COURT FILE NO.: 01-CV-221418CP
DATE: 20021113

ONTARIO

SUPERIOR COURT OF JUSTICE

Proceeding under the *Class Proceedings Act, 1992*

BETWEEN:	)	
RICHARD MANDEVILLE, WISMAR GREAVES, MARCUS JORDAN and ANTHONY BOWEN	)	*Harvey T. Strosberg, Q.C. and David Stratas*, for the plaintiffs
Plaintiffs	)	
- and -	)	
THE MANUFACTURERS LIFE INSURANCE COMPANY	)	*Wendy Matheson and Andrea M. Hill*, for the defendant
Defendant	)	
	)	**HEARD:** Written submissions

SUPPLEMENTARY REASONS - COSTS

NORDHEIMER J.:

[1] On September 30, 2002, I released my reasons in which I dismissed the defendant's motion made pursuant to rules 21.01(3)(a) and (d) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 and section 106 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 for an order dismissing or staying this action on the basis that this court did not have jurisdiction to adjudicate the claims raised or that the action was an abuse of the court's process. At the same time, I granted the plaintiffs' motion to certify this action as a class proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c.6. I awarded the plaintiffs their costs of both motions and said I was prepared to fix the costs upon receipt of the appropriate material that would permit me to do so. I have now received and reviewed the written submissions of the parties.

[2] The plaintiffs seek costs in the amount of $976,059.35 for fees inclusive of GST and $113,946.28 for disbursements inclusive of GST for a total of $1,090,005.63. The defendant submits that the costs should be fixed in the amount of $409,385.76.

[3] The defendant has very fairly conceded certain issues. First, the defendant acknowledges that the plaintiffs are entitled to their costs on a partial indemnity scale up to and including June 3, 2002 and on a substantial indemnity basis thereafter. This results from the fact that the plaintiffs delivered offers to settle on that date in which they offered to settle the certification motion on the basis that the proceeding would be certified and there would be no costs of the certification motion. The plaintiffs offered to settle the defendant's motion on the basis that it would be dismissed on a no costs basis. Neither of these offers were accepted. Under my decision, the plaintiffs succeeded on both motions and, as well, received their costs of both motions so it may be said that they received a result that was "as favourable or more favourable" than their offers to settle.

[4] Second, the defendant does not seek the costs of certain cross-examinations that were conducted with the consequence that there is no need for an order "otherwise" under rule 39.02(4)(b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 regarding those cross-examinations. Third, the defendant does not dispute the amount of $5,350, inclusive of GST, requested by the plaintiffs for the preparation of the costs submissions. Fourth, with some exceptions which I will address later, the defendant does not dispute the amounts sought for disbursements.

[5] Where the issues are joined between the plaintiffs and the defendant are in the following four areas:

(a) the hourly rates sought;
(b) extending the substantial indemnity award of costs to cover all matters relating to the defendant's Rule 21 motion;
(c) certain disbursements sought by the plaintiffs, and;
(d) the amount of time spent.

Hourly rates

[6] The plaintiffs seek higher hourly rates than would be permitted under the costs grid for Mr. Strosberg and Mr. Stratas on the basis that they possess a higher level of expertise. They rely on the recent decision in *Delrina Corp. (c.o.b. Carolian Systems) v. Triolet Systems Inc.*, [2002] O.J. No. 3729 (C.A.) in support of this request.

[7] The costs grid, being Part I of Tariff A, does state that where counsel has "special expertise", the hourly rate classification "may be varied accordingly". The Court of Appeal in *Delrina* permitted one counsel an increased rate on the basis that he had special expertise in the intellectual property/technology area, which was central to the legal issues raised in that case. However, a higher hourly rate for lead counsel was rejected by the Court of Appeal on the basis that, at para. 45:

> "No doubt Mr. Morrison is a very experienced and able counsel but we do not think that this qualifies him in the present case of having 'special expertise' within the meaning of this term in the tariff."

[8] Both Mr. Strosberg and Mr. Stratas are experienced and able counsel. They each have their individual areas of expertise. With respect, though, neither of them has any "special" expertise, as I understand that expression is intended to be used in the costs grid or as it was employed by the Court of Appeal in *Delrina*, with respect to the matters at issue on the Rule 21 motion. The motion did involve complicated issues in respect of insurance companies, the regulation of financial institutions and matters of Barbadian law. However, neither Mr. Strosberg nor Mr. Stratas can claim a special or unique expertise in these areas. I see no basis, therefore, for permitting hourly rates above those provided for in the costs grid.

The defendant's motion

[9] The plaintiffs seek substantial indemnity costs for all matters relating to the defendant's motion on the basis that it was really a summary judgment motion masquerading as a Rule 21 motion. Since the defendant did not obtain any relief on its motion, the plaintiffs submit that rule 20.06(1) should be applied. Rule 20.06(1) states:

> "Where, on a motion for summary judgment, the moving party obtains no relief, the court shall fix the opposite party's costs of the motion on a substantial indemnity basis and order the moving party to pay them forthwith unless the court is satisfied that the making of the motion, although unsuccessful, was nevertheless reasonable."

[10] I do not accept the fundamental premise upon which the plaintiffs' submissions in this regard are based. This was not a summary judgment motion. It was a motion under rule 21.01(3). While there are similarities between a summary judgment motion and a rule 21.01(3) motion, especially the right to file evidence and the possibility that the result of the motion may bring the proceeding to an end, they are nonetheless separate and distinct motions. The *Rules of Civil Procedure* do not contain, in Rule 21, a provision equivalent to rule 20.06(1) and I see no reason to read such a provision into that rule. However, even if I had acceded to the plaintiffs' request, I would have concluded that the making of the motion by the defendant was "nevertheless reasonable" such that the costs sanctions of that subrule would not apply. The plaintiffs are entitled to their substantial indemnity costs of the defendant's motion from June 3, 2002, because of the offer to settle, but not otherwise.

The challenged disbursements

[11] There are five specific disbursements which the defendant challenges. First, the defendant takes issue with the amount of $20,162.25 for accommodation at a resort in Barbados. This amount represents two separate stays in Barbados, one in February 2002 for two people over four nights and one in May 2002 for one person over two nights. It represents a cost substantially in excess of $1,000 per night. This is, needless to say, excessive. Counsel may choose to stay in luxury accommodations, and their clients may be prepared to pay for it, but that does not mean that the unsuccessful party on a motion should be required to bear such costs. The defendant submits that this amount should be reduced to an allowance on a per night basis of $300, which I consider to be more than reasonable. For eleven nights accommodation, this disbursement should then be reduced to $3,300.

[12] Second, the plaintiffs also seek to charge the defendant the amount of $7,621.08 for accommodation in Toronto for Mr. Strosberg and Ms. Speight. Both Mr. Strosberg and Ms. Speight have their own condominiums in Toronto and seek to charge $185 per night for staying

in their condominiums while in Toronto on matters relating to this action. The defendant objects to these amounts.

[13] I would not allow these amounts. I appreciate that, if plaintiffs' counsel were required to come to Toronto and stay in a hotel in order to make an appearance on this matter, normally they would be entitled to claim hotel charges associated with such a trip. However, it seems to me that when counsel's practices are such that they have to attend so frequently in another city that they choose to acquire a residence in that city, then they lose the entitlement to claim reimbursement for overnight accommodation.

[14] Third, the plaintiffs seek reimbursement for $1,335 covering fourteen meals, a number of which were consumed at some of the more expensive restaurants in Toronto, such as Hy's Steak House and the Four Seasons. My earlier comments regarding the luxury accommodation apply equally to these meal expenses. I disallow them.

[15] Fourth, there is a total of $191.94 for various beverages purchased from Starbucks. There have to be reasonable limits on disbursement items for which a unsuccessful party can be held responsible and this item goes beyond those reasonable limits. I disallow this amount.

[16] Fifth, there is an amount of $25,459.96 for photocopying charges. This is a very large amount for such a disbursement. I do not know at what per page cost these charges are made but even at 25¢ per page it would amount to in excess of 100,000 pages. While there was considerable material filed on the motions, it did not come close to approaching such a quantity. The defendant submits that the amount claimed should be reduced by fifty percent and I agree. The amount is allowed at $12,729.98

[17] In the end result, the recoverable disbursements are reduced to $75,206.03, inclusive of GST.

<u>The time spent</u>

[18] As is commonly the case, this is the area where the greatest difference occurs between the parties. The plaintiffs seek recovery for time spent by eleven different lawyers plus law clerks

and students. It appears that slightly over 2,000 hours are claimed among these various individuals. There are a number of problems that arise in this area.

[19] First, I do not accept that the matters raised by these two motions required the services of eleven lawyers. I do not quarrel with Mr. Strosberg, Mr. Stratas and Ms. Speight being involved in this matter nor would I take issue with the reasonable involvement of law clerks and students. While I recognize that by comparison to these three lawyers, the amount of time spent by the other eight lawyers is relatively small, that fact only reinforces my view that the involvement of these other lawyers in this matter was surplus. I would therefore not allow their time as part of the costs to be awarded.

[20] Second, some of the time spent is time that necessarily has benefit going beyond the two motions. It is time that will have advanced the proceeding overall and would therefore usually be included under the general heading of preparation for trial. The plaintiffs fairly concede that this is the case but do not appear to have made any corresponding adjustment to the quantum of costs which they seek. The amount of time recoverable must be reduced to reflect this reality. Doing so, however, is unavoidably somewhat arbitrary. I note that in *Nantais v. Telectronics Proprietary (Canada) Ltd.*, [1996] O.J. No. 5205 (Gen. Div.), Mr. Justice Brockenshire allocated one-half of the time of the certification motion to general preparation. I am inclined to make the same allocation here.

[21] The defendant also objects to the time spent by Mr. Stratas prior to the issuance of the notice of motion for the Rule 21 motion. The defendant submits that, given that Mr. Stratas' expertise is in the public law area, and since that issue did not arise until the Rule 21 motion was launched, his time prior to the delivery of the motion should be disallowed. I do not accept that contention. I assume that it was anticipated virtually from day one that the defendant would raise the proceedings in Barbados as a bar to the claims advanced in the action and, therefore, it was prudent to begin preparing for that eventuality starting from the outset.

[22] Finally, in terms of the overall amount of time spent, given that I have disallowed the time of the other eight lawyers and I have reduced the time by fifty percent to allow for the ongoing benefits to the proceeding generally, I do not intend to make any further reductions. To go beyond what I have done would clearly be to engage in second-guessing counsel in terms of

their expenditure of time and I do not consider that to be appropriate. I have already said that this matter was complicated and the time spent by counsel reflects that fact.

[23] In the end result, therefore, I would allow the following hours at the following rates for the period up to and including June 3, 2002:

Lawyer	Up to and including June 3, 2002	Partial Indemnity Rate	Total
H. Strosberg	60	350	$21,000
D. Stratas	25	250	$6,250
P. Speight	125	250	$31,250
			$58,500

[24] I would allow the following hours at the following rates for the period following June 3, 2002:

Lawyer	Following June 3, 2002	Substantial Indemnity Rate	Total
H. Strosberg	200	450	$90,000
D. Stratas	200	350	$70,000
P. Speight	250	350	$87,500
			$247,500

[25] In addition to the above, the plaintiffs are entitled to the counsel fee for the three days that the motions took to argue. The counsel fee also has to be on a substantial indemnity scale. I would allow Mr. Strosberg a counsel fee of $3,500 per day or a total of $10,500. Mr. Stratas was gowned for the motion but did not make any submissions. I would allow Mr. Stratas a counsel fee of $2,500 per day or a total of $7,500. Ms. Speight was neither gowned for the motion nor did she make any submissions. I would not allow any counsel fee for Ms. Speight – see *Delrina Corp. (c.o.b. Carolian Systems) v. Triolet Systems Inc., supra*, at para. 50.

[26] The allowed fees therefore total $324,000. GST on that amount is $22,680. In addition, there are the disbursements, as I have allowed them, which total $75,206.03 inclusive of GST. The total for fees and disbursements, inclusive of GST, is therefore $421,886.03. Since I have not made any allowance in these amounts for the time spent by law clerks and students, I would increase this number to $425,000 to cover their reasonable involvement. Finally, I must add the

amount for the preparation of the costs submissions which has been agreed at $5,350 which brings the total to $430,350.

[27] The final consideration is whether this amount is a reasonable amount to fix for the costs of these motions. I have already said that these motions were complicated. It would perhaps be more accurate to say that the Rule 21 motion was complicated since the certification motion proceeded in a reasonably straightforward manner following on the determination of the Rule 21 motion. The motions took three days to argue. There were a large number of cross-examinations and there were examinations of witnesses on a pending motion. Finally, there were affidavits from five experts on the law of Barbados. In my view, on the range of complex and complicated motions, the Rule 21 motion was clearly at the high end.

[28] Having said all of that, however, I find the amount which results from my analysis above to be troubling in terms of its quantum. Comparisons are probably not very useful but nevertheless I would note that the amount is $100,000 less than the costs fixed in *Delrina Corp. (c.o.b. Carolian Systems) v. Triolet Systems Inc., supra*, where the costs of the entire appeal, including a three day hearing, were on a substantial indemnity basis. On the other hand, the amount is more than twice the amount I fixed for costs in *Gariepy v. Shell Oil Company*, [2002] O.J. No. 3495 (S.C.J.) and in *Pearson v. Inco*, [2002] O.J. No. 3532 (S.C.J.) which involved comparable motions in terms of their length and their complexity. Lastly, the amount is only $50,000 less than the trial costs allowed on a solicitor and client scale for the entire proceeding in *Murano v. Bank of Montreal*, [1996] O.J. No. 2415 (Gen. Div.), which included a fifteen day trial.

[29] At the same time, I am cognizant of the fact that the defendant submitted that the costs should be fixed at $409,385.76. I do not consider myself bound to fix the costs at an amount that is at or above what the unsuccessful party submits is the fair amount, anymore than I am bound to fix the costs at or below the amount submitted by the successful party. Neveretheless, I believe that the court should be reluctant to go outside of the range of costs suggested by counsel unless there is a very good reason to do so.

[30] In the end result, I have decided that the costs should be fixed at $430,350. The final small issue is that the costs need to be split between the two motions. In this regard, I adopt the

suggestion of counsel for the plaintiffs that the costs should be allocated eighty percent to the Rule 21 motion and twenty percent to the certification motion. The defendant will therefore pay to the plaintiffs the costs of the Rule 21 motion fixed at $345,000 payable within 30 days. The defendant will also pay to the plaintiffs the costs of the certification motion fixed at $85,350 payable within 30 days.

NORDHEIMER J.

Released: November 13, 2002

Court File No. 01-CV-221418CP

SUPERIOR COURT OF JUSTICE

BETWEEN:

RICHARD MANDEVILLE
and others

Plaintiffs

- and -

THE MANUFACTURERS LIFE
INSURANCE COMPANY

Defendant

REASONS FOR DECISION

NORDHEIMER J.

RELEASED: NOV 1 3 2002