

# COURT OF APPEAL FOR ONTARIO

CITATION: Cornerstone Properties Inc. v. Southside Construction Management  
Limited, 2020 ONCA 380  
DATE: 20200612  
DOCKET: C66448

Doherty, Hourigan and Fairburn JJ.A.

BETWEEN

Cornerstone Properties Inc.

Plaintiff (Appellant)

and

Southside Construction Management Limited

Defendant (Respondent)

F. Scott Turton, for the appellant

David A. Decker, for the respondent

Heard: In writing

On appeal from the judgment rendered by Justice P. B. Hockin of the Superior Court of Justice, dated December 13, 2018, reported at 2018 ONSC 7487.

## REASONS FOR DECISION

[1] The appellant, Cornerstone Properties Inc. (“Cornerstone”), sought judgment against the respondent, Southside Construction Management Limited (“Southside”), in an amount equal to the total of various costs orders made in favour of Cornerstone and against 2108790 Ontario Inc. (“210”) in litigation

concerning the validity of a debenture (the “debenture litigation”). Southside was not a party to that litigation, however, Cornerstone alleged Southside should be ordered to pay the costs that had been ordered against 210.

[2] The trial judge dismissed Cornerstone’s action. He awarded costs of the action on a partial indemnity basis to Southside in the amount of \$48,408.03.

[3] Cornerstone appeals from the dismissal of the action. Cornerstone also seeks leave to appeal the costs order.

[4] For the reasons that follow, the appeal from the dismissal of the action is dismissed. Leave to appeal costs is granted, and the costs are reduced to \$25,000.

[5] Cornerstone and 210 were involved in litigation arising out of Cornerstone’s efforts to remove a debenture from title to property (the “Urlindale Lands”) owned by Cornerstone and a related company. 210 succeeded at trial. Cornerstone successfully appealed and the matter was returned to the trial court. 210 was once again successful at trial. Cornerstone was once again successful on appeal. This court held the debenture was statute-barred and unenforceable.

[6] The total costs awarded to Cornerstone in the debenture litigation totalled \$51,565.81. 210 had no assets.

[7] When Cornerstone could not collect the costs from 210, it commenced this action against Southside. Southside controlled and funded 210. It beneficially owned all of the shares of 210. Southside had incorporated 210 as part of its efforts

to acquire the Urlindale Lands. In furtherance of that purpose, it had caused 210 to acquire the debenture that eventually became the subject of the litigation initiated by Cornerstone and defended by 210. It is common ground 210 was a single purpose corporation directed and funded by Southside and/or related companies.

### **THE MAIN APPEAL**

[8] Costs can be awarded against a non-party. The jurisdiction to make that order, and the grounds on which the order can be made, were recently and thoroughly explained in *1318847 Ontario Limited v. Laval Tool and Mould Ltd.*, 2017 ONCA 184 (“*Laval Tool*”). There is no need to replough that ground in these reasons.

[9] Cornerstone submits the trial judge wrongly characterized its claim as an effort to pierce the corporate veil. Cornerstone further argues that, after the trial judge determined he would not pierce the corporate veil, he wrongly found he had no jurisdiction to require Southside to pay the costs ordered against 210.

[10] Cornerstone is correct when it argues the powers to order costs against a non-party do not depend on whether the corporate veil of the entity against whom the costs were ordered can be pierced so as to reach the non-party from whom costs are sought. It is difficult, however, to agree that the trial judge mischaracterized Cornerstone’s claim. In its pleadings, Cornerstone alleged 210

had “no substance” and that its “separate legal persona” should be ignored. By this pleading, Cornerstone effectively asked the court to look through the separate corporate identity of 210 and impose liability on Southside. It was appropriate that the trial judge address this claim in his reasons. More to the point, on the largely uncontested evidence in this case, piercing the corporate veil was the only real chance Cornerstone had to render Southside liable for the costs order imposed on 210.

[11] Lastly, we are satisfied that the trial judge’s characterization of the question, as one involving the piercing of the corporate veil, did not prejudice Cornerstone. Many of the considerations pertinent to that inquiry were also relevant to the existence of grounds to order Southside to pay 210’s costs.

[12] The appellant’s second argument, that the trial judge, having determined he could not pierce the corporate veil, wrongly held he had no jurisdiction to require Southside, a non-party, to pay the costs ordered against 210, finds support in one passage in the trial judge’s reasons (see reasons, para. 22). However, in the paragraphs that follow, the trial judge explicitly recognizes the power to impose costs on a non-party, and refers to *Laval Tool*, the governing authority. The trial judge goes on to identify the two bases recognized in *Laval Tool* for an order of costs against a non-party. The first, under s. 131(1) of the *Courts of Justice Act*, R.S.O. 1990, c.43, requires a finding the main plaintiff was “a person of straw” and not the actual litigant. The second, premised on the inherent jurisdiction of the

court, looks to conduct by the non-party tantamount to an abuse of process. The trial judge's reasons leave no doubt he appreciated both aspects of his jurisdiction to award costs against a non-party, and the bases upon which that order could be made.

[13] It is true the trial judge's consideration of the merits of Cornerstone's claim that Southside should pay the costs is brief. With respect, that brevity reflects the merits of Cornerstone's claim that Southside should be responsible for 210's costs.

[14] Cornerstone did not suggest that it fell within the "person of straw" criterion for making an order of costs against a non-party: see *Laval Tool*, at paras. 59-62. It does argue its claim meets the abuse of process criterion identified in *Laval Tool*, at para. 66:

In particular, apart from statutory jurisdiction, Superior Courts have inherent jurisdiction to order non-party costs, on a discretionary basis, in situations where the non-party has initiated or conducted litigation in such a manner as to amount to an abuse of process.

[15] There is no evidence Southside used 210 in any way to abuse the court's process or engage in dishonest or vexatious conduct in respect of any litigation. Southside incorporated 210 for a specific business purpose in respect of its attempted land acquisition. 210 acquired the debenture for that purpose. It did not initiate the debenture litigation.

[16] It is wrong to suggest, as counsel for the appellant does in his factum, that “Southside ran Cornerstone up and down the court system twice and never relented”. Cornerstone initiated the debenture litigation and the appeals in that litigation. The history of the litigation demonstrates 210’s response to Cornerstone’s attempt to declare the debenture unenforceable was anything but an abuse of the court’s process. There were obviously legitimate issues in that litigation. Southside, by funding and directing 210’s defence, by loan or otherwise, did nothing to abuse the court’s process or undermine the fair administration of justice.

[17] In his supplementary submissions, counsel for the appellant gets to the real point of his submissions. He argues, that if a party has no funds to satisfy a costs order, and that party is a corporation controlled in the litigation by another corporation that does have funds, fairness and the purposes underlying costs orders dictate that the successful party should receive its costs from the directing corporate entity that has assets. This argument was rejected in *Laval Tool: Laval Tool*, paras. 63, 77, and runs directly against s. 15 of the *Business Corporations Act*, R.S.O. 1990, c. B.16. Counsel’s submissions, if accepted, would fundamentally change the accepted notions of corporate identity insofar as costs awards are concerned. It is an argument best addressed to the legislature.

## THE COSTS APPEAL

[18] Assuming the order dismissing the action stands, Cornerstone does not quarrel with the trial judge's order that Southside receive its costs of the action on a partial indemnity basis. Cornerstone does submit, however, an award of costs of \$48,408.03, almost equal to the amount claimed in the action (\$51,565.81), defeats the access to justice principle animating the Simplified Procedure process in the rules, and is inconsistent with the principles of proportionality in costs.

[19] This court has held parties to actions under the simplified rules procedure can reasonably expect reduced costs awards: *Williams Distinctive Gems Inc. v. Advantex Dining Corporation*, 2019 ONCA 702, at para. 15.

[20] The trial judge did not specifically identify this action as governed by the Simplified Procedure process. He did, however, refer to the amount of the claim and Cornerstone's argument any costs awarded must be proportionate to the amount claimed.

[21] The trial judge de-emphasized proportionality. He did so, having regard to what he viewed as the novelty of the claim, the importance of the case to Southside, and the very good work done by counsel on both sides. None of these factors justified the significant devaluation of the proportionality principle reflected in the amount awarded by the trial judge.

[22] This was not a complicated case. Nothing in the pleadings, pretrial proceedings or evidence suggested otherwise. The evidence took a little over a day. The facts were straightforward and largely uncontested. The entirety of the relevant case law could be found in *Laval Tool*, a very recent decision from this court. It is fair to say the action was unusual in the sense that claims for costs against non-parties are few and far between. The unusual nature of the claim did not, however, make it complex.

[23] The importance of this case to Southside, beyond the money involved, is not self-evident and is not explained by the trial judge. Nor does the high quality of service provided by counsel warrant a departure from the proportionality principle.

[24] The trial judge also made no reference to the unsuccessful security for costs motion brought by Southside at the commencement of the trial. The motion took slightly over half a day. Southside should have been required to pay the costs attributable to that motion.

[25] The trial judge correctly appreciated the hourly rate claimed by counsel for Southside was modest. We are satisfied, however, he failed to give any, much less sufficient, weight to the proportionality principle. The other factors identified by the trial judge did not justify abandoning the proportionality principle. In our view, that principle finds legitimate expression in an award of \$25,000, inclusive of disbursements and taxes.

**COSTS OF THE APPEAL**

[26] Southside is successful on the main appeal. Cornerstone is successful on the costs appeal. We will make a single costs order on the main appeal that reflects the mixed results in the two appeals.

[27] Southside is entitled to costs on the main appeal in the amount of \$5,000, inclusive of disbursements and taxes. There shall be no order as to costs on the costs appeal.

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