CITATION: Green v. Canadian Imperial Bank of Commerce, 2016 ONSC 3829
COURT FILE NO.: CV-08-00359335
DATE: 20160610

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
HOWARD GREEN and ANNE BELL Plaintiffs	*Joel P. Rochon, Peter R. Jervis* and *Remissa Hirji*, for the Plaintiffs
- and -	
CANADIAN IMPERIAL BANK OF COMMERCE, GERALD McCAUGHEY, TOM WOODS, BRIAN G. SHAW, KEN KILGOUR Defendants	*Sheila Block*, *James C. Tory*, *Andrew Gray*, *Gillian B. Dingle* and *Lara Guest*, for the Defendant CIBC
	HEARD: In Writing

REASONS ON COSTS

G.R. Strathy C.J.O. (Ex Officio)

[1] In my reasons released July 3, 2012, reported as *Green v. Canadian Imperial Bank of Commerce*, 2012 ONSC 3637, [2012] O.J. No. 3072, I held that I was bound by the Court of Appeal's decision in *Sharma v. Timminco Ltd.*, 2012 ONCA 107, 109 O.R. (3d) 569, and dismissed this action as time-barred. But for that conclusion, I would have granted leave under the *Securities Act*, R.S.O. 1990, c. S.5, and certified this proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

[2] On appeal from my decision, a five-judge panel of the Court of Appeal reversed *Timminco* and allowed the plaintiffs' appeal. It set aside the order dismissing the action as time-barred and held that the statutory cause of action could be certified: 2014 ONCA 90, 118 O.R. (3d) 641. That decision was affirmed by the Supreme Court of Canada: 2015 SCC 60, [2015] 3 S.C.R. 801.

[3] It now falls to me, in my capacity as a judge *ex officio* of the Superior Court of Justice and as the former case management judge in this proceeding, to assess the costs of the successful plaintiffs on the certification and leave motions.

Governing principles

[4] In assessing the costs, I am guided by the principles governing costs awards contained in Rule 57.01 of the *Rules of Civil Procedure* as explained in *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.). The relevant considerations were summarized by Perell J. in *Labourers' Pension Fund of Central and Eastern Canada (Trustees of) v. Sino-Forest Corp*, 2015 ONSC 6354, at para. 117-129. An important principle, relied on by the defendants, is that the costs should reflect the fair and reasonable expectations of the unsuccessful party. Another is that, to the extent possible, awards should be consistent with those made in comparable cases, recognizing that comparisons will rarely provide clear guidance.

[5] Costs awards in class proceedings must also give effect to the principles underlying the *Class Proceedings Act, 1992*, and in particular the goal of access to justice. The principles have been discussed in such cases as *Pearson v. Inco Ltd.* (2006), 79 O.R. (3d) 427 (C.A.), at para. 13 and *McCracken v. Canadian National Railway*, 2012 ONSC 6838, at paras. 72-73.

The costs claimed

[6] The plaintiffs claim costs on a partial indemnity basis of $2,679,277.82 for the leave and certification motions. This is comprised of fees of $1,505,418.72, disbursements of $932,123.14 and HST. The claim for fees represents a ten percent discount from the partial indemnity amount as an acknowledgment by the plaintiffs of some ongoing benefit of the work required to analyze the complex factual basis of the claim. The costs claimed relate only to the certification and leave motions and do not include fees relating to the action apart from those motions.

The defendants' position

[7] The defendants do not suggest that either the time spent or the disbursements incurred were excessive or unreasonable. Indeed, had they intended to take that position they could reasonably be expected to have produced their own records, which they have not done.

[8] Instead, the defendants say that the amount claimed is well beyond what they could reasonably have expected to pay in the circumstances. In particular, they say that the amount should be reduced to reflect:

a) the fact that the plaintiffs were only permitted to proceed with parts of the action as a result of an indulgence – the *nunc pro tunc* order granted by the Supreme Court of Canada;

b) the reasonable expectations of the defendants, as informed by the following:

(i) some of the costs are not properly claimed in respect of the motions;

(ii) success was divided;

(iii) costs awarded in other cases; and

(iv) the ongoing benefit to the plaintiffs of much of the work done on the leave and certification motions.

[9] The defendants say that a total award of $800,000, with half payable now and half payable in the cause, would be fair and reasonable in the circumstances.

[10] The result is that the costs immediately payable would cover less than fifty percent of the disbursements paid by class counsel and would provide no compensation for their partial indemnity fees in the four years it took to prepare and advance the certification and leave motions.

Discussion

[11] This is an extraordinary case by any standard. In considering a fair and reasonable award, I have regard to all the circumstances, but particularly the following:

a) the plaintiffs put the claim at between $2 billion and $4 billion, amounts that I cannot say are unrealistic;

b) the class is very substantial and includes over 100,000 Canadian shareholders;

c) this was one of the first cases to advance a claim under Part XXIII.1 of the *Securities Act* dealing with secondary market misrepresentation and it is an important landmark case;

d) the facts were extraordinarily complex and required sophisticated expert evidence;

e) the law was both complex and novel;

f) the record was massive: there were a total of 25 affidavits filed by the parties, cross-examinations were conducted over 29 days, and the evidentiary record comprised 45 volumes of material;

g) the hearing before me, which was based entirely on the record, took seven days;

h) the proceeding was vigorously contested by the defendants, who were well-resourced and represented by teams of highly experienced counsel;

i) although the plaintiffs did not achieve everything they sought on the certification motion, they achieved very substantial success; and

j) the motions were skillfully and thoroughly prepared, prosecuted and argued by experienced class counsel.

[12] I also recognize the public interest in ensuring that parties pursuing secondary market misrepresentation claims that are certified and pass successfully through the statutorily-mandated judicial screening process are fairly compensated by realistic costs awards.

[13] This is an access to justice issue. These claims are suitable for class action treatment because no individual class member would take on the risks involved in pursuing individual litigation. The ability of the class to pursue these claims depends on the willingness of class counsel to accept the very substantial risks in exchange for the potential rewards.

[14] The risks are – quite simply – the exposure to substantial personal liability for costs and the risk of receiving no compensation for the time and disbursements invested in the case. There is no funding agreement in this case, but the latter risk exists even where there is a funding agreement to indemnify class counsel for an adverse costs award or for some portion of their disbursements. The efficacy of the statutory remedy depends on incentivizing class counsel to take these formidable risks.

[15] Defence counsel do not face these risks. They are well paid and rightly so. They no doubt bill on an interim basis – as they are entitled to do – and their clients will likely spare no expense in attempting to shut down the proceeding at the initial stages.

[16] If this claim had been defeated there is absolutely no doubt that the defendants would be seeking costs at least as substantial as those claimed by the plaintiffs and probably more substantial. The defendants retained two separate law firms and some of the best class action defence talent in the country. The costs the defendants would claim in the event of their success must inform their reasonable expectations in the event of the plaintiffs' success. In making these observations, I note, of course, that had the defendants been successful the litigation would be over and they would normally have expected to recover all their costs of the proceeding.

[17] Although this claim has passed through the initial screening, the plaintiffs and their lawyers have a long road ahead of them. A failure to award fair costs to the plaintiffs will encourage and reward a defence strategy of wearing down the plaintiffs by wearing down their lawyers. I am not suggesting that this was, or will be, the defendants' strategy in this case, but defendants have everything to gain and little to lose by sparing no expense in this kind of case.

[18] It also bears noting that the $1.5 million sought for fees (before taxes) is on a partial indemnity basis and reflects four years of legal work. The partial indemnity rates are less than half the lawyers' regular hourly rates.

[19] These considerations support the view that plaintiffs who cross the certification and screening thresholds in *Securities Act* cases should normally receive reasonable compensation for their costs incurred in getting there.

The defendants' arguments

[20] I turn to the defendants' arguments that the costs are excessive in the circumstances.

[21] *First*, the "indulgence". The term is the defendants' and not mine. The plaintiffs asked for an order *nunc pro tunc* in their notice of motion. It was purely incidental and procedural and was in addition to all the other relief they requested and were granted. It was the same relief van Rensburg J. granted in *Silver v. Imax Corp.*, 2010 ONSC 4017. With the benefit of the Supreme Court's decision, I would have granted the same relief. This is not a case where the only purpose of the motion was to request an indulgence. The *nunc pro tunc* order, while critically important, was a side issue. I would make no reduction for this factor.

[22] *Second*, required steps. The defendants say that any costs of steps the plaintiffs were required to take to advance their case, including the preparation of the leave and certification records, should be in the cause. They say that this is similar to the costs of preparation of a statement of claim, which are only recoverable if the plaintiff is successful at trial. I am not aware that this proposition has ever been advanced or applied in class proceedings, in which the costs of preparation of the certification motion record are routinely awarded. The distinction with a statement of claim is obvious – a statement of claim can be issued without leave. A class action can only proceed after a certification motion and a class action under the *Securities Act* can only proceed if leave is granted.

[23] *Third*, costs in relation to the limitation period issue. The defendants say that no costs should be awarded on this issue because I found the statutory claim was barred and four members of the Supreme Court of Canada agreed. However, as pointed out above, the Supreme Court granted leave and, had I followed the path taken by van Rensburg J., I would have done the same. The costs incurred by the plaintiffs on this issue were reasonable.

[24] *Fourth*, the costs of expert reports. The defendants say that I should follow Belobaba J. in *Dugal v. Manulife Financial Corporation*, 2013 ONSC 6354, in which he found the amount

claimed for experts to be excessive and reduced them by half with a portion payable forthwith and the balance in the cause. The defendants say that of the approximately $760,000 claimed for expert witnesses and reports, the court should order payment of $350,000, with $250,000 payable forthwith and $100,000 payable in the cause.

[25] In my view, the costs for experts were necessary and reasonable. I cannot find or assume that these expert reports will have any ongoing utility. The reports were necessary, they served their purpose and the defendants should pay the cost.

[26] *Fifth*, divided success. I do not agree that success was divided. The bottom line is that the plaintiffs' key claims have been certified and the plaintiffs have obtained leave to proceed with a class action asserting statutory and common law causes of action. The statutory cause of action relates to misrepresentations in core documents. They prevailed on the limitations issue that would have defeated the statutory claim. I reject a "slice and dice" approach based on the fact that some claims were not certified.

[27] *Sixth*, costs awards in similar cases. Reference has been made to the costs award of $1.85 million to the successful defendant in *Fairview Donut Inc. v. TDL Group Corp.*, 2014 ONSC 776, which I described as "off the chart" in comparison to other cases in terms of its complexity, the amount at issue and the work required of counsel.

[28] I regard this case as more demanding and more significant than *Fairview Donut*. As in that case, billions of dollars are claimed and there is a semblance of reality to the amount – it is not simply a scare tactic. The class is much larger in this case. The evidence and the legal issues are more complex. The jurisprudential issues are far more significant in this case – it raises issues of first impression and public importance.

[29] *Sino-Forest* is distinguishable. There, Perell J. found that it was arguable that less than half the costs claimed were expended for legal services necessary for the certification and leave motions. In his view, it was arguable that "the bulk of Class Counsel's services were services that would otherwise have been performed during the discovery and trial preparation stages of the class proceedings" (at para. 134). He added that "a defendant should not have to pay for legal services tacked on to the certification and leave motion that should more properly be paid for if the plaintiff is successful in the litigation" (at para. 138). It appears that his underlying concern was that it was not fair that the defendants should be expected to finance the plaintiff's litigation expense in attempting to prove the merits of the case against them at trial.

[30] I do not have that concern here. As noted above, the costs claimed relate only to the certification and leave motions.

[31] *Seventh*, the ongoing value of the work. The plaintiffs acknowledge that some of the work done on the leave motion will have value at trial and suggest a ten percent discount of the value of this time. The net amount claimed reflects this. In my view, this is a reasonable discount and I would not make any further discount. The argument that costs should not be paid now

because the work will have ongoing value is purely speculative, because it assumes that dated work, carried out for a different purpose, is going to have value at some time in the distant future.

[32] The work was done for two specific purposes – certification and leave. Those purposes were unique to this type of action. I would follow the course charted by van Rensburg J. in *Imax* and order the costs paid now. I respectfully agree with her observation that "[i]f the plaintiffs are successful at trial, the defendants will ensure that costs paid in relation to the leave motion will not be awarded a second time" (at para. 27). If the plaintiffs are successful at trial, the court can ensure there is no double recovery by noting what this award is intended to cover.

[33] If the plaintiffs are not successful at trial, I see no reason why they should be deprived of the costs of achieving the important milestones of certification and leave.

Conclusion

[34] For the foregoing reasons, I do not accept the defendants' submissions that the amounts claimed should be reduced. I would therefore order that CIBC pay the plaintiffs' costs as claimed, in the amount of $2,679,277.82, within 30 days.

[35] CIBC having undertaken that it will pay the costs, no costs are awarded against the individual defendants.

G.R. STRATHY C.J.O.

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COSTS ENDORSEMENT

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