

Case Name:

Lewis v. Cantertrot Investments Ltd.

PROCEEDING UNDER the Class Proceedings Act, 1992

Between

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., defendants

[2006] O.J. No. 1581
Court File No. 04-CV-277412 CP

Ontario Superior Court of Justice
M.C. Cullity J.

Heard: By written submissions.
Judgment: April 21, 2006.
(20 paras.)

Counsel:

Samuel S. Marr and Vadim Kats for the Plaintiffs

A Irvin Schein and Stephen C. Nadler for the Defendants

ENDORSEMENT ON COSTS

¶ 1 **M.C. CULLITY J.**— The plaintiffs were ultimately successful in obtaining certification pursuant to the CPA and, in my judgment, they are entitled to an award of costs. The defendants did not challenge the appropriateness of such an order in principle, but submitted that the costs should be made payable to the plaintiffs in the cause and that the quantum should be dealt with after judgment in the action, or, if fixed now, should be open to a possible reduction at that time. In support of these submissions, defendants' counsel relied on subsection 20(2) of the *Solicitors Act* and the provisions of the contingency fee agreement between the plaintiffs and their counsel.

¶ 2 Subsection 20(2) reads as follows:

(2) However, the client who has entered into the agreement is not entitled to recover from any other person under any order for the payment of any costs that are the subject of the agreement more than the amount payable by the client to the client's own solicitor under the agreement.

¶ 3 The subsection is qualified in respect of contingency agreements by subsection 20.1 (2):

- (2) Despite subsection 20(2), even if an order for the payment of costs is more than the amount payable by the client to the client's own solicitor under a contingency fee agreement, a client may recover the full amount under an order for the payment of costs if the client is to use the payment of costs to pay his, her, or its solicitor.

¶ 4 The contingency fee agreement was executed prior to the certification motion. Its relevant provisions can be summarized as follows:

- (a) Except with respect to disbursements paid out of either retainer deposits from prospective class members, or out of costs awards on "interim motions", the solicitors are not to be entitled to amounts for fees or disbursements unless and until the action has successfully concluded; and
- (b) in the event that the action is successful, the solicitors will be entitled to 33 per cent of the proceeds exclusive of any costs that might be awarded to their clients. Any such costs are then to be distributed to the class members to the extent that they are not used for outstanding disbursements.

¶ 5 The reasoning of defendants' counsel was set out succinctly in a written summary of their oral submissions:

As there are no circumstances in which any part of the fees portion of a costs award in the course of the action would be payable to (the solicitors), I submit that section 20.1 (2) has no application to the case at Bar. That subsection only speaks to the quantum of costs recoverable by a client if the client is to use those, costs to pay his, her, or its solicitor. Given the wording of the Agreement, that cannot happen in the case at bar. [The solicitors' firm] is only entitled to payment out of the amount awarded for damages and interest. The fees portions of costs awards are to be paid (only) to and distributed among class members.

As a result, we are left with the provision of section 20(2) of the Act. As indicated above, that subsection provides that the quantum of costs recoverable by the Plaintiffs cannot exceed the amount for which they are liable to their solicitors. We do not know that amount at the moment. We will not know that amount until after the proceedings have concluded. That amount may be zero or any amount above zero. If the number is zero (i.e. The Plaintiffs lose this case), the Plaintiffs will not be entitled to any costs award for any interim motion, or anything else.

¶ 6 I do not believe that counsel's suggested interpretation of subsection 20.1(2) is correct. The subsection excludes, or qualifies, the effect of subsection 20(2) in cases where, pursuant to a contingency fee agreement, costs are to be used to pay the client's solicitor. In such a case, an award of costs can be enforced even if the amount exceeds that which the solicitor is entitled to be paid by the client. The application of subsection 20.1(2) is not, in my opinion, restricted to cases where the costs are to be used to pay the solicitor's fees, as distinct from disbursements. Nor, in my opinion, does the retainer agreement exclude the solicitors' use of the fees portion of interim costs awards for the purpose of paying disbursements incurred while the proceedings are continuing.

¶ 7 The provisions of the Act dealing with the assessment of a solicitor's bill of costs apply to bills for "fees, charges or disbursements" and sections 23, 24 and 25 similarly contemplate that agreements between solicitors and their clients may deal with disbursements. I see no reason to exclude the use of a party and party costs award to pay disbursements from the payments to solicitors referred to in the concluding words of subsection 20.1(2).

¶ 8 An order for the payment of costs within the meaning of subsection 20(2) would commonly include an amount for disbursements and, for the purpose of measuring it against an "amount payable by the client" to the solicitor pursuant to the subsection, the latter amount must similarly include any payment by the client for disbursements incurred by the solicitor. Subsection 20.1(2) is expressed to qualify subsection 20(2) and I believe the reference in the former to the use of a payment of costs to pay the solicitor should be construed accordingly so as to include payments for disbursements. While subsection 28.1(2) includes within the concept of a "contingency fee agreement" an agreement that makes payments of a solicitor's "remuneration" contingent on a successful disposition of a matter, it does not exclude the possibility that the agreement will contain provisions for the payment of disbursements - as indeed, will most likely be the case.

¶ 9 The contingency fee agreement in this case expressly authorises the solicitors to

... pay any disbursements which may be made by it in connection with the subject matter of this retainer out of any . . . costs awarded on any interim motions. Other than retainer deposits paid by the class members or costs paid by the defendants on interim motions, [the solicitors] must pay for disbursements without contribution from us or class members.

¶ 10 Contrary to the submission of defendants' counsel, the agreement does not preclude the use of the fees portion of any costs award to pay for disbursements. I accept the submission of plaintiffs' counsel that the agreement contemplates that the entirety of any interim cost awards may be retained by the solicitors in trust to pay disbursements as they are incurred. In my opinion, subsection 20.1(2) applies in these circumstances and, in consequence, subsection 20(2) does not prevent the plaintiffs and their solicitors from implementing their intention to use an award of costs to pay for disbursements incurred - and to be incurred in the future. The use of a costs award for this purpose falls within the concluding words of subsection 20.1(2).

¶ 11 Plaintiffs' counsel have, inevitably, incurred disbursements in preparing the case for certification and, as is not uncommon on such motions, the amounts are significant. If the plaintiffs' action is unsuccessful and it is then ascertained that the costs awarded exceed the disbursements incurred by plaintiffs' counsel, the latter may have to account to their clients, but I do not believe that subsection 20(2) would then apply. The situation would, in my opinion, be precisely that envisaged by subsection 20.1(2).

¶ 12 A similar question was considered in *Nantais v. Teletronics Proprietary (Canada) Ltd* (1996), 28 O.R. (3d) 523 (G.D.) - before the enactment of section 20.1(2) - where a contingency agreement provided that solicitors would be entitled to costs awarded only if the action was successful. One issue was whether the terms of the agreement affected the rights of the plaintiffs to recover their costs of motions. Brockenshire J. stated:

As between the parties, any party-party costs awarded are the property of the client. Under rule 59.03(6), an order for the payment of costs shall direct payment to the party entitled, and not to the party's solicitor. However, the client can, and commonly does, agree with the solicitor to assign such entitlement to the solicitor, and directs payment accordingly.

Here, under the contingency fee agreement, the entitlement of the solicitor is contingent on success at trial or by settlement. If pursuant to the client's direction or otherwise, payments of costs are received by the solicitor before judgment or settlement there would be an obligation to account if in the end the proceedings should fail.

However, that is a matter between counsel and the client. It does not in any way affect

the right of the client to claim costs or the power and authority of the court to award costs.

¶ 13 In *Nantais*, the issues related to the costs of jurisdictional and certification motions. There is no suggestion in the Reasons of the learned judge that, pursuant to subsection 20(2) of the *Solicitors Act*, or otherwise, the liability of the defendants to pay costs might be limited - or that its consideration should be deferred - because of the possibility that, in the event that the litigation was unsuccessful, the plaintiffs' solicitors might have no entitlement to be paid fees, or be repaid for disbursements, out of interim costs awards.

¶ 14 In my opinion, subsection 20.1(2) confirms the correctness of the reasoning in *Nantais*. Its purpose and effect is to exclude from the application of subsection 20(2) situations where, under a contingency fee agreement, costs awarded to a client are to be used by the client or - which amounts to the same thing - by the solicitor with the agreement of the client, to pay fees or disbursements or both. Among other things, it precludes arguments that interim costs awards cannot be fixed, and made payable within 30 days, in accordance with rule 57.03(1), on the ground that the amount that the client will have to pay a solicitor under a contingency fee agreement may not be ascertained until the end of the proceedings. The facts here are even more favourable to the plaintiffs' position on this motion as the agreement expressly contemplates the application of interim costs awards to pay disbursements prior to the termination of the proceedings.

¶ 15 For the above reasons, I do not believe subsection 20(2) creates a barrier to the award of costs now requested on behalf of the plaintiffs.

Quantum of Costs

¶ 16 Defendants' counsel challenged the plaintiffs' attempt to justify their request for a partial indemnity costs award of \$83,745.00 - of which \$66,792 would consist of fees and \$16,953 would be for disbursements.

¶ 17 While I accept the submission of plaintiffs' counsel that the costs awarded should reflect the fact that certification was vigorously and tenaciously contested by the defendants, the amount claimed is, in my judgment, excessive in a number of respects including the number of hours spent on preparing the motion material, cross-examinations and for counsels' attendance at the initial hearing. However, in exercising my discretion to fix the costs at an amount smaller than that requested, I attribute most significance to the fact that the case for certification, as originally presented, was deficient in particular respects and on adjournment was granted pursuant to section 5(4) of the CPA to permit further material to be filed and further submissions to be made on a subsequent occasion. Even after such submissions had been made, there were still pending amendments to the statement of claim. Although the defendants, and their counsel, must I believe take some responsibility for the protracted course of the proceedings to date, I do not believe they can reasonably be required to indemnify the plaintiffs for an expenditure of time and effort that could have been avoided if the pleading and the certification motion had received more attention at the outset.

¶ 18 Having taken the above matters under consideration, the costs will be fixed at \$30,000 for legal fees and \$16,506.51 for disbursements. I have made only minor adjustments to the latter as, despite the significant amounts paid to expert witnesses for the purpose of the supplementary hearing, the decision to file their affidavits was reasonable given the case presented on behalf of the defendants

¶ 19 The defendants are also to pay the plaintiffs' costs - fixed at \$900 - for the preparation of their

submissions on the costs of the motion - including their costs of responding to the submissions of law made on behalf of the defendants.

¶ 20 GST is to be added to the above amounts as applicable. They are to be paid within 30 days of the release of this endorsement.

M.C. CULLITY J.

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