The Full ‘Costs' Of Lying: When Full-Indemnity Costs are Awarded

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It’s not every day that an insurer is able to recover its full costs. But sometimes, when an opposing party lies and engages in unlawful conduct, it just might be your lucky day.

That’s what happened in *Net Connect Installation Inc. v. Mobile Zone Inc.*[1]: the defendants hid their money offshore, and fabricated evidence. The case involved an oral agreement between the parties for the sale and installation of cable packages in Ontario. The plaintiff claimed for the recovery of loaned money, breach of contract, and funds that the defendants had diverted to Pakistan. On a motion for summary judgment, the court found in favour of the plaintiff, and granted full-indemnity costs. The Court of Appeal agreed and upheld the costs award.

Obviously, courts don’t like it when parties lie and fabricate evidence. What was surprising, in this case, is that the court granted the plaintiff its full costs (100 percent). Normally, the winning party might expect to get partial-indemnity costs (about 60 percent) from the losing party. The award may be higher (substantial indemnity - about 80 percent) if a court disapproves of a party’s conduct.

What this case demonstrates is that, in rare and exceptional circumstances, where conduct is particularly egregious, full-indemnity costs might be warranted.

What was it about this case made the defendants’ conduct sufficiently egregious? Several things:

1. The defendants diverted funds despite knowing that the plaintiff was seeking an injunction to prevent depletion of those very assets.
2. They also created a shroud of lies, buying time to empty their bank accounts.
3. They even fabricated the existence of agreements to provide the foundation for a meritless counterclaim.

The court concluded that the defendants were solely to blame for the unnecessary length of the litigation, and the significant cost of the proceedings.

So, when can an insurer expect to succeed in obtaining full-indemnity costs?

… [A] court is entitled to award full indemnity costs and is justified in so doing in rare instances where a party to litigation adds delay and costs to the proceedings, is less than forthright with documentary disclosure, repeatedly lies under oath, fraudulently creates documents and/or attempts to perpetrate a fraud on the plaintiff and the court.[2]

The Court of Appeal[3], in dismissing the defendants' leave to appeal, expanded on this principle, albeit with some caution:

[8] … There is a significant and important distinction between full indemnity costs and substantial indemnity costs. An award of costs on an elevated scale is justified in only very narrow circumstances - where an offer to settle is engaged or where the losing party has engaged in behaviour worthy of sanction: *Davies v. Clarington (Municipality)* (2009), 100 O.R. (3d) 66 (Ont. C.A.) at para. 28. Substantial indemnity costs is the elevated scale of costs normally resorted to when the court wishes to express its disapproval of the conduct of a party to the litigation. It follows that conduct worthy of sanction would have to be especially egregious to justify the highest scale of full indemnity costs. [emphasis added]

[9] In this case, full indemnity costs were warranted given the factual findings that the motion judge made regarding the conduct of the appellants, especially the movement of funds out of the country in an effort to place them out of reach of the respondents and the instances of fabricated evidence. We would reiterate, however, that it is only in rare and exceptional cases where such a costs award is justified. [emphasis added]

Although relatively rare, the court, in *Net Connect*, specified that when bad behaviour is "especially egregious" and beyond the pale, full-indemnity costs may be justified.

[1] 2017 ONCA 766 [*Net Connect*].
[2] Costs Decision of Justice DiTomaso, in *Net Connect Installation Inc. v. Mobile Zone Inc.*, 2017 ONSC 1097, 2017 at para. 29.
[3] N*et Connect*, *supra* note 1 at paras. 8-9.