

**CITATION: Zanardo v Di Battista Gambin Developments Limited, 2019 ONSC 2115**  
**DIVISIONAL COURT FILE NO.: DC-18-523**  
**DATE: 20190408**

**ONTARIO SUPERIOR COURT OF JUSTICE**  
**DIVISIONAL COURT**

**BETWEEN:**

**ANTHONY ZANARDO in his capacity as Estate Trustee for the ESTATE OF LUIGI GAMBIN, Respondent**

– and –

**DI BATTISTA GAMBIN DEVELOPMENTS LIMITED, RAY DIBATTISTA, ANTHONY DIBATTISTA, JULIA DIBATTISTA, WHITWOOD DEVELOPMENTS LTD. and GREYSTAR DEVELOPMENTS INC., Appellants**

**BEFORE: DAMBROT, EMERY, and MYERS JJ.**

**COUNSEL: Matthew Sammon and Chris Trivisonno for the Respondent**  
**Sheila Block, Jeremy Opolsky, and Jonathan Silver for the Appellants**

**READ: April 3, 2019**

**Myers J:**

**COSTS ENDORSEMENT**

[1] By Reasons for Judgment dated February 27, 2019, reported at 2019 ONSC 1376, the court dismissed the appellants’ appeal from the decision of Dunphy J. ordering, among other things, that the corporate defendant Di Battista Gambin Developments Limited (“DBGDL”) be liquidated. The respondent seeks costs of the appeal on a partial indemnity basis in the amount of approximately \$36,000, all-in. This amount includes the costs of a motion for a stay pending appeal heard on August 24, 2018 that were reserved to this panel.

[2] On the stay motion, the parties agreed to hold the *status quo* pending the outcome of the appeal. In light of Justice Dunphy’s findings that the personal appellants had committed “grave” breaches of duty and had oppressed the respondent, the parties agreed that it was reasonable to appoint an independent third party to monitor the appellants’ management of DBGDL to ensure that the appellants did nothing further to prejudice the respondent’s position pending the outcome of the appeal. The respondent seeks indemnity for the monitor’s fees and disbursements.

[3] The parties also argued one issue on the stay motion concerning the timing of the exercise of the option to purchase the respondent’s shares of the DBGDL that Dunphy J. had provided to the personal appellant Anthony DiBattista. The respondent was successful on that issue. On that basis, he seeks costs of the stay motion and has included his costs in the \$36,000 quantum that he seeks.

[4] The appellants argue that success on the stay motion was divided. Moreover, they submit that the quantum sought by the respondent exceeds the normal expectations for an appeal to this court. The appellants submit that the quantum of costs that they should be ordered to pay ought reasonably be set at \$25,000 all-in.

[5] The fixing of costs is a discretionary decision under section 131 of the *Courts of Justice Act*. That discretion is generally to be exercised in accordance with the factors listed in Rule 57.01 of the *Rules of Civil Procedure*. These include the principle of indemnity for the successful party (57.01(1)(0.a)), the expectations of the unsuccessful party (57.01(1)(0.b)), the amount claimed and recovered (57.01(1)(a)), and the complexity of the issues (57.01(1)(c)). Overall, the court is required to consider what is “fair and reasonable” in fixing costs, and is to do so with a view to balancing compensation of the successful party with the goal of fostering access to justice: *Boucher v Public Accountants Council (Ontario)*, 2004 CanLII 14579 (ON CA), (2004), 71 O.R. (3d) 291, at paras 26, 37.

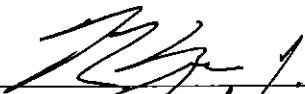
[6] Fixing costs is an inexact process. The appeal was not especially complicated. In the main, the respondent was able to rely successfully on detailed findings of fact made by Justice Dunphy. In my judgment, considering that the appeal was argued in a half day, the lack of complexity, and the reasonable expectations of the parties to a proceeding in this court, I agree with counsel for the appellants that the quantum of costs ought to be fixed at \$25,000 all-in.

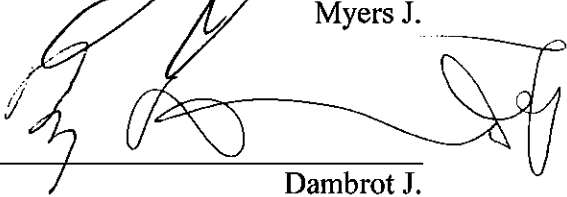
[7] The respondent asks that the costs be ordered against the personal appellants only and not the corporate appellants. As DBGDL is owned by the parties 50/50, the respondent argues that costs should not be paid by the corporation as he would, in effect, be paying 50% of his own costs award. I agree. Accordingly, it is the personal appellants who are ordered to pay costs to the respondent fixed at \$25,000 on a partial indemnity basis all-in.

[8] The respondent asks that the costs be payable within thirty days. The appellants argue that costs should be paid by way of an adjustment to the shareholders’ accounts on the ultimate liquidation of DBGDL as was ordered by the judge below. However, Dunphy J. granted a costs order against DBGDL jointly and severally with the personal appellants. An adjustment mechanism was therefore required in order to prevent the respondent from effectively paying his own costs. In this court, costs are not sought or ordered against the corporate appellants. Only the personal appellants are ordered to pay costs and I see no reason why those costs should not be payable in the ordinary course. Accordingly, the costs ordered paid by the personal appellants are due within thirty days.

[9] The respondent also seek indemnity for the fees and disbursements of the monitor. As discussed above, the monitor was required to provide an assurance to the respondent and the court that the personal appellants could not continue to oppress the respondent pending the appeal. In light of the fact that in this court the appellants did not even challenge the findings of oppression and breaches of duty made against them by Dunphy J., it was eminently reasonable and necessary to incur the costs of the monitor to preserve the *status quo* while the appellants conducted this proceeding. The appointment of the monitor was the minimum step required to hold the *status quo*. The alternative would have been the immediate commencement of the liquidation or the removal of the corporate appellants from management pending the appeal. As the monitor was essentially

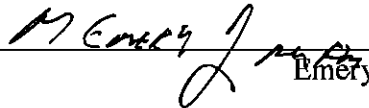
an accommodation to the appellants or was otherwise required due to their misconduct, in my view, it is fair and reasonable that the personal appellants bear sole responsibility for the costs charged by the monitor to DBGDL or otherwise. The personal appellants are therefore jointly and severally liable to indemnify the respondent and DBGDL for all costs incurred by either of them for the monitor's fees and disbursements. If not paid otherwise, this indemnity shall be paid by adjustment to the amounts to be distributed to the parties on their respective distributions from the liquidation of DBGDL so as to immunize the respondent from directly or indirectly bearing any liability for the monitor's fees and disbursements including those of its counsel, if any. Any dispute as to the quantum or process for payment of the monitor's fees and disbursements may be resolved by motion to the judge who oversees the liquidation of DBGDL on the Commercial List.

  
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Myers J.

  
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Dambrot J.

I agree

I agree

  
\_\_\_\_\_  
Emery J.

**Date:** April 8, 2019