

BRIEFING NOTE

Special Costs Imposed for Insurer's Failure to Provide Disability Benefits *Tanious v. the Empire Life Insurance Company*, 2017 BCSC 85

In *Tanious v. the Empire Life Insurance Company*, 2017 BCSC 85 the BC Supreme Court has further clarified the circumstances under which a party may reasonably seek full solicitor client costs (full indemnity costs or special costs) following a successful trial.

It was only last year that the courts in BC, for the first time, considered the issue of awarding full indemnity costs in a proceeding where the insured was successful in seeking a duty to defend (*Williams v. Canales* 2016 BCSC 1811). In finding such an award justified, the Court in noted *Williams* that, while full indemnity costs are normally reserved for circumstances where the court is attempting to rebuke reprehensible conduct, the unique nature of an insurance contract, which entails a duty to defend at no cost to the insured, is also sufficiently broad to entitle a litigant to full indemnity. In *Tanious*, the Court has again ordered full indemnity costs following a trial, but in this instance the basis was to put the Plaintiff back in the position she would have been, but for being forced to retain counsel in order to enforce an insurance contract for disability benefits.

The Plaintiff, Ms. Tanious, worked for a retail marketing company and in or around February 2005 was diagnosed with Multiple Sclerosis ("MS"). While she generally attempted to continue working, she found herself increasingly succumbing to MS related symptoms. On or about January 10, 2012, following a sequence of events related to work performance, the Plaintiff was terminated from her employment and then on March 26, 2012, the defendant Empire Life rejected her claim for weekly indemnity benefits and later refused to pay long-term disability benefits. Following an 8 day trial, the Court determined that the Plaintiff had been rendered completely disabled as of December 28, 2011 and awarded disability benefits, past and prospective to age 65, provided for under the Empire Life policy, as well as costs at Scale C. The Plaintiff then applied for full indemnity costs, either as costs, or damages.

In awarding full indemnity, the court confirmed that the cost award was not punitive as against Empire Life, as much as it was the foreseeable outcome of giving full effect to an insurance contract where the insured was required to retain counsel in order to pursue and acquire that which was the fundamental purpose of the contract in the first place; the disability benefits. Further, in making the above determination, the Court reviewed this area of law and set out 4 categories of insurance contract claims where full indemnity costs have been awarded:

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Category “A”: claims by an insured against an insurer, in which the insured incurred legal costs to determine coverage under the contract. As previously mentioned in *Williams*, whether by implied or explicit terms, the court has said that an award of full indemnity costs naturally flows from a claim where an insured incurs legal costs in pursuit of a duty to defend that the insurer should have provided at the outset.

Category “B”: claims by an insured against an insurer in which the courts found full indemnity of the insured’s legal costs were necessary to give effect to the fundamental purpose of the contract and to secure justice. Similar to Category “A”, generally these are claims where it was determined that an insured was denied the benefit of a contract for insurance through no fault of their own and thus, having confirmed coverage, full indemnity costs are further awarded to put the insured back in the position he or she would have been under the policy, had the insurer not wrongly denied coverage.

Category “C”: claims by an insured against an insurer, in which full indemnity costs were awarded to the insured as an extension of punitive damages. This award is punitive in nature and usually only arises where the insurer is judged to have acted in a harsh and unreasonable manner in failing to provide a benefit to an insured in a vulnerable situation.

Category “D”: claims by an insured against an insurer, in which legal fees are a foreseeable cost incurred in mitigation of the insured’s losses or a foreseeable loss stemming from a breach of the contract. Generally, these are breach of contract claims where the court has found that retaining counsel in pursuit of litigation was the only option the insured had to enforce the contract of insurance.

In terms of what the above may signal, while the courts in BC had previously only awarded full indemnity costs in duty to defend matters or as a form of punitive damages, in *Taniou* the BC Court recognized that full indemnity costs are also the natural extension of the principle of putting the Plaintiff in the position that she would have been but for the breach by the insurer in denying a claim for benefits. Moreover, while it is arguable that the findings in *Taniou* should be confined to the unique relationship between a disability insurer and policyholder, the focus on the contractual nature of the dispute and the recognition the 4 categories of cases in which such costs have been awarded in other Provinces, perhaps signals a willingness for the courts in this Province to make an award of special costs the norm in first party insurance claims rather than the exception.

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