2017 ONCA 42
Ontario Court of Appeal

1588444 Ontario Ltd. v. State Farm Fire and Casualty Co.

2017 CarswellOnt 369, 2017 ONCA 42, [2017] O.J. No. 241, 135 O.R. (3d) 681, 135 O.R. (3d) 694, 274 A.C.W.S. (3d) 745, 409 D.L.R. (4th) 75, 64 C.C.L.I. (5th) 1

# 1588444 Ontario Ltd. dba Alfredo's and Vincenzo Spartaco (Plaintiffs / Respondents) and State Farm Fire and Casualty Company (Defendant / Appellant)

John Laskin, K. Feldman, C.W. Hourigan JJ.A.

Heard: September 9, 2016
Judgment: January 18, 2017
Docket: CA C61277

Counsel: Thomas J. Donnelly, for Appellant
Gordon A. Marsden, Adam D. Romain, for Respondents

Subject: Civil Practice and Procedure; Insurance; Property

**Related Abridgment Classifications**

Insurance
X Actions on policies
X.2 Practice and procedure
X.2.c Pleadings
X.2.c.ii Amendment

Insurance
X Actions on policies
X.2 Practice and procedure
X.2.e Costs
X.2.e.vii Scale and quantum of costs

**Headnote**

Insurance --- Actions on policies — Practice and procedure — Pleadings — Amendment
Premises owned by plaintiff insured, and insured by defendant insurer, were destroyed by fire caused by arson — Insured brought action against insurer for indemnification pursuant to insurance policy — Years later, insurer brought motion to amend statement of defence to abandon defence of non-cooperation and allege that fire was started by or at direction of insured — Motion judge dismissed motion — Judge held that there would be actual and presumed prejudice to insured — Insurer appealed — Appeal dismissed — Judge made palpable and overriding error of mixed fact and law in concluding that insured met onus of proving actual prejudice since insured did not adduce specific evidence of prejudice — Insured's failure to take steps to conduct forensic investigations was deliberate choice given it was on notice of possibility that insurer would deny coverage on basis that insured set fire, and was unconnected to insurer's delay in moving to amend statement of defence — Judge did not err in finding that there was presumed non-compensable prejudice that had not been rebutted — Motion was brought nine years after fire and eight years after commencement of action, which was sufficient delay to trigger presumptive prejudice — While insured was responsible for some delay, much of delay was result of insurer's insistence on examining insured as if it had pleaded that insured was responsible for fire, which led to insurer's unsuccessful refusals motion —

Insurer did not point to any specific information obtained during litigation that it relied upon in support of its new defence.

Insurance --- Actions on policies — Practice and procedure — Costs — Scale and quantum of costs
Premises owned by plaintiff insured, and insured by defendant insurer, were destroyed by fire caused by arson — Insured brought action against insurer for indemnification pursuant to insurance policy — Insurer defended on basis that insured had failed to cooperate with fire investigation and failed to produce relevant documentation — Years later, insurer brought motion to amend statement of defence to abandon defence of non-cooperation and allege that fire was started by or at direction of insured — Motion judge dismissed motion and ordered substantial indemnity costs of $40,000 against insurer — Judge held that insurer had acted unreasonably in its conduct of litigation, and that motion was more complex than usual — Insurer appealed costs award — Appeal allowed — Costs award was set aside and substituted with award of $20,000 against insurer — There were not sufficient grounds to award costs on substantial indemnity basis — While insurer's conduct in delaying bringing its motion was not ideal, insured was responsible for part of delay — While there was significant litigation history that had to be canvassed, matter was not complex.

**Table of Authorities**

**Cases considered by *C.W. Hourigan J.A.*:**

*Andersen Consulting v. Canada (Attorney General)* (2001), 2001 CarswellOnt 3139, 150 O.A.C. 177, 13 C.P.C. (5th) 251, [2001] O.T.C. 313 (Ont. C.A.) — followed

*Family Delicatessen Ltd. v. London (City)* (2006), 2006 CarswellOnt 1021 (Ont. C.A.) — followed

*Haikola v. Arasenau* (1996), 46 C.P.C. (3d) 292, 27 O.R. (3d) 576, 1996 CarswellOnt 259 (Ont. C.A.) — followed

*Hanlan v. Sernesky* (1996), 39 C.C.L.I. (2d) 107, 95 O.A.C. 297, 3 C.P.C. (4th) 201, 1996 CarswellOnt 4690 (Ont. C.A.) — followed

*Iannarella v. Corbett* (2015), 2015 ONCA 110, 2015 CarswellOnt 2150, 65 C.P.C. (7th) 139, 75 M.V.R. (6th) 185, 124 O.R. (3d) 523, 331 O.A.C. 21, 45 C.C.L.I. (5th) 171 (Ont. C.A.) — referred to

*Iroquois Falls Power Corp. v. Jacobs Canada Inc.* (2009), 2009 ONCA 517, 2009 CarswellOnt 3617, 80 C.L.R. (3d) 1, 75 C.C.L.I. (4th) 1, 71 C.P.C. (6th) 9, 264 O.A.C. 220 (Ont. C.A.) — followed

*Iroquois Falls Power Corp. v. Jacobs Canada Inc.* (2010), 2010 CarswellOnt 425, 2010 CarswellOnt 426, *(*sub nom. *Jacobs Canada Inc. v. Iroquois Falls Power Corp.)* 404 N.R. 397 (note), *(*sub nom. *Jacobs Canada Inc. v. Iroquois Falls Power Corp.)* 270 O.A.C. 393 (note) (S.C.C.) — referred to

*King's Gate Developments Inc. v. Drake* (1994), 23 C.P.C. (3d) 137, *(*sub nom. *Kings Gate Developments Inc. v. Colangelo)* 17 O.R. (3d) 841, *(*sub nom. *Kings Gate Developments Inc. v. Colangelo)* 70 O.A.C. 140, 1994 CarswellOnt 483 (Ont. C.A.) — followed

*Mazzuca v. Silvercreek Pharmacy Ltd.* (2001), 2001 CarswellOnt 4133, 207 D.L.R. (4th) 492, 56 O.R. (3d) 768, 152 O.A.C. 201, 15 C.P.C. (5th) 235, [2001] O.T.C. 360 (Ont. C.A.) — followed

*Ontario (Securities Commission) v. McLaughlin* (2009), 2009 CarswellOnt 2694 (Ont. Div. Ct.) — considered

*Plante v. Industrial Alliance Life Insurance Co.* (2003), 2003 CarswellOnt 2961, 66 O.R. (3d) 74, 3 C.C.L.I. (4th) 274, 39 C.P.C. (5th) 323, [2003] O.T.C. 715 (Ont. Master) — followed

*Toronto District School Board v. Molson Breweries Properties Ltd.* (2009), 2009 CarswellOnt 3661 (Ont. S.C.J.) — referred to

*Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1995), 25 O.R. (3d) 106, 41 C.P.C. (3d) 75, 1995 CarswellOnt 1003 (Ont. Gen. Div.) — followed

*Whiten v. Pilot Insurance Co.* (1996), 132 D.L.R. (4th) 568, 47 C.P.C. (3d) 229, 27 O.R. (3d) 479, 1996 CarswellOnt 187 (Ont. Gen. Div.) — distinguished

*Whiten v. Pilot Insurance Co.* (1999), 1999 CarswellOnt 269, [1999] I.L.R. I-3659, 170 D.L.R. (4th) 280, 117 O.A.C.

201, 42 O.R. (3d) 641, 32 C.P.C. (4th) 3, 58 O.R. (3d) 480 (note) (Ont. C.A.) — referred to

*Whiten v. Pilot Insurance Co.* (2002), 2002 SCC 18, 2002 CarswellOnt 537, 2002 CarswellOnt 538, [2002] I.L.R. I-4048, 20 B.L.R. (3d) 165, 209 D.L.R. (4th) 257, 283 N.R. 1, 35 C.C.L.I. (3d) 1, 156 O.A.C. 201, [2002] 1 S.C.R. 595, 58 O.R. (3d) 480 (note), 2002 CSC 18 (S.C.C.) — referred to

**Rules considered:**

*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194
R. 26.01 — considered

APPEALS by insurer from judgment dismissing its motion to amend statement of defence and from judgment awarding substantial indemnity costs against insurer.

***C.W. Hourigan J.A.*:**

**Introduction**

1 During the late evening hours of June 4, 2006 a restaurant and banquet facility operated by the corporate respondent was destroyed by fire. The cause of the fire was arson. The premises were insured under a policy issued by the appellant.

2 Approximately one year later, the respondents sued the appellant, seeking indemnification pursuant to the insurance policy it had issued to the corporate respondent. The appellant defended the action on the basis that the respondents had failed to cooperate with the investigation of the fire and failed to produce relevant documentation.

3 In January 2015 the appellant brought a motion to amend its statement of defence. The effect of the proposed amendments was to abandon the defence of non-cooperation and assert a defence that the fire was set by or at the direction of the respondents.

4 The motion judge dismissed the motion and ordered substantial indemnity costs against the appellant. Both parts of that order are appealed.

5 For the reasons that follow, I would dismiss the appeal of the order refusing leave to amend the statement of defence and would allow the appeal of the costs award.

**Background**

6 On June 9, 2006 approximately four days after the fire, a representative of the appellant wrote to the corporate respondent stating as follows:

> There is a question as to whether the cause and origin of the loss was accidental in nature from the standpoint of the insured.
>
> ***Section I Losses Insured And Losses Not Insured***
>
> ***Losses Not Insured***
>
> 21. *dishonest or criminal act occurring at any time by you, any of your partners, employees, directors, trustees, authorized representatives or anyone to whom, you entrust the property for any purpose whether acting alone or in collusion with others.* [Emphasis in original.]
>
> For this reason and for other reasons which may become known, you are hereby notified that any action taken by State Farm Fire & Casualty Company or its authorized representative to investigate the cause of the loss, determine the amount of loss or damage, or attempt to adjust any claim arising out of the alleged loss shall not waive any of the terms or conditions of the policy of insurance described above, nor shall such action waive any of your rights under the policy.

7 The same day the individual respondent, Vincenzo Spartaco, the directing mind of the corporate respondent, executed a Request for Claim Service and Non-Waiver of Rights form, wherein he acknowledged that the appellant might not have an obligation to indemnify its insured for claims arising out of the fire. Mr. Spartaco also authorized the appellant to, among other things, investigate the cause of the fire.

8 As part of the appellant's investigation of the fire, Mr. Spartaco attended at both an interview and an examination under oath. He also signed an authorization agreeing to the release of relevant documents to the appellant.

9 The appellant retained an engineer to investigate the cause of the fire, who concluded that the fire was deliberately set. This was the same conclusion reached by the Barrie Police Force and the Office of the Fire Marshall.

10 In their statement of claim issued on June 4, 2007 the respondents alleged that the appellant wrongfully and unreasonably denied payment under the insurance policy.

11 The appellant served a statement of defence dated September 14, 2007 wherein it admitted that the policy provides for coverage for damage caused by fire and pleaded that the fire was "intentionally set and incendiary in nature". The appellant did not take the position in its pleading that the respondents, or anyone on their behalf, set the fire. The appellant did plead that the respondents had "failed to provide sufficient, or any, supporting damage documentation and have failed to cooperate in the defendant's investigation as to the cause of the loss and the quantum of the damages."

12 After the close of pleadings, there was delay in conducting the examinations for discovery. The source of this delay was twofold. First, Mr. Spartaco was out of the country and unable to attend for several months. Second, the action was administratively dismissed in December 2009 and the parties took almost a year to agree to a consent to set aside the dismissal.

13 Discoveries of all parties took place in May 2011. The appellant conceded during the discoveries that its only basis for not paying under the policy was the respondents' non-cooperation and that it was not taking the position that the respondents were responsible for setting the fire. Despite this concession, during the appellant's examination of Mr. Spartaco, it attempted to ask questions of him in support of an allegation that he had intentionally set the fire. Those questions were refused.

14 The appellant brought a motion before Mullins J. to compel Mr. Spartaco to answer questions regarding his alleged involvement in the fire. Mullins J. denied that portion of the motion on the grounds that the appellant had not pleaded that Mr. Spartaco was responsible for setting the fire.

15 In a letter dated September 13, 2013 counsel for the appellant provided answers to outstanding undertakings. In that letter, counsel confirmed that the appellant was in receipt of all necessary documentation and was "not waiting to receive any further information" from the respondents. Further, counsel advised that the appellant was not aware of any failure on the part of the respondents to comply with the terms of the insurance policy.

16 Given these concessions, counsel for the respondents concluded that there was no genuine issue requiring a trial regarding the appellant indemnifying under the insurance policy, and that the only remaining issue was the quantification of damages. On March 20, 2014 counsel for the respondents wrote to counsel for the appellant advising him of the respondents' position and sought dates for a motion for summary judgment. On December 9, 2014 the respondents served their motion for summary judgment returnable December 19, 2014.

17 During a court appearance on December 19, 2014 to schedule the summary judgment motion, the appellant's counsel advised for the first time that his client would be bringing a motion seeking leave to amend the statement of defence. Counsel for the appellant eventually served motion materials, which included a proposed amended statement of defence. In that new pleading the appellant withdrew the allegations of non-cooperation and pleaded instead that coverage was being denied on the basis that the respondents had committed arson.

**Motion Judge's Reasons**

18 The motion for leave to amend the statement of defence was heard on May 21, 2015. On October 16, 2015 the motion judge released an endorsement, which provided:

> Having reviewed the record, the submissions of counsel, and the law underpinning Rule 26 motions, this endorsement, to be followed by complete reasons, is to alert counsel that the motion is denied.

19 In response to this endorsement, the appellant commenced its appeal to this court, asserting as its primary ground of appeal that the motion judge had failed to provide sufficient reasons.

20 On February 12, 2016 after this appeal was perfected, the motion judge released his reasons in support of his order dismissing the motion. He found that the respondents would suffer actual and presumed non-compensable prejudice if leave to amend were granted.

21 With respect to actual prejudice, the motion judge found that the proposed amendments would have the effect of restarting the litigation process. He concluded that the respondents had lost the ability to marshal evidence to counter a claim of arson.

22 With respect to presumed prejudice, the motion judge found, at para. 135, that "prejudice is presumed given the failure of the Defendant to demonstrate that there is no prejudice occasioned by the delay." He also concluded that the appellant had failed to provide a reasonable excuse to explain its delay.

23 The motion judge released a costs endorsement dated April 15, 2016 in which he awarded costs to the respondents in the total amount of $40,000. In so ruling, the motion judge concluded that that "there was unreasonableness exhibited" by the appellant in the manner in which it conducted the litigation. As a consequence of this finding and the motion judge's view that this motion was more complicated than the average motion to amend, the motion judge found that "costs higher than partial indemnity are required."

**Analysis**

***1. Motion to Amend***

*(a) Legal Principles*

24 Motions for leave to amend a pleading are governed by r. 26.01, which provides:

> On motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

25 The law regarding leave to amend motions is well developed and the general principles may be summarized as follows:

• The rule *requires* the court to grant leave to amend unless the responding party would suffer non-compensable prejudice; the amended pleadings are scandalous, frivolous, vexatious or an abuse of the court's process; or the pleading discloses no reasonable cause of action: *Iroquois Falls Power Corp. v. Jacobs Canada Inc.*, 2009 ONCA 517, 75 C.C.L.I. (4th) 1 (Ont. C.A.), at paras. 15-16, leave to appeal to SCC refused, 2010 CarswellOnt 425 (S.C.C.), and *Andersen Consulting v. Canada (Attorney General)* (2001), 150 O.A.C. 177 (Ont. C.A.), at para. 37.

• The amendment may be permitted at any stage of the action: *Whiten v. Pilot Insurance Co.* (1996), 27 O.R. (3d) 479 (Ont. Gen. Div.), rev'd on other grounds (1999), 42 O.R. (3d) 641 (Ont. C.A.), aff'd 2002 SCC 18, [2002] 1 S.C.R. 595 (S.C.C.).

• There must be a causal connection between the non-compensable prejudice and the amendment. In other words, the prejudice must flow from the amendments and not from some other source: *Iroquois*, at paras. 20-21, and *Mazzuca v. Silvercreek Pharmacy Ltd.* (2001), 56 O.R. (3d) 768 (Ont. C.A.), at para. 65.

• The non-compensable prejudice may be actual prejudice, i.e. evidence that the responding party has lost an opportunity in the litigation that cannot be compensated as a consequence of the amendment. Where such prejudice is alleged, specific details must be provided: *King's Gate Developments Inc. v. Drake* (1994), 17 O.R. (3d) 841 (Ont. C.A.), at paras. 5-7, and *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1995), 25 O.R. (3d) 106 (Ont. Gen. Div.), at para. 9.

• Non-compensable prejudice does not include prejudice resulting from the potential success of the plea or the fact that the amended plea may increase the length or complexity of the trial: *Hanlan v. Sernesky* (1996), 95 O.A.C. 297 (Ont. C.A.), at para. 2, and *Andersen Consulting*, at paras. 36-37.

• At some point the delay in seeking an amendment will be so lengthy and the justification so inadequate, that prejudice to the responding party will be presumed: *Family Delicatessen Ltd. v. London (City)* [2006 CarswellOnt 1021 (Ont. C.A.)], 2006 CanLII 5135, at para. 6.

• The onus to prove actual prejudice lies with the responding party*:* *Haikola v. Arasenau* (1996), 27 O.R. (3d) 576 (Ont. C.A.), at paras. 3-4, and *Plante v. Industrial Alliance Life Insurance Co.* (2003), 66 O.R. (3d) 74 (Ont. Master), at para. 21.

• The onus to rebut presumed prejudice lies with the moving party: *Family Delicatessen*, at para. 6.

26 Bearing in mind these principles, I turn to a consideration of the actual and presumed prejudice in the present case.

*(b) Actual Prejudice*

27 On the motion, the respondents filed an affidavit sworn by Adam Romain, a lawyer acting for them in this litigation. In that affidavit, Mr. Romain testified to the prejudice that his clients would suffer as a consequence of the amendments to the statement of defence.

28 Mr. Romain swears that the delay in making the allegation of arson against the respondents has deprived them of the "opportunity to fully investigate the fire and attempt to ascertain the identity of the potential suspects." In furtherance of that position, he testified that among other things, the respondents have lost the opportunity to interview potential suspects and review their personal records, canvass the neighbourhood for video evidence, and conduct forensic analysis of a broken window at the premises and of Mr. Spartaco's clothing.

29 Mr. Romain does not state that any specific witnesses are no longer available. Rather, he says that interviews of available witnesses "will be hindered by the inevitably faded memories".

30 In my view, the respondents have not met their onus of proving actual prejudice, and the motion judge made a palpable and overriding error of mixed fact and law in concluding otherwise.

31 To meet their onus, the respondents were obliged to adduce specific evidence of actual prejudice. For example, such evidence could include details of witnesses who were available previously but are no longer available. Noting that witnesses' memories may have faded is really just a generalized description of presumed prejudice. Such evidence lacks the required degree of specificity to qualify as evidence of actual prejudice.

32 I agree with the observation of William J. Poulos in his article *Prejudice: Taking a Hard Look at the Merits* (1999), 22 C.P.C. (4th) 366, at p. 379, that when it comes to alleging actual prejudice in response to a motion to amend:

> The specific allegation of prejudice should be detailed in sufficient particularity in evidence to allow the opposing party to respond to the allegation and to allow the court to take a hard look at the merits of the allegation.

33 To the extent that there is evidence of specific prejudice in Mr. Romain's affidavit, e.g. the loss of opportunity to conduct a forensic analysis of the scene, I agree with the submission of the appellant that the motion judge made a palpable and overriding error of mixed fact and law in failing to find that the prejudice does not flow from the proposed amendments.

34 It is clear that the respondents were put on notice within days of the fire that there was a possibility that the appellant would deny coverage on the basis that Mr. Spartaco set the fire. That potential was certainly alive during the course of the approximately fifteen months between the date of the fire and the service of the statement of defence. Given the warning they received, had the respondents wished to protect themselves from an allegation that they were responsible for the fire, they could have taken steps to conduct forensic investigations. To the extent that they chose not to do so, that was a deliberate choice on their part, wholly unconnected to the appellant's delay in moving to amend the statement of defence. Thus the necessary nexus between the delay and the prejudice has not been established.

35 To be clear, in reaching this conclusion I am not suggesting that an insured in a fire claim is obliged to conduct its own investigation of the cause of the fire. However, where an insured is put on notice that a claim may be denied on the basis that the arson was caused by the insured and chooses not to investigate, the insured cannot later rely on its failure to investigate as an example of actual prejudice. This is because the decision not to investigate is wholly unrelated to the delay by the insurer.

*(c) Presumed Prejudice*

36 The seminal case in Ontario considering the concept of presumed prejudice in the context of a r. 26.01 motion is the *Family Delicatessen* decision. In that case, this court observed that at a certain point after an exceptional delay, non-compensable prejudice will be presumed absent evidence to the contrary. In other words, after inordinate delay, the presumption in favour of granting leave shifts to a presumption that non-compensable prejudice will result if leave is granted. This makes sense as a matter of fairness. It would be very difficult for a responding party to prove, for example, the generalized prejudice that witnesses' memories will be diminished after a lengthy passage of time.

37 The presumption of prejudice is rebuttable. Where the moving party provides an adequate explanation for the delay or tenders evidence that there is no non-compensable prejudice, the presumption will be rebutted.

38 The court in *Family Delicatessen* did not elaborate on when the shift in onus takes place, i.e. the point at which the delay will be so lengthy that prejudice will be presumed. It also did not explain what evidence would need to be led by the moving party to rebut the onus.

39 The Divisional Court elaborated on the concept of presumed prejudice in *Ontario (Securities Commission) v. McLaughlin* [2009 CarswellOnt 2694 (Ont. Div. Ct.)]. There the court stated, at para. 6, that to rebut the presumption of prejudice, a moving party needs to provide "some explanation of the delay in seeking the amendments and the presence or absence of prejudice to the opposite party and the need to show a nexus between the proposed amendments and the facts or evidence said to be recently discovered."

40 The respondents submit that the *OSC* case provides a framework to determine whether the presumption has been rebutted. They urge the court to adopt a three part test that the moving party must satisfy as follows: (i) an explanation for the delay; (ii) the absence of non-compensable prejudice to the responding party; and (iii) a nexus between newly discovered information and the proposed pleading. The respondents submit that unless a moving party can adduce compelling evidence on all three parts of the test, then they have not rebutted the presumption.

41 I would not adopt the rigid test urged upon us by the respondents. In my view, the Divisional Court in *OSC* did not purport to establish a stringent test for rebutting the presumption. Rather, they were simply referencing the types of evidence that might be adduced by a moving party to rebut the operation of the presumption.

42 In any event, such a rigid test is contrary to the fairness considerations that underlie the court's recognition of the concept of presumed prejudice in *Family Delicatessen*. It would be inequitable to require a moving party to satisfy all three parts of the proposed test in all cases. For example, if a moving party were able to establish that the responding party would suffer no non-compensable prejudice by reason of the amendment, then it would be an odd result if the presumption was not rebutted simply because an adequate explanation for the delay had not been established.

43 Turning to the facts of this case, I am not satisfied that the motion judge erred in finding that there was presumed non-compensable prejudice that has not been rebutted.

44 The motion to amend the claim was brought approximately nine years after the fire and eight years after the commencement of the litigation. While there is no hard and fast rule as to what qualifies as inordinate delay, I can see no error in the motion judge's finding that there was sufficient delay in this case to trigger presumptive prejudice.

45 In my view, for the reasons that follow, the appellant did not meet its onus of rebutting the presumption of presumed prejudice.

46 The appellant did not adduce any evidence to establish that the respondents would not suffer prejudice by reason of the amendment. For example, the appellant did not show that through its own investigation it had retained key pieces of evidence or taken witness statements at a time closer to the fire, before the passage of time is presumed to have caused evidence to disappear and memories to fade. Nor did it explain how information discovered through the litigation process resulted in the proposed amendments.

47 What the appellant attempted to do was to explain its delay in moving to amend the statement of defence. It makes two arguments. First, it says that the respondents are responsible for much of the delay in the litigation by reason of the unavailability of Mr. Spartaco and the administrative dismissal of the action. It also submits that as a result of the decision in *Whiten*, it was put in an untenable position because if it alleged arson at the outset of the litigation it faced the potential of a punitive damages claim, and if it waited to assert the arson defence then it would face a prejudice argument.

48 While there was delay attributable to the respondents during the course of the litigation, much of the delay was the result of the appellant's insistence on examining Mr. Spartaco as if it had pleaded that the respondents were responsible for the fire. This led to the appellant's unsuccessful refusals motion. Moreover, there is no explanation as to why, after that refusals motion, a motion was not brought to amend the statement of defence.

49 The *Whiten* argument is based upon a misapprehension of that case. The facts in that case are very different from the circumstances of the present case. In *Whiten*, the insurer persisted with an arson defence even though the local fire chief, the respondent's own expert investigator, and its initial expert all said there was no evidence of arson.

50 In the present case, all parties knew from the beginning that arson was the cause of the fire. The appellant pleaded that the respondents were not cooperating with its investigation of the fire. Given this plea and the fact that it was common ground that the fire was caused by arson, there was nothing stopping the appellant from pleading at the outset, or very early on in the litigation, that the respondents were responsible for the fire. It is perfectly appropriate to allege arson where there is positive evidence of the arson and the insured is not cooperating with the investigation of the fire.

51 Further, this is not a case where the appellant was cautious about pleading arson but later discovered information that supported the plea. The appellant has not pointed to any specific information obtained during the course of the litigation that it relies upon in support of its new defence.

***2. Costs Award Below***

52 The motion judge awarded costs on a substantial indemnity basis on the ground that the appellant acted unreasonably in bringing its motion to amend.

53 In my view, there were not sufficient grounds to award costs on a substantial indemnity basis and the motion judge erred in making the award. The court must find that a party has engaged in egregious misconduct in a proceeding before a substantial indemnity costs award is justified: *Iannarella v. Corbett*, 2015 ONCA 110, 124 O.R. (3d) 523 (Ont. C.A.), at para. 139.

54 While the appellant's conduct in delaying bringing its motion is not ideal, it must also be remembered that the respondents were responsible for part of the delay in this proceeding.

55 Further, and in any event, even an award of costs on a substantial indemnity basis must be consistent with the reasonable expectations of the parties: *Toronto District School Board v. Molson Breweries Properties Ltd.*, 2009 CarswellOnt 3661 (Ont. S.C.J.), at para. 16. This was a motion to amend a statement of defence. While there was a significant litigation history that had to be canvassed, the matter was not complex.

56 I would set aside the costs award and substitute an award of costs in favour of the respondents in the total amount of $20,000.

**Disposition**

57 For the foregoing reasons, I would dismiss the appeal of the order dismissing the motion for leave to amend the statement of defence. I would set aside the costs award below and substitute an award in favour of the respondents in the amount of $20,000, inclusive of fees, disbursements, and taxes.

58 With respect to the costs of the appeal, the parties agreed that if the respondents were successful on the appeal they would be entitled to partial indemnity costs of $13,759. Given the divided success on the appeal, I would reduce this amount and award the respondents costs of the appeal in the amount of $11,000, inclusive of fees, disbursements, and taxes.

***John Laskin J.A.*:**
I agree.

***K. Feldman J.A.*:**
I agree.

*Appeal of dismissal of motion to amend dismissed; appeal of costs award allowed.*

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