity. If we assume the absolute maximum for substantial indemnity is 99% of the total actual legal fees *charged*, we can work backwards using these definitions to calculate the absolute maximum allowable partial indemnity amount. Since 1.5 times 66% equals 99%. The

absolute maximum permissible for indemnity to a lawyer's client, on a partial indemnity basis, is thus 66% of the fee charged to the client.

[98] Any other basis gives a windfall to someone at the other side's expense.

[99] Hardly a "proportional" result.

[100] Moreover, it is reasonable to expect that the legal costs paid by an insurer are a tax deductible business expenses, whereas the plaintiffs may be paying security with after tax dollars. Regardless, I have not adjusted for this factor as this matter is troubling enough without trying to adjust for the dictates of "proportionality" in that regard.

VIII. WHAT DOES PROPORTIONALITY REQURE?

[101] In approaching this motion for security for costs I have endeavoured to investigate at least part of the history of Civil Justice Reform, which contributed to the addition of the concept to our rules, in order to establish the intent of the requirement for "*proportionality*".

[102] The Right Honourable the Lord Woolf delivered an interim report entitled "*Access to Justice*" in June of 1995.

[103] One of the Hallmarks of his work was the importance given to the concept of "Proportionality". Chapter I of the Report which is central to his investigation is entitled "The Principles". It is relatively brief and, as it is in many ways the seminal document with respect to this concept, I quote the Chapter it in its entirety :

> *The Importance of Civil Justice*
>
> **"1.** A system of civil justice is essential to the maintenance of a civilised society. The law itself provides the basic structure within which commerce and industry operate. It safeguards the rights of individuals, regulates their dealings with others and enforces the duties of government. The administration of civil justice plays a role of crucial importance in maintaining this structure as Sir Jack Jacob, the doyen of civil proceduralists, observed in "The Reform of Procedural Law":
>
> > "It manifests the political will of the State that civil remedies be provided for civil

> rights and claims and that civil wrongs, whether they consist of infringements of private rights in the enjoyment of life, liberty, property or otherwise, be made good, so far as practicable, by compensation and satisfaction, or restrained, if necessary, by appropriate relief. It responds to the social need to give full and effective value to the substantive rights of members of society which would otherwise be diminished or denuded of worth or even reality."

2. Effective access to the enforcement of rights and the delivery of remedies depends on an accessible and effective system of civil litigation. Lord Diplock drew attention to the constitutional role of our system of civil justice and the constitutional right which individuals have to obtain access to it in ***Bremer v South India Shipping Corporation Ltd*** (1981) A. C. 909, 917, when he said:

> "Every civilised system of government requires that the state should make available to all its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights. The means provided are courts of justice to which every citizen has a constitutional right of access in the role of plaintiff to obtain the remedy to which he claims to be entitled in consequence of an alleged breach of his legal or equitable rights by some other citizen, the defendant."

To which statement I would add that he is also entitled to access today in order to seek a remedy for the adverse effects of a breach of public duty.

3. In considering the problems of the civil justice system I have had in mind the basic principles which

should be met by a civil justice system so that it ensures access to justice:

> (a) It should be *just* in the results it delivers.
> (b) It should be *fair* and be seen to be so by:
> - ensuring that litigants have an equal opportunity, regardless of their resources, to assert or defend their legal rights;
> - providing every litigant with an adequate opportunity to state his own case and answer his opponent's;
> - treating like cases alike.
> (c) Procedures and cost should be *proportionate* to the nature of the issues involved.
> (d) It should deal with cases with reasonable *speed.*
> (e) It should be *understandable* to those who use it.
> (f) It should be *responsive* to the needs of those who use it.
> (g) It should provide as much *certainty* as the nature of particular cases allows.
> (h) It should be *effective*: adequately resourced and organised so as to give effect to the previous principles."

[104] Ontario undertook a *Civil Justice Reform Project*, led by the Honourable Coulter Osborne which led to rules amendments, which took effect on January 1, 2010. The mandate given to him by the province was "to review potential areas of reform and deliver recommendations for action to make the civil justice system more accessible and affordable for Ontarians."

[105] The guiding principles provided to him included the following:

> **"Proportionality**: recommendations should reflect of the principal that but time and expense devoted to civil proceeding should be proportionate to the amount in dispute and/or the importance of the issues at stake."

[106] Ultimately, with respect to the subject of proportionality, the leading recommendation was:

> "The Rules of Civil Procedure should include, as an overarching principle of interpretation, that the court and the parties must deal with the case in a manner that is proportionate to what is involved, the jurisprudential importance of the case and the complexity of the proceeding."

[107] That recommendation turn has led to the implementation of new subrule 1.04 (1.1) with respect to interpretation of the existing and new *Rules of Civil Procedure* which as noted above, reads:

> General Principle
> **1.04** (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.
> (1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

[108] In Chapter 5 of his Report, entitled “The role of the courts and the parties in the conduct of civil litigation”, Lord Woolf notes:

> “1. The overall aim of my Inquiry is to improve access to justice by reducing the inequalities, cost, delay and complexity of civil litigation and to introduce greater certainty as to timescales and costs. My specific objectives are:
> (a) to provide appropriate and proportionate means of resolving disputes;
> (b) to establish "equality of arms" between the parties involved in civil cases;

> (c) to assist the parties to resolve their disputes by agreement at the earliest possible date; and
> (d) to ensure that the limited resources available to the courts can be deployed in the most effective manner for the benefit of everyone involved in civil litigation."

[109] The Attorney General's website presently has extensive commentary on the amendments to the rules and at the outset asks and answers the question "Why were the civil rules reformed?":

> In June 2006, the Ontario government asked a former Associate Chief Justice of Ontario, the Honourable Coulter Osborne, to review and recommend improvements to the civil justice system to make it more accessible and affordable for Ontarians.

[110] With this in mind, I adopt the wisdom and guidance of Lord Woolf, and his report "*Access to Justice*" in establishing the best way for me to ensure the availability of our courts, "to which *every citizen has a constitutional right of access"* so that the plaintiff in this particular case may attempt to obtain the remedy to which he claims to be entitled "in consequence of an alleged breach of his legal or equitable rights by some other citizen".

[111] How do I establish "equality of arms" between these parties?

[112] At the time of the development of first pilot project with respect to a mandatory mediation Center to be located in Toronto, the committee was considering the concept of a "Multi-Door Courthouse". Many litigators did not feel that their clients would want to be "deprived" of their day in court.

[113] History has proven otherwise. The cost and complexity of litigation has meant that many more traditional court officers are involved in mediation and case resolution outside the courtroom. As a past president of the ADR Institute of Canada, I recognize the value of mediation and other forms of alternative dispute resolution in the bringing to an economical and sensible resolution a wide variety of disputes between parties.

[114] However, the fact that these other alternatives are available, ought not to deprive any citizen of a right of access to a trial before the courts of this province if that is what is desired or necessary.

[115] If the plaintiff in this case is to have a trial, this court is charged with the duty of reducing delay and ensuring progress towards an “equality of arms".

IX. The New Discovery Rules

[116] That exercise will involve a review of the new rule provisions relating to examinations for discovery in cases such as this. New Rule 31.05.1 provides as follows:

> (1) No party shall, in conducting oral examinations for discovery, exceed a total of seven hours of examination, regardless of the number of parties or other persons to be examined, except with the consent of the parties or with leave of the court.
> (2) In determining whether leave should be granted under subrule (1), the court shall consider,
>
> (a) the amount of money in issue;
>
> (b) **the complexity of the issues of fact or law**;
>
> (c) the amount of time that ought reasonably to be required in the action for oral examinations;
>
> (**d) the financial position of each party**
>
> (e) **the conduct of any party**, including a party’s unresponsiveness in any examinations for discovery held previously in the action, such as failure to answer questions on grounds other than privilege or the questions being obviously irrelevant, failure to provide complete answers to questions, or providing answers that are evasive, irrelevant, unresponsive or unduly lengthy;
>
> (f) **a party’s denial or refusal to admit anything that should have been admitted**; and

> (g) **any other reason that should be considered in the interest of justice.** **[**emphasis added]

[117] I have highlighted factors which while specifically directed for consideration in determining whether to extend the length of discoveries , I believe also are useful in identifying elements to be considered in endeavouring to comply with the dictates of the amended rule 1.04.

X.WHAT IS TO BE DONE?

[118] In light of that analysis I do not accept that a security for costs claim of $63881.32 by one of two defendants, whose policy limit is $168,000, be said to be appropriately "proportionate" in this case. As noted above Hill sought $59,416.10. In my opinion, requiring payments totalling in excess of $123,000 from a couple seeking a remedy for the loss their home, in the circumstances of this case, does not to make our justice system “more accessible and affordable for Ontarians”.

[119] It will be clear that I am not satisfied with the approach taken by counsel for the defendants. Nevertheless, in light of the concession by counsel for the plaintiff that his clients are non-residents of Ontario and the uncertainty of the quantum of any available asserts in the province I am ordering that security be posted with the account for each of the defendants.

[120] Master Graham recently ruled in *Environmental Health Foundation v. MacGregor*, 2010 ONSC 215 that the calculation of the security for costs to be ordered for examinations for discovery, should be based on the *prima facie* duration established by the new rule. Thus I assume there will be approximately 14 hours of “live” discovery time. As well, I expect the mediation will be a three hour session as contemplated by the rules. I am allowing hours for preparation for these events together with an allowance for discovery of documents as requested in Pilot’s costs submission.

[121] I also agree with Master Graham’s view in *Environmental Health* that it is inappropriate to allow security for the costs of any refusals motions as it should not be assumed that such a motion will be necessary.

[122] Further, in light of this strong belief of counsel on his client’s lack of liability in this case and the position being taken by Pilot that the claim as against Pilot is said in the affidavit of Pilot's counsel to be "devoid of merit an

almost certain to fail", it would seem that a relatively short time would be adequate with respect to the pre-trial conference.

[123] In light of the manner in which the costs submissions were received at and following the motion I had decided that it would be necessary to take a more broad brush approach to establishing meaningful amounts.

[124] The original contemplated disbursements from both defendants included $7,500 for an expert report. The Fire Marshal has already reported on the cause of the fire. Absent expert evidence to the contrary I would have thought the report of the Fire Marshal would be conclusive. I found no indication in the affidavit material as to what other expert might be necessary in the circumstances of this case.

[125] I do no propose to provide a contingent expert allowance to either defendant.

[126] While the claims against the two defendants are based on distinct claims, they arise from the same fire. I see no real reason to allow differing amounts for either party. Proportionality and subrule“0b” of rule 57.01 would suggest the plaintiff is entitled to expect a consistency of amounts in circumstances such as those in this case.

[127] Pilot’s new Cost Outline includes the costs of this motion and asks for $33482.96 including disbursements through to the completion of the pre-trial on a “Partial Indemnity” basis. Hill provides a calculation based on “Actual Rates” totalling $28,349.12.

[128] With some difficulty I have deconstructed the material received. After removing time and disbursements relating to this motion I believe the total times estimated for counsel and clerks is as set out below. I have taken 66.6 % as the raw partial indemnity rate based on stated “Actual” rates. In the case of law clerks I have used an $80 partial indemnity rate.

[129] My calculations are as follows:

Actual Rate	HILL		216.45
PILOT	$325		209.79
	$315	249.75	176.49
$375	$265	216.45	136.35
$325	$205	132.00	80.00
$200	Clerk	80.00	
Clerk			
			Time estimated
	66.6%		

		totals	
	2.8		
.4	12.		606.06
43.7	15.	99.90	3146.85
6.1	5.	9458.86	2647.35
37.1	18.6	805.20	682.65
		2968.00	1488.00
			$8570.91_
	Extension &	$13,331.96	

[130] Both firms have similar briefs. An average between the two totals would seem to meet the dictates of rule 57.01 (1) (0.a) as something between the two amounts could reasonably be expected. That amount is $10,951.44.

[131] Thus I am establishing $10,951.44 towards the amount to be addressed on account of fees for each of the defendants.

[132] The remaining disbursements sought by the defendants (after removing the notices of motion disbursements for this application) were roughly equal and averaged $1063.49.

[133] The gross amount for each firm is thus $10951.44 plus $1063.49 on which GST of $600.75 would be payable, being a total of $12,615.68.

[134] A further adjustment in my mind is dictated by the desirability of "equality of arms" in this case. It seems appropriate to recognize in this calculus that if the defendants had acted in the way the plaintiff asserts is correct with respect to the real property, then the plaintiff would not have the deficiency of available assets upon which the defendants now rely. I have determined that a 15% reduction on the amounts otherwise payable is appropriate, particularly where security is being sought by two sets of counsel. That total net amount rounds to $10,725.00 which is the sum I am establishing as being payable by the plaintiff for each of the defendants on account of security for costs.

[135] The plaintiff may have to post further security for costs at or after the pre-trial conference. Speaking only for myself, I have no doubt that a pre-trial conference judge has jurisdiction under the broad powers now contained new rule 50.06 (1) to order further security at that time the need of a further motion. As well, the rules permit any party to request a reconsideration of these matters in the future.

[136] I understand that a mediation in this case is scheduled for May 21, 2010. The amounts that I have determined are payable by way of security for costs may not be not within the available unregistered investment assets of the plaintiff's. I do not feel it is necessary at this point to require them to collapse their RRSP's etc. as the case may well settle at mediation. Therefore, I am

ordering that security for these costs be posted, twenty days after the completion of the mediation in this case.

XI. DISPOSITION

[137] For the above reasons I believe the proper exercise of my discretion under the *Rules of Civil Procedure* now in force is to make the following Order:

> (a) that within 20 days after the completion of the scheduled mediation on May 21st (or such other date as counsel may establish on consent) the plaintiffs shall make separate payments with regard to the costs of each continuing defendant as security for costs of this proceeding up to the conclusion of the pre-trail conference for each of those defendants costs in the sum of $10,725.00 inclusive of 5% on account of the GST ;
> (b) that the amount of any further security for costs for trial shall be addressed by the judge conducting the pre-trial conference; and
> (c) that until any security required by this Order has been given following the mediation, the plaintiffs may not take any step in this proceeding, except any possible appeal from this Order.

[138] As indicated above, having regard to all the factors which I have identified in these reasons, notwithstanding I have ordered that security be posted, I am not prepared to grant any costs to either of the defendants for this motion. There will be no order as to costs of the motion.

XII. CONCLUSION

[139] I have considered the requests of all counsel and the guidance of the five justices of Court of Appeal in *Zeitoun* sitting on the appeal in May of 2009 from three Judges of the Divisional Court, as a result of the leave given by one Judge to appeal the decision of a different Judge, who reversed a Master. The Master at first instance had exercised her discretion

with respect to an order for security for costs following a hearing held more than three years before in April of 2006 !

[140] From the foregoing, it will be clear that I do not regard the mandate of the new rules to be "More of the same". I believe I have correctly interpreted the desired result of the drafters of the new rules, if I am incorrect, others will need to establish corrective guidance.

[141] In his *First Institute* Sir Edward Coke wrote: "Reason is the life of the law; nay, the common law itself is nothing else but reason…. The law, which is perfection of reason"

[142] Theses reasons unquestionably are far from perfection. However it is my hope that they will be of some assistance to the bench and bar in dealing with the intent of the newly revised *Rules* in order to achieve their stated goals of "improvements to the civil justice system to make it more accessible and affordable for Ontarians."

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_____

Master D. E. Short

DATE: February 4, 2010

DS/ R17