

Litigation - Canada

Costs awards in class actions: equal treatment for plaintiffs and defendants

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Introduction

In *Fischer v IG Investments Management Ltd*, the Ontario Divisional Court rejected the notion that Ontario courts should treat plaintiffs and defendants differently when determining costs in cases that raise novel issues or matters of public interest.⁽¹⁾ In doing so, the court disabused many of the assumption that in class proceedings, only unsuccessful plaintiffs may be relieved of their obligation to pay costs in appropriate circumstances. Instead, the court confirmed that the costs regime set out in the Class Proceedings Act, 1992 applies fairly to all parties to class actions.⁽²⁾

Facts

The plaintiffs brought a motion to certify a class action against several investment firms that permitted 'market timing' to occur in mutual funds that they managed. The defendants had previously admitted liability in enforcement proceedings brought by the Ontario Securities Commission (OSC). After negotiations with the OSC, the defendants entered into settlement agreements in which they admitted – among other things – that market timing events had occurred and that investors in their mutual funds had suffered losses. In accordance with the settlement agreements, the defendants paid C\$205.6 million to the investors.

Notwithstanding this payment, the plaintiffs were of the view that the actual losses suffered by investors were as much as C\$832 million and sought to certify their claim as a class proceeding so that the remainder of the investors' alleged losses could be recovered. The defendants maintained that the plaintiffs' action failed to meet the criteria for certification established in Section 5(1) of the Class Proceedings Act. In particular, the defendants argued that the 'preferable procedure' element was not satisfied, as the settlement agreement approved by the OSC already served as the preferable procedure for resolution of the common issues.

At first instance, the plaintiffs' motion to certify the claim as a class action was dismissed by Justice Perell.⁽³⁾ The defendants sought costs in light of their initial success. However, the motion judge determined that the plaintiffs' motion raised novel issues about the preferable procedure element of the certification test, with the result that the parties should bear their own costs.⁽⁴⁾

The plaintiffs appealed the dismissal of their certification motion to the Ontario Divisional Court, which granted the appeal and certified the action as a class proceeding.⁽⁵⁾ Although the plaintiffs were granted costs of the appeal, the court made no order in respect of the plaintiffs' costs of the original certification motion before the motion judge.

The defendants were unsuccessful in their appeal of certification to both the Court of Appeal for Ontario⁽⁶⁾ and the Supreme Court of Canada.⁽⁷⁾ Consequently, the plaintiffs asked the motion judge to reconsider his original costs decision. However, the motion judge confirmed that there should be no order as to costs and that "[t]he normal principles about the exercise of the court's discretion with respect to costs apply to certification motions and there is no asymmetry favouring plaintiffs".⁽⁸⁾ The plaintiffs sought leave to appeal the motion judge's decision regarding costs to the Ontario Divisional Court.

Decision

In their motion for leave to appeal, the plaintiffs maintained that the costs regime established under the Class Proceedings Act – and in particular, the court's discretion to order that an unsuccessful party be absolved of its obligation to pay costs – is intended to operate in favour of plaintiffs only.

Section 31(1) of the Class Proceedings Act provides as follows:

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"In exercising its discretion with respect to costs under subsection 131 (1) of the Courts of Justice Act, 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."⁽⁹⁾

Section 131(1) of the Courts of Justice Act⁽¹⁰⁾ provides as follows:

"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."⁽¹¹⁾

In considering the plaintiffs' motion for leave to appeal, the court confirmed that decisions in respect of costs are highly discretionary. With respect to the test for leave to the Ontario Divisional Court and the correctness of the motion judge's decision, the plaintiffs argued that Section 31(1) of the Class Proceedings Act has never been relied on to deny costs to a successful plaintiff. The court determined that novelty alone does not raise good reason to doubt the correctness of the order in question.

The court held that neither the legislative history nor the case law supported the plaintiffs' position that Section 31(1) of the Class Proceedings Act is intended to provide protection to plaintiffs, but not defendants. While it may be a rare case in which the exercise of the court's discretion will fall to be decided in favour of defendants, that does not constitute a rule against such an order where the criteria in Section 31(1) exist.⁽¹²⁾

The plaintiffs also argued that a "logical asymmetry" inherent in Section 131(1) of the Courts of Justice Act does not protect unsuccessful defendants from a costs award even in novel cases. The court dismissed this argument and deferred to the motion judge's earlier decision:

"[The] novelty of the facts and uncertainty of the law made it reasonable for both the Plaintiffs and the Defendants to have their day in court to debate the preferable procedure criterion. Underlying the principle that it may be appropriate to order no costs in novel cases is the notion that where the law is uncertain, it is appropriate to attenuate the litigation chill associated with possible adverse costs consequences."⁽¹³⁾

Finally, the court confirmed that the principle of access to justice, which supports the class action regime, does not automatically entitle plaintiffs to their costs of successful certification motions. Indeed, all participants in class actions are entitled to access to justice. Such a policy objective must be considered among other factors in the court's discretion to grant costs.⁽¹⁴⁾

Comment

In dismissing the plaintiffs' motion for leave to appeal in *Fischer*, the Ontario Divisional Court confirmed that Section 31(1) of the Class Proceedings Act does not apply asymmetrically in favour of plaintiffs only. The court also acknowledged that costs decisions are highly discretionary and should be granted significant deference.

Before *Fischer*, there may have been a perception that Section 31(1) of the Class Proceedings Act should be interpreted only in favour of plaintiffs, who may not have the same resources as defendants. However, this decision, along with the motion judge's underlying order, demonstrates that no such imbalance exists in the Class Proceedings Act. Defendants may therefore launch vigorous but unsuccessful defences against certification without adverse cost implications in circumstances where a novel point of law or other factor set out in Section 31(1) is engaged.

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Endnotes

(1) *Fischer v IG Investments Management Ltd*, 2015 ONSC 2491, 2015 CarswellOnt 6848 (Ont Div Ct) [*Fischer*].

(2) Class Proceedings Act, 1992, SO 1992, c 6.

(3) *Fischer v IG Investment Management Ltd*, 2010 ONSC 296, 184 ACWS (3d) 319, 2010 CarswellOnt 135.

(4) *Fischer v IG Investment Management Ltd*, 2010 ONSC 2839, 188 ACWS (3d) 970, 2010 CarswellOnt 338.

(5) Before the appeal was heard, the plaintiffs reached a settlement with three of the five defendants: IG Investment Management Ltd, Franklin Templeton Investments Corp and AGF Funds Inc. The plaintiffs continued their action against CI Mutual Funds Inc and AIC Limited.

(6) *Fischer v IG Investment Management Ltd*, 2012 ONCA 47, 109 OR (3d) 498, 2012 CarswellOnt 635.

(7) *Fischer v IG Investment Management Ltd*, 2013 SCC 69, [2013] 3 SCR 949, 2013 CarswellOnt 17258.

(8) *Fischer v IG Investment Management Ltd*, 2014 ONSC 6260, 246 ACWS (3d) 48, 2014

CarswellOnt 14927 at para 36 [*Fischer*, 2014 Reasons for Decision – Costs].

(9) Class Proceedings Act, *supra* note 2, s 31(1).

(10) Courts of Justice Act, RSO 1990, c C.43.

(11) *Ibid*, s 131(1).

(12) *Fischer*, *supra* note 1 at para 17.

(13) *Fischer*, 2014 Reasons for Decision – Costs, *supra* note 8 at para 35.

(14) *Fischer*, *supra* note 1 at para 27.

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