CITATION: Del Giudice v. Thompson, 2020 ONSC 3623
COURT FILE NO.: CV-19-00625030-00CP
COURT FILE NO.: CV-19-00625262-00CP
DATE: 2020/06/10

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	
RINA DEL GIUDICE and DANIEL WOOD Plaintiffs - and - **PAIGE A. THOMPSON, CAPITAL ONE FINANCIAL CORPORATION, CAPITAL ONE BANK (CANADA BRANCH), CAPITAL ONE (SERVICES) CANADA INC., CAPITAL ONE, N.A., CAPITAL ONE BANK (USA), N.A., and GITHUB, INC.** Defendants Proceeding under the *Class Proceedings Act, 1992*	*John A. Campion, R. Douglas Elliott, Hugh Scher, Jeff Childs, Glyn Hotz* and *Jonathan Nehmetallah* for the Plaintiffs
AND BETWEEN:	
DAVID MARK SLAPINSKI Plaintiff - and – **CAPITAL ONE SERVICES (CANADA) INC., CAPITAL ONE FINANCIAL CORPORATION, CAPITAL ONE, N.A., and CAPITAL ONE BANK (USA), N.A** Defendants	*Vadim Kats* for the Plaintiff

Proceeding under the *Class Proceedings Act, 1992*	)	**HEARD**: In writing

PERELL, J.

REASONS FOR DECISION - COSTS

[1] This is a costs decision. It is an exceptional case. It is exceptional for three reasons. First, it is a request for costs in a carriage motion, *i.e.*, a motion to determine which of two rival consortia of law firms shall have carriage of a class action under the *Class Proceedings Act, 1992*.[1] The rule for carriage motions has been that costs are not awarded, and so the costs request in the immediate case is exceptional. Second, the costs are being claimed by the unsuccessful consortium on the carriage motion, and it is exceptional for any type of motion to award costs to the loser of the motion. Third, in the immediate case, the costs are being claimed against the consortium of law firms and it is exceptional to make lawyers pay costs personally; typically, it is the parties not the lawyers that pay costs.

[2] In the immediate case, there was a carriage fight between the proposed Class Counsel in *Del Giudice v. Thompson* ("the Del Giudice Action") and the proposed Class Counsel in *Slapinski v. Capital One Services (Canada) Inc.* ("the Slapinski Action"). Carriage was granted to the Del Giudice Action Consortium. In my Reasons for Decision,[2] I stated that I would consider, if requested, costs in whole or in part against counsel personally in the Del Guidice Action (not to be charged or passed onto the Class Members) for the failure to comply with my case management direction.

[3] The Slapinski Action Consortium requests partial indemnity costs of **$76,324.25** comprised of $65,978.40 plus disbursements of $1,768.66 and HST of $8,577.19. For the reasons that follow, I award **$42,907**, all inclusive.

[4] The Del Giudice Action Consortium submit that there should be no order as to costs. They submit that no award of costs is justified having regard to: (a) the absence of any egregious or bad faith misconduct by the Del Giudice Action Consortium that requires punishment by the court; (b) the success of the Del Giudice Action Consortium on the carriage motion; (d) the importance of access to justice in the context of contested public interest class actions; and because: (d) the Slapinski Action Consortium rejected an offer to settle that would have negated the need for any carriage motion.

[5] Further, the Del Giudice Action Consortium submit that: (a) allegations of technical noncompliance with a timetable do not represent egregious or bad faith misconduct of the sort required to justify an award of costs personally against a solicitor, particularly in the absence of actual prejudice; (b) where the conduct in question is explained, justified or necessary and where it is in the interests of justice, that conduct should not be the subject of a punitive cost order made personally against a lawyer; (c) costs against a solicitor personally should be awarded sparingly and only in the most extreme cases where the administration of justice requires a punitive measure to denounce egregious counsel misconduct; and (d) the Slapinski Action Consortium suffered no

[1] S.O. 1992, c.6.
[2] *Del Giudice v. Thompson*, 2020 ONSC 2676

actual prejudice from the late filing of an amended claim that sought to add Amazon as a defendant.

[6] Counsel in the Del Giudice Action have disclosed that their own expenditure of time for the carriage motion was $65,010 on a full indemnity basis or between $32,505 (50%) and $42,907 (66%) on a partial indemnity basis.

[7] The background to the costs request by counsel in the Slapinski Action is that on July 29, 2019, it was disclosed to the public that the information technology systems of Capital One Financial Corporation, Capital One, N.A., Capital One Bank (USA), N.A., and Capital One Services (Canada) Inc., (collectively "Capital One") had been hacked and personal information had been misappropriated. The data had been stored on computer servers owned by Amazon Web Services Inc. and Amazon Web Services (Canada) Inc. (collectively "Amazon"). The data was posted on a website operated by GitHub Inc., which is associated with Microsoft.

[8] On July 31, 2019, Penny Stewart commenced an action with respect to the Capital One data breach (the "Stewart Action"). The law firm Du Vernet, Stewart was the lawyer of record.

[9] On August 6, 2019, in the Del Giudice Action, Rina Del Giudice issued a Statement of Claim against Capital One and GitHub Inc. Subsequently, Daniel Wood was joined in the Del Giudice Action as a plaintiff, and they joined Paige A. Thompson, the hacker, and Amazon as party Defendants. The lawyers of record were Diamond and Diamond Lawyers LLP and Hotz Lawyers. Diamond and Diamond Lawyers subsequently decided that it did not wish to be a Class Counsel. Proposed Class Counsel in the Del Giudice Action became a consortium of: (a) Cambridge LLP; (b) Gardiner Roberts LLP; (c) Hotz Lawyers; and (d) Scher Law Professional Corporation.

[10] On August 8, 2019, in the Slapinski Action David Mark Slapinski issued a Statement of Claim against Capital One. The lawyers of record were Landy Marr Kats LLP and McKenzie Lake Lawyers LLP. Subsequently, Du Vernet, Stewart joined the consortium to prosecute the Slapinski Action rather than its own for Ms. Stewart. Subsequently, the hacker, Ms. Thompson, was added as a party defendant to the Slapinski Action.

[11] In the summer of 2019, there were now two rival proposed class actions, and on December 16, 2019, at a case conference, I fixed a timetable for a carriage motion. Technically a carriage motion is a stay motion where the rivals seek to stay the others' action. The result is that only one action has carriage of the class members' claims.

[12] At the case conference, I fixed a timetable for the carriage motion. As part of the timetable, I directed that the rival consortia simultaneously exchange motion materials on January 20, 2020.

[13] On January 20, 2020, the motion material in the Slapinski Action was served in accordance with my file direction.

[14] On February 7, 2020 - 18 days late -, the motion material in the Del Giudice Action was served. The Del Giudice Motion Record included an Amended Amended Statement of Claim dated February 7, 2020, which amended a pleading dated January 20, 2020, which pleading was also included in the Motion Record. The amended pleadings added Mr. Wood as a party Plaintiff and Ms. Thompson, Capital One (Services) Canada Inc., Capital One, N.A., Capital One Bank (USA), N.A., and GitHub Inc. as party Defendants.

[15] On February 20, 2020, the Reply Motion Record was delivered in the Del Giudice Action. And also on February 20, 2020, a Fresh as Amended Statement of Claim was delivered in the Del

Giudice Action. There was no reply material in the Slapinski Action.

[16] On March 31, 2020, counsel in the Del Giudice Action delivered another affidavit for the carriage motion.

[17] The parties exchanged Factums on April 1, 2020, and the parties exchanged Reply Factums on April 15, 2020.

[18] On Sunday April 26, 2020, the day before the argument of the carriage motion, the Del Giudice Action Consortium delivered a revised Fresh as Amended Statement of Claim that added Amazon Web Services Inc. and Amazon Web Services (Canada) Inc. as party Defendants.

[19] The carriage motion was argued on April 27, 2020, and I released my Reasons for Decision on April 30, 2020. In my Reasons for Decision, I stated:

> […] I was displeased and disappointed that the lawyers in the Del Giudice Action failed to comply with my direction about the carriage motion, but keeping in mind that ultimately it is the interests of the Class Members that matters and given that I heard the carriage motion on its merits, I did not grant a default victory to the Slapinski Action. I shall, however, deal with the non-compliance with my case management direction as a matter of the costs of the motion.

[20] In my Reasons for Decision, I did not explain precisely why I was displeased and disappointed that the lawyers in the Del Giudice Action had failed to comply with my direction about the carriage motion. And, it seems the Del Giudice Action Consortium has assumed that my displeasure and disappointment was caused: (a) by the lateness of the delivery of the motion material; or (b) by the Slapinski Action Consortium having been prejudiced by that late delivery.

[21] The Del Giudice Action Consortium assert that I should not act on my displeasure and disappointment because: (a) there was substantial compliance and some material was delivered on time; (b) there was no actual prejudice; and (c) there is nothing objectionable to Statements of Claim being successively amended during the context of a carriage motion.

[22] The Del Giudice Action Consortium, however, are incorrect. I was not displeased and disappointed by the timing of the delivery of the motion material. The late arrival of the motion material was not the problem. I was displeased and disappointed by the circumstance that I had ordered a simultaneous exchange of the motion material and that direction was breached. A mutual exchange of motion material is an essential rule for a carriage motion. Having already spent a considerable amount of time preparing for the motion, I was also displeased and disappointed by the delivery by the Del Giudice Action Consortium of the amended amended Statement of Claim on the Sunday before the Monday motion.

[23] The simultaneous exchange of materials and the freezing of the pleadings are not non-essential features of a carriage fight. Metaphorically, a carriage fight can be compared to a tender for a contract for services. In a fair tender process, the tender bid packages are simultaneously opened and then judged. One tenderer does see the bid of the other and then submit his or her own bid. On a carriage motion, it is both unreliable and unfair to make a decision as to which lawyers can best serve the class by a sequential exchange of bids where one law firm can better its bid having seen the bid of the rival.

[24] Metaphorically, if a carriage contest can be compared to a card game, on January 20, 2020, the Slapinski Action Consortium laid its cards on the table. The Del Giudice Action Consortium did not. Rather, it had a look at the cards played by its rival and then it laid out its cards on February 7, 2020, which happens to be 18-days late and it laid out cards again on April 26, 2020, when it

played its winning hand. But had the material been delivered 1-day late, instead of 18 days, it would not have made a difference to my displeasure and disappointment. In terms of the rules of the game, the Del Giudice Action Consortium had not played fair. Whether or not the Slapinski Action Consortium was prejudiced is not the matter that displeased and disappointed me. I was displeased and disappointed because the Del Giudice Action Consortium was not playing by the rules of the carriage contest which called for a simultaneous exchange of materials. It was the court that was being prejudiced in its ability to reliably and fairly decide the carriage contest.

[25] Counsel in the Del Giudice Action are also incorrect in submitting that there are reasons that would make an award of costs inappropriate in the immediate case. They are certainly wrong in submitting that costs cannot be awarded against counsel unless there is egregious or bad faith misconduct by counsel that requires punishment by the court.

[26] The court has an inherent jurisdiction to punish lawyers for their egregious conduct as officers of the court,[3] but I accept that there was no egregious conduct or bad faith conduct in the immediate case that requires punishment; however, pursuant to rule 57.07 (1) of the *Rules of Civil Procedure*,[4] a lawyer may be found liable for costs with or without reprehensible conduct or bad faith.[5] Rule 57.07 (1) states:

> 57.07(1) Where a lawyer for a party has caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default, the court may make an order:
>
> (a) disallowing costs between the lawyer and client or directing the lawyer to repay to the client money paid on account of costs;
>
> (b) directing the lawyer to reimburse the client for any costs that the client has been ordered to pay to any other party; and
>
> (c) requiring the lawyer personally to pay the costs of any party.

[27] The court's jurisdiction under rule 57.07 is independent of the court's inherent jurisdiction to award costs against a lawyer who acted unprofessionally and reprehensively. Rule 57.07 empowers the court to award costs when the lawyer "has caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default".[6]

[28] The operation of rule 57.07 in the context of a class action is different from a regular action where it is assumed that the client bears the costs consequences of failure at the motion, application, or trial. In a normal action, the lawyer for the client is not personally a litigant. However, in the context of a proposed class action, putative Class Counsel approaches being a co-party with the Class Members in advancing the action. Typically, in terms of risks and rewards,

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[3] *Young v. Young*, (1993), 108 D.L.R. (4th) 193 (S.C.C.); *Fong v. Chan*, [1997] O.J. No. 949 (C.A.); *Rockwell Developments Ltd. v. Newtonbrook Plaza Ltd.*, [1972] 3 O.R. 199 (C.A.).

[4] R.R.O. Reg. 194.

[5] *Standard Life Assurance Co. v. Elliott* (2007), 86 O.R. (3d) 221 (S.C.J.); *Bank of Nova Scotia v. George Hill Cartage Ltd.*, [2001] O.J. No. 1776 (S.C.J.); *Desjardins v. Mooney*, [2001] O.J. No. 1448 (S.C.J.); *Mangan v. Inco Ltd.*, [1998] O.J. No. 2684 (Gen. Div.); *Chernick v. Spodek*, (1997), 37 O.R. (3d) 422 (Gen. Div.); *Strazisar v. Canadian Universal Insurance Co.*, [1981] O.J. No. 2194 (Dist. Ct.); *Dunford v. Hudder*, [1997] O.J. No. 4832 (Gen. Div.).*Lico v. Griffiths*, [1996] O.J. No. 3117 (Gen. Div.); *Mans v. State Farm Mutual Insurance Co.* (1996), 32 O.R.(3d) 786 (Gen. Div.); *Worsley v. Lichong* (1994), 17 O.R. (3d) 615 (Gen. Div.); *Shachar v. Bailey* (1989), 67 O.R. (2d) 726 (Master) aff'd (1989), 67 O.R. (2d) 732(H.C.J.); *Davoulgian v. Windsor*, [1987] O.J. No. 1680 (Dist. Ct.), affd [1988] O.J. No. 2802 (H.C.J.); *Aliferis v. Parfeniuk*, [1985] O.J. No. 120 (C.A.);

[6] *Standard Life Assurance Co. v. Elliott*, [2007] O.J. No. 2031, 86 O.R. (3d) 221 (Ont. S.C.J.); *Marchand (Litigation guardian of) v. Public General Hospital Society of Chatham*, [1998] O.J. No. 527 (Gen. Div.); *Worsley v. Lichong* (1994), 17 O.R. (3d) 615 (Gen. Div.); *Faber-Castell Canada Ltd. v. Woods*, [1994] O.J. No. 475 (Gen. Div.).

Class Counsel has far more an interest in the class action than an individual class member. This is especially true at a carriage motion. A carriage fight, however, is where Class Counsel is most in it for himself or herself. I have commented more than once that it would be desirable that putative Class Counsel retain a lawyer to argue a carriage motion.

[29] In class proceedings, the inherent conflicts of interests of Class Counsel are acceptable and tolerable in furtherance of access to justice and because of the court's oversight of Class Counsel. There is case management. Settlements and Class Counsel's contingency fees must be approved by the Court.

[30] The operation of rule 57.07 in the context of a carriage motion should and can reflect the realities of the role played by Class Counsel and the court in class proceedings. In the circumstances of the immediate case, rule 57.07 can be viewed as an aspect of the court's supervision of Class Counsel in proceedings under the *Class Proceedings Act, 1992*. See also s.12 of the *Class Proceedings Act, 1992* which provides that the court may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination. In the immediate case, the court made a direction for the fair and reliable determination of a carriage fight, and the Del Giudice Action Consortium was in default of the court's direction. In the immediate case, in my opinion, there was default within the ambit of rule 57.07.

[31] The fact that Del Giudice Action Consortium was successful on the carriage motion does not excuse its default; that is an aggravating not an ameliorating circumstance. During the argument of the carriage motion, I expressed my displeasure and disappointment before I knew whom the successful consortium would be, and as I noted in my Reasons for Decision, it was a close call. Had the Slapinski Action Consortium been the successful consortium, I would have made the same direction with respect to costs as I did in the immediate case.

[32] That the Slapinski Action Consortium rejected an offer to join the Del Giudice Action consortium, the details of which were never determined, is irrelevant to why a costs order is appropriate in the immediate case.

[33] Finally, the Del Giudice Action Consortium offers the importance of access to justice in the context of contested public interest class actions as a reason not to award costs on a carriage motion. If by this the Del Giudice Action Consortium means that normally costs should not be a factor in a carriage motion, I agree with them. However, while that is a good rule, there are exceptions to good rules, and in my opinion, the exceptional circumstances of the immediate case, justify an exemption to what will remain the normal good rule.

[34] The court retaining the capacity to enforcing the rules of a carriage fight will facilitate fair and reliable carriage contests that would be in the interests of access to justice, and that would be in the best interests of the class members. The rival firms will know that there are rules and that they will not be taken advantage of if they participate in a carriage fight. It will be a fair fight. It is trite to say that justice must not only be done, but it must be seen to be done.

[35] Accordingly, I award the Slapinski Action Consortium **$42,907**, all inclusive, for the carriage motion, which I regard as fair and reasonable in the circumstances of the immediate case.

[36] In the circumstances of the Covid-19 emergency, these Reasons for Decision are deemed to be an Order of the court that is operative and enforceable without any need for a signed or entered, formal, typed order.

[37] The parties may submit formal orders for signing and entry once the court re-opens; however, these Reasons for Decision are an effective and binding Order from the time of release.

Perell, J.

Released: June 10, 2020

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RINA DEL GIUDICE and DANIEL WOOD
Plaintiffs

- and -

PAIGE A. THOMPSON, CAPITAL ONE FINANCIAL CORPORATION and CAPITAL ONE BANK (CANADA BRANCH), CAPITAL ONE (SERVICES) CANADA INC., CAPITAL ONE, N.A., CAPITAL ONE BANK (USA), N.A., and GITHUB, INC.
Defendants

AND BETWEEN:

DAVID MARK SLAPINSKI

Plaintiff

- and –

CAPITAL ONE SERVICES (CANADA) INC., CAPITAL ONE FINANCIAL CORPORATION, CAPITAL ONE, N.A., and CAPITAL ONE BANK (USA), N.A
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REASONS FOR DECISION - COSTS

PERELL J.

Released: June 10, 2020