CITATION: Lewis v. Cantertrot Investments Limited, 2010 ONSC 5679
COURT FILE NO.: 04-CV-277412CP
DATE: 20101018

SUPERIOR COURT OF JUSTICE – ONTARIO

PROCEEDING UNDER the Class Proceedings Act, 1992

RE: SOLLY LEWIS and HERSL KALIF, Plaintiffs

AND:

CANTERTROT INVESTMENTS LIMITED, SANDOR HOFSTEDTER, MARK SAMUEL MANDELBAUM, GEORGE HOFSTEDTER, LARRY FROOM, ALEX LEWIN, HELEN GORENDER and NORMAN HILL REALTY INC., H & R PROPERTY MANAGEMENT LTD., and STANLEY CAPPE, Defendants

BEFORE: C.Horkins J.

COUNSEL: *Samuel S. Marr*, for the Plaintiffs

Stephen C. Nadler, for the Defendants

HEARD: September 15, 2010

ENDORSEMENT

INTRODUCTION

[1] In 2006, Cullity J. certified this class action (reasons at [2005] O.J. No. 3535; [2006] O.J. No.199 and [2006] O.J. No. 1061). Examinations for discovery have been completed, the action has been set down for trial and a trial date is set for 2011.

[2] There are two motions before me. The defendants brought a motion for summary judgment to dismiss the action against three of the defendants (Mark Samuel Mandelbaum, Sandor Hofstedter, and George Hofstedter). Following service of the defendants' motion, the plaintiffs brought a motion for leave to discontinue the action against Mark Samuel Mandelbaum, Sandor Hofstedter, and to withdraw allegations of fraud and deceit against George Hofstedter.

[3] The parties have settled the defendants' summary judgment motion as it relates to George Hofstedter. The allegations of fraud and deceit made against him will be withdrawn without costs. He will remain a defendant and all other allegations against him continue.

[4] The plaintiffs consent to the dismissal of their action against Mark Samuel Mandelbaum, Sandor Hofstedter but do not agree on what costs if any the plaintiffs should pay to these defendants.

[5] The defendants seek costs on a substantial indemnity scale because the plaintiffs made unfounded allegations of fraud and deceit against Mark Samuel Mandelbaum, and Sandor Hofstedter. Their costs, disbursements and GST total $24,045.56. The plaintiffs argue that no costs should be paid.

[6] The agreement to dismiss the action against two of the defendants and narrow the allegations against George Hofstedter, requires court approval under s. 29(1) of the *Class Proceedings Act*, 1992, S.O. 1992, c. 6. A settlement, even a partial one, is not binding unless the court approves it.

[7] For the reasons that follow, I approve the dismissal of the action against Mark Samuel Mandelbaum and Sandor Hofstedter, and the withdrawal of allegations of fraud and deceit against George Hofstedter. My decision on costs also follows.

BACKGROUND

[8] A summary of the relevant allegations in the statement of claim follows.

[9] The class members are purchasers of residential condominium units located at 745 New Westminster in Thornhill, Ontario. The purchases occurred from 1999 to 2002 and the condominium was registered as York Region Standard Condominium Corporation No. 974 ("YRSCC No. 974")

[10] During the marketing of the condominium project, prospective purchasers (including the class) were provided with documents that represented what owners would be charged for monthly assessments and maintenance fees. The documents consisted of a flyer, a disclosure statement and a budget.

[11] The documents represented that depending on the size of the unit, an owner's monthly assessments and maintenance fees in the first year would range from $312.39 to $354.05 per month. The class alleges that they relied on these documents when making their decision to purchase a condominium unit.

[12] During the first year of operation it was determined that operating expenses for the condominium were higher than what the documents stated. As a result, the common expenses increased 62.24% above what was represented in the documents.

[13] As a result, the class alleges that they have suffered damages including increased maintenance fees and diminished property values.

[14] The class alleges that the information about monthly assessments and maintenance fees contained in the documents was “inaccurate, false, deceptive and misleading”.

[15] All of the defendants are alleged to have held various roles in the sale and marketing of the condominium units to the class members and specifically in the creation and presentation of the “inaccurate, false, deceptive and misleading” information.

[16] The defendants, Cantertrot Developments Limited ("Cantertrot") and Norman Hill Realty Inc. ("Norman Hill Realty"), were, respectively, the vendor of the units and the listing agent for their sale. The defendants, Sandor Hofstedter, Mark Samuel Mandelbaum, George Hofstedter, Larry Froom and Alex Lewin were either officers or directors, or both, of Cantertrot or of the condominium corporation at the time of the sale of the units. Helen Gorender was an employee of Norman Hill Realty and the primary sales agent for the condominium units.

[17] H & R Property Management Ltd. ("H & R Property") provided the development expertise for the condominium project. Stanley Cappe was the general manager of H & R Property. It is alleged that he was involved in drafting, approving and authorizing the preparation and distribution to class members of the documentation containing the misrepresentations.

[18] The class alleges fraudulent, deceitful and other serious conduct against Messrs. S. Hofstedter and Mandelbaum, as follows:

- They fraudulently and deceitfully misrepresented the maintenance fees in the budget statement as well as in a sales flyer distributed to potential purchasers;
- They intentionally distributed inaccurate, false, deceptive and misleading information to the class and did so to lure them to purchase condominium units for the defendants’ profit and gain.
- They intentionally distributed the documentation to class members knowing that the documents contained inaccurate information about fees;
- Once they became aware of the inaccurate fee information, they fraudulently and deceitfully failed to take any steps to revise the documents or otherwise advise the potential purchasers of the inaccuracies;
- They knew that the class would receive and rely on these documents and the accuracy of the information contained therein.
- They intentionally took steps to strip Cantertrot of any assets in order to render it judgment proof. Alternatively, they were willfully blind to such activity being carried on by others.

- They behaved with arrogance and high-handedness, and their conduct was sufficiently harsh, vindictive, reprehensible and malicious so as to justify an award of punitive, exemplary and aggravated damages against them.

[19] When the action was commenced and serious acts of fraud and dishonesty were alleged against Messrs. S. Hofstedter and Mandelbaum, the plaintiffs knew that these defendants were registered as officers and/or directors of one of the corporate defendants and nothing more. They had no evidence connecting them to the creation and distribution of the documents allegedly containing information that was "inaccurate, false, deceptive and misleading".

[20] Counsel for the class states that during their examination for discovery of the defendants, the very limited role of Mark Samuel Mandelbaum and Sandor Hofstedter became apparent to them. As a result, they concluded that there was no basis for continuing the claim against them.

[21] The evidence of these defendants (summarized below) supports the decision to dismiss the action against them.

[22] Mark Samuel Mandelbaum's only involvement with this condominium related to the land development aspect of the project and, in particular, zoning and land-use planning issues. After he completed this work, he became aware that a decision had been made to bring the site to market. However, he had no involvement with any aspect of the marketing of the project. His role ended when the land was serviced and zoned.

[23] While Mr. Mandelbaum understood that as a matter of general process in Ontario, purchasers of condominium units receive a budget disclosure package, he did not see the budget for this project at any time before the commencement of the action. He has no knowledge about the information that was given to purchasers about the budget or anything contained in the budget. Before this action commenced, he did not even know that there had been a deficiency in the first year budget. He had no involvement in the financial side of Cantertrot and had nothing to do with the distribution of revenues from the sale of units in the condominium project.

[24] Sandor Hofstedter has been semi-retired since the mid-1990s. His only involvement with the condominium project was in connection with the original purchase of the land in the 1980s. While he was nominally the president of Cantertrot, he had nothing to do with the planning of the project itself or its construction. He generally understood that a budget statement would have to be prepared but he had nothing to do with the budget and never spoke to any of the other defendants or anyone else about the budget or how it was being calculated. Furthermore, Sandor Hofstedter never saw the budget statement, never spoke to any of the salespeople about the project and before this action was commenced, he was unaware of any increase in maintenance fees or any complaint by anyone regarding maintenance fees. As well, he had nothing to do with the distribution of revenues from the sale of the unit in the project. Simply put, he had absolutely nothing to do with the project once the land was purchased.

[25] The plaintiffs agree that there is no evidence to support the allegations of fraud and dishonesty against George Hofstedter. However, there is a sufficient evidentiary base for continuing with the remaining claims against this defendant as set out in amended statement of claim. Briefly, it is alleged that he and other defendants breached their duty to the class when they misrepresented the estimated maintenance fees for units in the project for the year following the registration of the condominium. Having reviewed the available evidence, I agree that the claim against George Hofstedter should continue without the allegations of fraud and deceit.

[26] The affidavit of George Hofstedter offers the following evidence. Cantertrot was incorporated to act as the vendor of residential units created for a subdivision known as the Residences of Beauclaire. The condominium in question was the final segment of this development. The development expertise was provided by H & R Developments. George Hofstedter is a senior principal of this company. His role with Cantertrot was to oversee the construction of the buildings in the project.

[27] Stanley Cappe prepared the initial draft budget statement for the project. The statement estimated what the utility and other costs relating to the project would be several years down the road. This task was undertaken in or around 1998. The budget was finalized in August 1999 and incorporated into a disclosure statement that was forwarded to Norman Hill, Cantertrot's realtor for the project.

[28] At some point, a sales flyer was generated and made available to potential purchasers. It provided an estimated maintenance fee of 0.32 cents a square foot, based on the budget statement forecast of expenses for the first year of ownership.

[29] Marketing of the condominium units began around September 1999 and construction started to thereafter. The first occupants began to take possession in or about February 2002. Registration of the condominium corporation took place at the end of June 2002. Most of the final closing took place in early August 2002 and turnover to the condominium corporation took place in September 2002.

[30] From the perspective of the defendants, George Hofstedter explained what occurred next. The budget statement provided that the common expenses for the building for the year following registration would total $413,000. After the first year was over, the condominium corporation reported a shortfall of $203,000. A large portion of this increase related to the decision made by the condominium board to increase on-site security. Demand for payment was made pursuant to the *Condominium Act 1998*, S.O. 1998, c. 19, requiring the developer to cover any first-year deficiency. After a process of negotiation, a compromise was reached and the developer paid the condominium corporation about $154,000 towards that shortfall.

[31] It is the defence position that for the second year of operation, namely, August 2003 to August 2004, the Board of Directors established an increased budget that caused the class member's monthly maintenance fees to increase.

[32] In his affidavit, George Hofstedter explains that his role was to "oversee that the project would ultimately be built so that it could be put on the market". In the summer of 1998, he attended a meeting where a decision was made to market the project. At this point, a budget did not exist. Going forward he was only concerned with the construction of the building.

[33] George Hofstedter understood that the purchasers of units in the building would receive a disclosure package including a budget. He saw the disclosure statement in its final form but never reviewed its contents. In fact, he did not review the budget at any time before the commencement of the litigation. He explains that it was not his responsibility to prepare the budget or make sure that the numbers were accurate. He relied on management personnel (Mr. Froom) to prepare the budget and the disclosure package. Mr. Cappe assisted in the process. George Hofstedter never had any discussions with those involved in preparing the budget. He relied on their expertise and experience.

[34] George Hofstedter also states that he never reviewed the sales flyers before they were distributed to the purchasers. Before the litigation was commenced, he did not even know who prepared them and had no idea what purchasers were being told as far as maintenance fees were concerned. During the sale process, he states that his only involvement with sales consisted of general discussions from time to time with the sales representative, the defendant Helen Gorender. These discussions did not include any reference to the budget or to maintenance fees.

Steps Taken in the Litigation

[35] The steps taken in this class action that are relevant to the issue of costs are set out below.

[36] The plaintiffs' examination for discovery of Mark Samuel Mandelbaum, Sandor Hofstedter was conducted in March and April 2007.

[37] In April 2009, the defendants' counsel, Mr. Nadler, informed the Plaintiffs' counsel, Mr. Marr, of the defendants' intention to bring a summary judgment motion.

[38] By letter dated June 5, 2009, Mr. Nadler confirmed that he had instructions to bring the motion. At this time, counsel also discussed the possibility of conducting mediation.

[39] Before a mediator was agreed upon, Mr. Marr asked Mr. Nadler if a dismissal of the action against Messrs. S. Hofstedter and Mandelbaum on a without costs basis was acceptable. At this point, Mr. Marr did not have instructions.

[40] As of June 2009, the fees that Mr. Nadler had incurred to defend these two defendants totaled $8,878.45. This included time to prepare draft summary judgment motion materials and supporting affidavits.

[41] Mr. Nadler agreed to hold his summary judgment motion in abeyance while he considered Mr. Marr's dismissal without costs proposal.

[42] Subsequently, counsel discussed possible dates for the mediation and agreed to schedule the mediation on January 11, 2010. Further preparation of the defendants' summary judgment motion was held in abeyance pending the outcome of mediation.

[43] By e-mail sent on October 9, 2009, Mr. Nadler advised Mr. Marr that the Plaintiffs' proposal to dismiss the action against Messrs. S. Hofstedter and Mandelbaum on a without costs basis was not acceptable. Mr. Nadler further indicated that, given the upcoming mediation, he would hold off bringing the summary judgment dismissal motion until after the mediation was held.

[44] The mediation took place on January 11, 2010, as scheduled. It was unsuccessful.

[45] On March 1, 2010, Mr. Nadler and Mr. Marr attended a case conference before Mr. Justice Cullity to schedule the defendants' summary judgment dismissal motion. At the case conference, a timetable for the summary judgment motion was set. It provided (in part) as follows:

(1) The defendants would deliver their motion record by the end of March;

(2) The plaintiffs would deliver their responding motion material by the end of April; and

(3) The motion would be heard on September 15th.

[46] The defendants' cost outline indicates that in March 2010, work was done to finalize the summary judgment motion in order to comply with the court's timetable.

[47] On March 19, 2010, the plaintiffs served a Rule 49 Offer to Settle, offering to settle the defendants' pending summary judgment dismissal motion. The offer provided that the action against Messrs. S. Hofstedter and Mandelbaum would be dismissed with $1,000 in costs to each defendant. The terms of this offer linked the quantum of costs to the dismissal of the action against the two defendants.

[48] By this point, Nr. Nadler had already incurred costs well in excess of $2,000 to defend these defendants. Mr. Nadler's cost outline as of March 30, 2010 confirms that approximately $14,000 in fees and disbursements had been incurred in the defence of these two defendants alone.

[49] On March 30, Mr. Nadler served Mr. Marr with the defendants' summary judgment motion.

[50] On April 30, the plaintiffs delivered their responding motion record. At the same time, Mr. Marr also served the plaintiffs' motion record seeking leave to discontinue the action against Messrs. S. Hofstedter and Mandelbaum, without costs. Mr. Nadler had no advance notice that the plaintiffs would be bringing this motion.

[51] On May 27, 2010, Mr. Marr told Mr. Nadler that the fees he had incurred were excessive. In an attempt to resolve costs, the plaintiffs offered to pay the two defendants costs of $3,500 all inclusive.

[52] On June 11, 2010, Mr. Nadler rejected this cost offer. He pointed out that by March 30, 2010, they had already incurred $14,000 in costs. Unless the plaintiffs were prepared to offer an amount “at or near $14,000” for costs, Mr. Nadler stated that he saw no chance of resolving the motion. He warned plaintiffs’ counsel that they would be seeking additional costs for the time incurred after March 30, 2010.

Legal Framework- Approval of the Dismissal

[53] A settlement of a class proceeding is not binding unless it is approved by the court. In order to approve a settlement, the court must find that it is fair, reasonable and in the best interests of the class as a whole: *Class Proceedings Act*, 1992, S.O. 1992, c.6, s. 29(2). The leading case is *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O. J. No. 2811 (Gen. Div.) at paras. 30-46, aff'd (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. refused [1998] S.C.C.A. No. 372.

[54] Consideration must be given to all the circumstances, including the factual context of the proceedings, the legal issues, the claims made and defences raised, as well as any objections to the proposed settlement.

[55] Settlement of complex litigation is encouraged by courts and favoured by public policy: *Sparling v. Southam Inc.* (1988), 66 O.R. (2d) 225 (H.C.J.); *Ontario New Home Warranty Program et al. v. Chevron Chemical Company et al.*, [1999] O.J. No. 2245 (Sup. Ct.) at para. 70; *Gariepy v. Shell Oil Co.*, [2002] O.J. No. 4022 (Sup. Ct.) at para 43.

[56] There is a strong presumption of fairness when a proposed class settlement, negotiated at arm’s length by counsel for the class, is presented for court approval. To rebut this presumption, the court must find that the settlement does not fall within a range of reasonable outcomes.

[57] A court reviewing a proposed settlement must not measure it against a standard of perfection. The court must be assured that the settlement secures appropriate consideration for the class in return for surrender of litigation rights against the defendants. However, the court must balance the need to scrutinize the settlement against the recognition that there may be a number of possible outcomes within the "zone or range of reasonableness". As was stated in *Dabbs v. Sun Life*, at para. 30:

> [...] all settlements are the product of compromise and a process of give and take and settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection. Reasonableness allows for a range of possible solutions. A less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and costs of litigation.

[58] In assessing a proposed settlement, the court will consider a number of factors, recognizing that the importance of particular factors will vary from case to case. Perell J. summarized the factors in *Corless v. KPMG LLP*, [2008] O.J. No. 3092 (Sup. Ct.) at para 38:

> When considering the approval of negotiated settlements, the court may consider, among other things: likelihood of recovery or likelihood of success; amount and nature of discovery, evidence or investigation; settlement terms and conditions; recommendation and experience of counsel; future expense and likely duration of litigation and risk; recommendation of neutral parties, if any; number of objectors and nature of objections; the presence of good faith, arms length bargaining and the absence of collusion; the degree and nature of communications by counsel and the representative plaintiffs with class members during the litigation; and information conveying to the court the dynamics of and the positions taken by the parties during the negotiation: *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.) at 440-44, aff'd (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. refused Oct.22, 1998; *Parsons v. The Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) at paras. 71-72.; *Frohlinger v. Nortel Networks Corp*., [2007] O.J. No. 148 (S.C.J.) at para. 8; *Kelman v. Goodyear Tire and Rubber Co*., [2005] O.J. No. 175 (S.C.J.) at paras. 12-13; *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.* (2005), 74 O.R. (3d) 758 (S.C.J.) at para. 117; *Sutherland v. Boots Pharmaceutical plc*, [2002] O.J. No. 1361 (S.C.J.) at para. 10.

[59] Not all of these factors will be applicable in every case and the importance of each factor will vary from case to case. Applying the relevant factors to the case at hand, I draw the following conclusions.

[60] The parties have exchanged documents and have conducted examinations for discovery. With the benefit of this evidence it is clear that the case against Mark Samuel Mandelbaum and Sandor Hofstedter will not succeed and there is no evidence to support allegations of fraud and deceit against George Hofstedter.

[61] Subject to court approval, experienced counsel have agreed to dismiss the action against Mark Samuel Mandelbaum and Sandor Hofstedter and withdraw the claims of fraud and deceit against George Hofstedter. While they have not resolved the issue of costs for the defendants leaving the action, it is clear that this agreement has been reached in good faith and after careful consideration by plaintiffs' counsel. If the plaintiffs were to continue their claim against Mark Samuel Mandelbaum and Sandor Hofstedter and continue to allege fraud and deceit against George Hofstedter, no benefit would result from doing so. Instead, the plaintiffs would be exposed to additional costs as the action continues forward.

[62] For these reasons I conclude that the settlement proposal is a reasonable one and in the best interests of the class as a whole.

COSTS

The Legal Framework

[63] The source of judicial discretion to award costs is set out in s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 that states:

> 131(1) Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

[64] In addition to this general discretion, an award of costs is governed by rules 49 (in the event of an offer to settle) and 57.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[65] Rule 57.01 states that "in addition to the result in the proceeding and any offer to settle … made in writing" the court "may" consider the following factors:

> (0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;
>
> (0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;
>
> (a) the amount claimed and the amount recovered in the proceeding;
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> (b) the apportionment of liability;
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> (c) the complexity of the proceeding;
>
> (d) the importance of the issues;
>
> (e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
>
> (f) whether any step in the proceeding was,
>
> (i) improper, vexatious or unnecessary, or
>
> (ii) taken through negligence, mistake or excessive caution;
>
> (g) a party's denial of or refusal to admit anything that should have been admitted;

(h) whether it is appropriate to award any costs or more than one set of costs where a party,

(i) commenced separate proceedings for claims that should have been made in one proceeding, or

(ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer; and

(i) any other matter relevant to the question of costs.

[66] When awarding costs, it is important to bear in mind the difference between the three scales of costs that the rules provide: partial, substantial and full indemnity. In *Hanis v. University of Western Ontario* , [2006] O.J. No. 2763 at para. 46 the court discussed the relationship between the three scales of costs:

> Rule 1 defines substantial indemnity costs as meaning "costs awarded in an amount that is 1.5 times what would otherwise be allowable in accordance with Part I of Tariff A" - i.e., 1.5 times the partial indemnity rate. Costs calculated on a substantial indemnity scale, obviously, represent something less than full indemnity. By way of example: - if the actual fees billed by a lawyer to his or her client are, for instance, $300 per hour, and if $300 is acceptable as an appropriate hourly billing rate in the circumstances, the partial indemnity rate should be something in the range of 60% of that amount, or $180 per hour. Therefore, the substantial indemnity rate, using the 1.5 formula, would be $270 per hour. This equates to something in the range of 90% of the fees actually being charged to the client, i.e. full indemnity. These numbers, needless to say, are simply rough estimates of the relationship between the three levels of costs - i.e., 60%, 90% and 100% I quite often employ these percentages as a rough rule of thumb.

[67] However, fixing an amount for costs is not driven solely by a mathematical calculation. The court must be guided by the overriding principle of reasonableness as stated in *Boucher v. Public Accountants Council for the Province of Ontario,* [2004] O.J. No. 2634 (C.A.)

[68] Finally, when costs are being considered in a class proceeding, s. 31 (1) of *Class Proceedings Act* states that the court “may consider whether the class proceeding was a test case, raised a novel point of law or involved a matter of public interest.”

Analysis

[69] The defendants have incurred costs, disbursements and GST that total $24,045.57. It is broken down as follows. As of March 30, 2010 fees were $13,601.36 plus GST of $680.07 and disbursements including GST of $229.09. After March 30, 2010, fees of $9,081 were incurred plus GST on fees of $454.05.

[70] First, the factors identified in s. 31 of the *Class Proceedings Act* are not engaged in this case. The action is not a test case, it does not raise a novel point of law and does not involve a matter of public interest. It is a relatively straightforward private dispute between the parties concerning alleged misrepresentations made by the defendants concerning maintenance fees that the condominium purchasers would be required to pay.

[71] The defendants did not make a Rule 49 offer to settle and so the cost implications of such an offer are not engaged.

[72] When the action was commenced against these defendants, the plaintiffs knew that they were registered with the Ministry as being officers and/or directors of one of the corporate defendants and nothing more. Therefore, the defendants argue that the decision to pursue such serious allegations of fraud and deceit against them was reckless. As a result, they ask for substantial indemnity costs. To be clear, this is not a request for full indemnity.

[73] The plaintiffs ask that the issue of the defendants' costs be left to the trial judge to consider. In my view, costs must be dealt with now. There is a presumption that costs will be fixed by the judge hearing the motion unless the case is an exceptional one requiring an assessment. As the judge hearing the motion, I am in a better position to deal with costs than a trial judge would be. I see no merit in postponing the inevitable.

[74] The plaintiffs argue that no costs should be awarded to these defendants because they had a *bona fide* cause of action against them. They argue that their decision to sue these defendants was not "frivolous or vexatious" and they were justified in commencing the action against them.

[75] I acknowledge that the plaintiffs were justified in their decision to sue these defendants based on the fact that they were officers and/or directors of one of the corporate defendants. However, they had no reason to pursue claims of fraud and deceit against them. It is always open to a party to amend the statement of claim after examinations for discovery, if evidence is discovered to warrant serious allegations such as fraud and deceit. This is the preferred approach.

[76] There is ample case law to support the principle that unfounded claims of fraud and other serious conduct justify a costs award on a substantial or full indemnity basis*: Réno-Dépôt v. Wonderland Commercial Centre Inc.* 2008 ONCA 786; *131843 Canada Inc. v. Double "R" (Toronto) Ltd*., [1992] O.J. No. 3879, 7 C.P.C. (3d) 15 (Gen. Div.); *Re Bisyk (No. 2)* (1980), 32 O.R. (2d) 281 (H.C.J.); *Unisys Canada Inc. v. York Three Associates Inc*., [2000] O.J. No. 3622, 100 A.C.W.S. (3d) 31 (S.C.J.), aff'd [2001] O.J. No. 3777, 150 O.A.C. 49 (C.A.); *Mele v. Thorne Riddell* (1997), 32 O.R. (3d) 674, [1997] O.J. No. 443 (Gen. Div.); *Toronto-Dominion Bank v. Berthin*, [1994] O.J. No. 2590 (Gen. Div.); *DiBattista v. Wawanesa Mutual Insurance Co*. (2005), 78 O.R. (3d) 445; *McNaughton Automotive Ltd. v. Co-Operators General Insurance Co.*, [2008] O.J. No.5040 (C.A.)

[77] As a general rule, a plaintiff who pursues unfounded allegations of fraud and deceit should not escape a substantial indemnity cost order simply because the action is a class proceeding. I agree with the comments of Haines J. who stated in *McNaughton Automotive Ltd. v. Co-operators General Insurance Co*. (2005), 74 O.R. (3d) 216 at para. 18 as follows:

> It is accepted that class proceedings are, in many respects, different from other litigation and that courts have been cautious in their approach to costs in such proceedings in order to avoid stifling the objectives of the CPA, but proceeding under the CPA should not confer immunity from costs sanctions designed to discourage unacceptable practices.

[78] Having advanced unfounded allegations of fraud and deceit against the defendants with no justification for doing, the plaintiffs should have reviewed these claims immediately after the examination for discoveries were completed. They had no basis for alleging fraud and deceit at the outset and no evidence was gathered during discovery to change this situation. As of September 2007, after examinations for discovery were done, these defendants had only incurred modest fees of $4,805.

[79] Instead of reviewing the unfounded allegations of fraud and deceit and agreeing to withdraw them, the plaintiffs moved ahead with the action. Even in April 2009, when the defendants warned them about their intention to proceed with a summary judgment motion, the plaintiffs did not deal with the problem allegations. I appreciate that the parties went to mediation and during this time frame the summary judgment motion was held in abeyance. However, if they had dealt with the unfounded claims in June 2009, they could have minimized their exposure to the defendants' costs. The defendants' costs as of June 2009 totaled $8,878.45.

[80] I have reviewed the time spent and hourly rates charged. As of March 30 2010, a total of 45.1 hours was incurred to defend the two defendants. This time was shared by two lawyers and an articling student. The hourly rate for the senior lawyer (year of call 1980) ranged from $550 to $600. The hourly rate for Mr. Nadler (year of call 1996) ranged from $350 to $390 and the articling student's rate was $175.

[81] The defendants' outline of costs incurred after March 30, 2010 includes preparation of their factum, the usual preparation for attending in court and attendance in court on the motion. In total, 22.8 hours of time was incurred and fees of $9,081. All but 0.9 hours was incurred by Mr. Nadler. The senior lawyer's involvement was limited to 0.9 hours.

[82] In summary, the tasks were appropriately shared between two lawyers and an articling student and the hourly rates are typical of what is charged in this area of work.

[83] In general, the plaintiffs argue that the time incurred by the defendants was excessive but no particular task is singled out. While I do not find the fees to be excessive, the time spent is somewhat high given that the case for summary judgment was clear and straightforward.

[84] The defendants are entitled to substantial indemnity costs because of the unfounded allegations of fraud and deceit that were pursued. However, the overriding principle of reasonableness must govern. For this reason, a small adjustment downwards is necessary to reflect the straightforward nature of this summary judgment motion. I fix the defendants' fees at $18,000. I order the plaintiffs to pay the defendants fees of $18,000 plus GST. In addition I allow the disbursements of $229.09 inclusive of GST and order the plaintiffs to pay this amount.

[85] The cost award I have made does not in any way jeopardize the goals of the *Class Proceedings Act* and, in particular, the objects of access to justice and judicial economy. The amount in question is modest and justified.

C. Horkins J.

Date: October 18, 2010