Cassels

Ontario Superior Court of Justice Awards Defendants Millions in Costs Against a Sole Plaintiff in a Personal Injury Class Action

August 9, 2019

Introduction

In what Justice Edwards called the “gold standard” for how expensive it is to litigate in the 21st century – and in this case, to litigate a class action – the Ontario Superior Court of Justice recently fixed costs against a single plaintiff in the amount of $2.56 million. This decision is reflective of a recent trend of Ontario courts recognizing the cost to defendants of vigorously defending the merits of class proceedings and other actions and ensuring that successful defences are reflected in adequate costs awards.

The class action in *Davies v. The Corporation of the Municipality of Clarington* settled in 2006 without prejudice to the ability of two class members to continue with the case, with the class action narrowed to their own individual claims. This costs award arose out of the 106-day trial of one of those two opt-out plaintiffs, Christopher Zuber, who chose to litigate the action rather than be part of the class settlement.

Background

The underlying class action commenced following a VIA Rail train derailment in 1999. The issue of liability was determined through the course of a 10-week trial, and the parties entered into court-approved minutes of settlement in 2006. At the time of execution, it was understood that Mr. Zuber’s claim had not been settled and would go forward separately following the settlement.

In his claim, Mr. Zuber sought damages in the amount of $60 million for loss of income. The court noted that this amount “far exceeded anything that this court has ever heard of being awarded in a personal injury action in this country”.[1] Mr. Zuber originally offered to settle his claim for $35 million, which he subsequently reduced to $26,200,000, plus costs, before trial.

Over the course of the litigation, the defendants made three settlement offers. The final offer to settle from the defendants was $500,000.

Ultimately, Mr. Zuber missed the mark of that final offer to settle at trial, obtaining judgment only for $50,000, plus prejudgment interest, for a total recovery of approximately $146,000.[2] Although the plaintiff was only granted $50,000 on a $60 million claim, Mr. Zuber argued that he was the successful party and should be

entitled to his costs of approximately $7 million. By contrast, the defendants claimed that they were entitled to their costs of $3 million, starting from their first settlement offer, which was made in November 2009.

Costs Considerations

In granting the significant $2.5 million costs award to the defendants, the Court considered, and ultimately rejected, a number of Mr. Zuber's arguments that he should be awarded costs, or alternatively, that costs should not be awarded to the defendants.

Consistent with what is generally understood about litigation financing disbursements, the Court rejected the contention that the plaintiff's litigation loans and accrued interest thereupon could constitute recoverable disbursements. The litigation loans were not disclosed to the Court or the defendants until after all three of the defendants' settlement offers were made. Notably, Mr. Zuber did not submit the loan agreements for approval by the Court, and despite his case being a class action, did not seek funding from the Class Proceedings Fund until the Court's reasons for decision were released. The Court determined that since the defendants had no knowledge of the litigation loans, it would be a "gross unfairness" for the defendants to pay interest on Mr. Zuber's undisclosed litigation loans.[3]

The Court also considered whether the significant interest accrued on Mr. Zuber's litigation loans meant that Mr. Zuber was justified in his decision not to accept the defendants' settlement offers, on the basis that to do so would have left him in "a deficit position".[4] The Court rejected this argument, finding that the real issue was whether the defendants' offers represented sincere attempts to compromise, which he was satisfied they were.

The Court also rejected the argument that this action was in any way a "test case" simply because it involved foreign officials as witnesses.[5]

Key Takeaway Principles

The Superior Court's decision in *Davies v. The Corporation of the Municipality of Clarington* makes clear that litigants are expected to make genuine settlement offers in order to limit unnecessary, costly, and lengthy litigation, and that an unreasonable party should expect to be at risk of a proportionate costs award. The Court explained that:

Litigants must be encouraged to settle their claims in an age when court time is precious, and which should be reserved for those litigants who have a real *lis* that requires adjudication. Civil trials are an important part of our judicial system. Courtrooms are there to adjudicate real disputes between parties who have made a real effort to resolve their dispute through an exchange of offers.[6]

Increasingly, where parties – including class action plaintiffs – fail to meet this obligation, they are beginning

to find that the Court will be even-handed in assessing costs against them.

The decision in Davies is also reflective of a helpful trend for defendants: namely, that Ontario courts are willing to award significant adverse costs in the context of class actions. For example, in 2016, Cassels was successful in obtaining a significant costs award on behalf of its client Pet Valu in respect of a failed franchisee class proceeding.

Another key point of interest in this case was the Court's rejection of litigation funding and interest as a recoverable disbursement. In this particular case, the Class Proceedings Fund had rejected Mr. Zuber's late application for costs indemnity and neither the parties nor the Court were advised of the higher-risk loans that had been taken out to support the action. This decision has not entirely closed the door on the possibility that such loans and interest may be recoverable in reasonable circumstances and on due notice in the future.

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[1] *Davies v. The Corporation of the Municipality of Clarington ("Davies")*, 2019 ONSC 2292, para 2.

[2] *Ibid*, para. 9; *Davies v. The Corporation of the Municipality of Clarington*, 2018 ONSC 4370, para. 451.

[3] *Ibid*, *Davies*, para. 86.

[4] *Ibid*, *Davies*, para. 96.

[5] *Ibid*, *Davies*, para. 90.

[6] *Ibid*, *Davies*, para. 104.
