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"Entrepreneurial" Class Plaintiff Hit With $1 Million Costs Award

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By Michael Statham

In *Yip v. HSBC Holdings plc*[1], a decision released on November 20, 2017, Justice Perell awarded partial indemnity costs of $1 million to defendants that had succeeded, on jurisdictional and forum conveniens grounds, in defeating a proposed shareholder class action.

The decision illustrates the significant costs exposure that unsuccessful class plaintiffs may have to bear in complex and high-stakes commercial disputes. While the plaintiff relied in his costs submissions on the public interest and access to justice objectives that generally underlie class proceedings in Ontario, Justice Perell rejected these arguments in holding that there was no basis to relieve the plaintiff from the costs of the "entrepreneurial litigation" that he had triggered.

The plaintiff, a shareholder of HSBC Holdings ("**HSBC**"), sued HSBC and one of its former employees for alleged misrepresentations concerning, among other things, the company's compliance with anti-money laundering and anti-terrorist financing laws. On his own behalf, and on behalf of a proposed global shareholder class, the plaintiff asserted statutory (under Part XXIII.1 of the Ontario Securities Act) and common law negligent misrepresentation claims. The plaintiff maintained that investors had suffered a USD $8 billion loss.

The defendants moved to dismiss or stay the plaintiff's action on the grounds that: (i) the Ontario court lacked jurisdiction to hear the case (HSBC is a foreign corporation whose securities do not trade on any Canadian exchange); and (ii) Ontario was not a convenient forum for a misrepresentation action against a foreign issuer that did not carry on business in Canada. In response, the plaintiff advanced a cross-motion for a declaration that HSBC was a "responsible issuer" within the meaning of the *Securities Act*. For reasons released in September 2017,[2] Justice Perell found that the Ontario court had no jurisdiction over the defendants and that Ontario was not a convenient forum in any event. Justice Perell granted the defendants' motion, dismissed the plaintiff's cross-motion, dismissed the plaintiff's claim under the Securities Act and stayed his common law negligent misrepresentation claim.

The parties advanced profoundly different positions on costs. The defendant sought a partial indemnity award of approximately $1 million, comprised of $527,000 in fees[3] and $473,000 for disbursements, including expenditures in connection with five expert reports. In support of their position, the defendants cited the complexity of the arguments, the enormity of the evidentiary record (some 18,000 pages), the dispositive nature of the motions and the plaintiff's reasonable anticipation that a jurisdictional challenge would be mounted.

For his part, the plaintiff argued that the proposed quantum amounted to "punishment" and reflected the defendants' excessive and unreasonable commitment of resources to the task. Against that background, the plaintiff invited the court to exercise its discretion to award no costs in view of: (i) the unique and important nature of the jurisdiction issues for investor protection in Canada; (ii) his pursuit of access to justice on behalf of investors through Ontario's class actions regime; and (iii) his own status as a retail investor of modest means with a modest personal stake in the litigation.[4] In the alternative, the plaintiff contended that the defendants' costs were properly fixed at $150,000 – 15% of the amount sought by the defendants – on the basis of fairness, reasonableness and access

to justice.

Justice Perell began his analysis by affirming two controlling principles in the determination of partial indemnity cost awards: (i) the "loser pays" principle that costs are normally ordered to be paid by the unsuccessful party to the successful party; and (ii) the reasonableness principle that the sum awarded to the successful party ought properly to reflect the fair and reasonable expectations of the unsuccessful party. From there, Justice Perell identified general circumstances in "normal litigation" in which courts might exercise their discretion to decline to award costs to the successful party. Such orders are relatively rare, however. In Justice Perell's words: "[i]n most cases, even if there is some public benefit that may be achieved by the litigation…a party will have the expectation that if he or she…fails, he or she will have to indemnify the successful party."

The analysis then turned to the class proceeding context and how, if at all, that bears on the controlling principles that guide the awarding of costs in "normal litigation". Section 31 of the *Class Proceedings Act*, 1992[5] provides that in exercising their discretion with respect to costs, courts "…may consider whether the class proceeding was a test case, raised a novel point of law or involved a matter of public interest." In Justice Perell's view, while these factors may be entitled to "special weight" in any given case, they do not inexorably lead to the conclusion that a successful defendant should receive no costs from an unsuccessful plaintiff in a class proceeding. To the contrary, Justice Perell observed, with reference to earlier cases, that the legislature chose not to "…impose a public interest burden on [successful] defendants, who are also entitled to access to justice, by imposing an asymmetrical system of costs."

After setting out the principles, Justice Perell awarded the defendants their costs in the requested amount of $1 million, without deduction. The court's reasoning, and application of the "normal litigation" principles in the class proceedings context, appears to turn on the characterization of the nature of the proposed class proceeding. In particular, Justice Perell found that the proposed proceeding "was not altruistic litigation" but, rather, "entrepreneurial litigation". Justice Perell explained the significance of this distinction for the plaintiff's reasonable expectations and, in turn, for the disposition of costs in favour of the successful defendants, this way: "[i]t is a fantasy to suggest that when Mr. Yip and his entrepreneurial class counsel sued a foreign defendant for $20 billion, later reduced to the not trifling $8.0 billion, that they did not reasonably anticipate that HSBC Holdings would spend $0.0001 billion to defend itself."

Further, because he regarded the plaintiff's primary motivations in advancing claims of this magnitude as "entrepreneurial", and not "altruistic", Justice Perell rejected any suggestion that the costs award was punishing the plaintiff for pursuing access to justice for shareholders. Given that the plaintiff had taken on "…a self-appointed engagement as a regulator in another's jurisdiction's regulated stock market", neither the plaintiff nor his lawyers had any reasonable basis for expecting that he would be relieved from the consequences of a loser pays costs regime.

The key takeaway is that not all class proceedings are on equal footing for the purposes of assessing costs. While courts will consider a class plaintiff's reasonable expectations against his or her access to justice and public interest objectives, the placement of any given class proceeding on an altruism-entrepreneurialism spectrum may have, on Justice Perell's view of the matter, a significant bearing on an unsuccessful plaintiff's ultimate costs exposure in complex and high-stakes commercial matters. The further an unsuccessful plaintiff's motivations can be said to tilt to the entrepreneurial end of the spectrum, the greater the potential costs exposure may be.

[1]2017 ONSC 6674.
[2]2017 ONSC 5332.
[3]This figure represented some discounting against the actual legal fees.
[4]The representative plaintiff is the only class member who is liable for the payment of adverse costs awards on class-wide issues. See s. 31(2) of the Class Proceedings Act, 1992, S.O. 1992, c.6.
[5]S.O. 1992, c.6.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

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