

# Windisman v. Toronto College Park Ltd.

Between

Anita Windisman, on behalf of herself for the plaintiff and  
all others similarly situated, plaintiff, and  
Toronto College Park Ltd., defendant

And between

Toronto College Park Ltd., plaintiff by counterclaim, and  
Anita Windisman, on behalf of herself and all others similarly  
situated, Metropolitan Condominium Corporation No. 901 and  
Metropolitan Toronto Condominium Corporation No. 907,  
defendants to the counterclaim

[1996] O.J. No. 2897

DRS 96-18823

Court File No. 93-CQ-38966

**Ontario Court of Justice (General Division)**

**Sharpe J.**

Heard: June 27-28, 1996.

Judgment: August 26, 1996.

(22 pp.)

*— Compensation — Agreements, contingent fees — Calculation of — Practice — Costs —  
Party and party costs — Particular proceedings, class actions.*

Motion to determine the solicitors fees and the claim of the representative plaintiff to compensation and costs. This was a class action. The plaintiff class was awarded \$2.6 million, including pre-judgment interest. The action had been undertaken on a contingency basis. An agreement was made between the solicitors and the representative plaintiff, W, as to scale of fees to be charged, which included a multiplier of two point five, if successful.

**HELD:** The solicitors for the plaintiff class were entitled to a fee of \$750,000 and disbursements of \$10,509.69. W was entitled to compensation of \$4,000 from the fund recovered on behalf of the plaintiff class. The plaintiff class was awarded costs from the defendant of \$233,000 plus disbursements. This included solicitor and client costs from the date of the plaintiffs' offer to settle to the date of judgment, and party and party costs prior to the date of the offer to settle. The Class Proceedings Act and Rule 12 clearly contemplated the awarding of costs where the plaintiff class was the successful party. In determining the reasonableness of the base fee the court considered the time expended by the solicitor, the legal complexity of the matters to be dealt with, the degree of responsibility assumed by the solicitor, the monetary value of the matters in issue, the importance of the matter to the client, the degree of skill and competence demonstrated by the solicitor, the results achieved, the ability of the client to pay and the client's expectation as to the amount of the fee. Although there was no real basis in law for awarding compensation to W, she had shown that she had rendered active and necessary assistance in the preparation or presentation of the case and that her assistance had resulted in

monetary success for the class. W was compensated on a quantum meruit basis based on time docketed.

### **Statutes, Regulations and Rules Cited:**

An Act Respecting Champerty, R.S.O. 1897, c. 327.

Class Proceedings Act, ss. 32, 32(1), 32(2), 32(3), 32(4), 33, 33(1), 33(2), 33(3), 33(4), 33(5), 33(6), 33(7), 33(7) (b), 33(8), 33(9).

Condominium Act, s. 53(3).

Ontario Rules of Civil Procedure, Rule 12.

Solicitors Act.

### **Counsel:**

J. Gardner Hodder and Andrew Frei, and defendants to the counterclaim.  
Jonathon H. Fine and Jack D. Pappalardo, for the defendant/plaintiff by counterclaim.

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### **SHARPE J.:—**

#### Introduction

¶ 1 In a judgment, dated February 13, 1996, I awarded the plaintiff class approximately 2.6 million dollars, including pre-judgment interest. The claim of the plaintiff class was for interest on deposits paid pursuant to agreements to purchase condominium units, based on the Condominium Act, s. 53(3). The claim was in three parts. First was the appropriate rate of interest payable on deposits; second was whether interest was payable on deposits for parking and storage units; and third was whether interest was payable on a compound basis. The plaintiff class succeeded on the first two questions but not on the third. This motion is to determine the fees to which the solicitors for the plaintiff class are entitled, to deal with the claim of the plaintiff class for party and party costs against the defendant, and to settle various terms of the judgment with respect to distribution and other issues.

#### Issues

¶ 2

1. What is an appropriate amount to be approved by way of fees and disbursements pursuant to ss. 32 and 33 of the Class Proceedings Act?
2. Is the representative plaintiff, Anita Windisman, entitled to compensation from the plaintiff class for the time and effort she expended in relation to this action?
3. Is the plaintiff class entitled to party and party costs and, if so, on what

scale and in what amount?

4. Other terms relating to distribution and similar issues.

#### Analysis

1. What is an appropriate amount to be approved by way of fees and disbursements pursuant to ss. 32 and 33 of the Class Proceedings Act?

¶ 3 The solicitors for the plaintiff class undertook this action on a contingency basis. The representative plaintiff signed a contingency fee retainer form which set out the proposed basis for calculation of the solicitors' fees with reference to the applicable provisions of the Class Proceedings Act. The agreement indicated that fees would be based on hourly rates ranging from \$75 for clerks and students to \$200 for the senior solicitor and counsel. The agreement also indicated that, as the matter was being undertaken on a contingency basis, the solicitors would be asking for the application of a multiplier to the fee at the rate of 1.75. This fee agreement was modified subsequently in two respects. First, the solicitor indicated that his hourly rate had increased from \$200 to \$210. Second, the solicitor indicated that in light of the manner in which the action was being defended, it was his assessment that the risk of continuing had increased and that accordingly the multiplier to be sought would be at the rate of 2.5.

¶ 4 The fee agreement, as amended, was mentioned in the certification order. Accordingly, all members of the plaintiff class received notice of its terms. The Class Proceedings Act makes the following provision with respect to such agreements:

- 32(1) An agreement respecting fees and disbursements between a solicitor and a representative party shall be in writing and shall,
  - (a) state the terms under which fees and disbursements shall be paid;
  - (b) give an estimate of the expected fee, whether contingent on success in the class proceeding or not; and
  - (c) state the method by which payment is to be made, whether by lump sum, salary or otherwise.
- (2) An agreement respecting fees and disbursements between a solicitor and a representative party is not enforceable unless approved by the court, on the motion of the solicitor.
- (3) Amounts owing under an enforceable agreement are a first charge on any settlement funds or monetary award.
- (4) If an agreement is not approved by the court, the court may,
  - (a) determine the amount owing to the solicitor in respect of fees and disbursements;
  - (b) direct a reference under the rules of court to determine the amount owing; or
  - (c) direct that the amount owing be determined in any other manner.
- 33(1) Despite the Solicitors Act and An Act Respecting Champerty, being chapter 327 of Revised Statutes of Ontario, 1897, a solicitor and a

representative party may enter into a written agreement providing for payment of fees and disbursements only in the event of success in a class proceeding.

- (2) For the purpose of subsection (1), success in a class proceeding includes,
  - (a) a judgment on common issues in favour of some or all class members; and
  - (b) a settlement that benefits one or more class members.
- (3) For the purposes of subsections (4) to (7),  
"base fee" means the result of multiplying the total number of hours worked by an hourly rate;  
"multiplier" means a multiple to be applied to a base fee.
- (4) An agreement under subsection (1) may permit the solicitor to make a motion to the court to have his or her fees increased by a multiplier.
- (5) A motion under subsection (4) shall be heard by a judge who has,
  - (a) given judgment on common issues in favour of some or all class member; or
  - (b) approved a settlement that benefits any class member.
- (6) Where the judge referred to in subsection (5) is unavailable for any reason, the regional senior judge shall assign another judge of the court for the purpose.
- (7) On the motion of a solicitor who has entered into an agreement under subsection (4), the court,
  - (a) shall determine the amount of the solicitor's base fee;
  - (b) may apply a multiplier to the base fee that results in fair and reasonable compensation to the solicitor for the risk incurred in undertaking and continuing the proceeding under an agreement for payment only in the event of success; and
  - (c) shall determine the amount of disbursements to which the solicitor is entitled, including interest calculated on the disbursements incurred, as totalled at the end of each six-month period following the date of the agreement.
- (8) In making a determination under clause (7)(a), the court shall allow only a reasonable fee.
- (9) In making a determination under clause (7)(b), the court may consider the manner in which the solicitor conducted the proceeding.

(a) Base Fee

¶ 5 The material before me includes detailed dockets of the solicitors for the plaintiff class setting out, on a day-by-day basis, the work time devoted to the file. Initially, Mr. Fine, on behalf of the defendant, took the position that he should be allowed to cross-examine the solicitors on their docket entries with a view to testing the veracity of the material before me. During the

course of argument, Mr. Hodder conceded that there was one error in his docket entries, reducing the number of hours by 8.3, but otherwise maintained that the entries were accurate. During the course of argument, Mr. Fine withdrew his submission that he should be entitled to cross-examine and he proceeded to argue the question of costs, fees and related issues on the basis of the material I have.

¶ 6 The dockets indicate that the solicitor on the file, Andrew Frei docketed 665.5 hours while J. Gardner Hodder, who acted as counsel, docketed 848.2 hours (after correction for error mentioned above). Junior lawyers docketed 119.7 hours, approximately 25 hours of student time were docketed and just over 200 hours of law clerk time were also docketed. On the basis of the solicitors' dockets, I have no hesitation in accepting that the hours docketed were indeed expended upon this matter.

¶ 7 The hourly rates claimed by the solicitors appear to me to be reasonable. Mr. Frei, a solicitor of eleven years experience, has charged his time at \$210 per hour. In view of the written fee agreement, this rate should only apply after the date of the amending agreement. Otherwise, it is reasonable. Mr. Hodder, who subsequent to the trial on the proceeding was certified as a specialist in civil litigation, is charged at \$200 per hour. The junior lawyers on the file are charged at \$130 and \$150 an hour and student's and clerk's time is billed at \$75 per hour. The total amount claimed for fees, arrived at by multiplying the hours spent by the hourly rate is \$349,372.25. The GST on this amount is \$24,456.06.

¶ 8 Pursuant to s. 33(8) of The Class Proceedings Act, "the court shall allow only a reasonable fee" when determining the solicitor's base fee. It is common ground that in determining the reasonableness of the base fee, the usual factors are to be considered, namely:

- (a) the time expended by the solicitor;
- (b) the legal complexity of the matters to be dealt with;
- (c) the degree of responsibility assumed by the solicitor;
- (d) the monetary value of the matters in issue;
- (e) the importance of the matter to the client;
- (f) the degree of skill and competence demonstrated by the solicitor;
- (g) the results achieved;
- (h) the ability of the client to pay; and
- (i) the client's expectation as to the amount of the fee.

(See *Cohen v. Kealey & Blaney* (1985), 26 C.P.C. (2d) 211 (Ont. C.A.).

¶ 9 I will proceed to consider these factors in relation to the circumstances of this proceeding.

Time expended and complexity

¶ 10 While the amount of time expended by the solicitors on this file is very substantial, undoubtedly far more than one would normally expect even for comparable complex commercial

litigation, the second item on the list, the legal complexity of the matters to be dealt with, explains to some considerable extent the large amount of time expended. According to counsel, this was the first Ontario class action under the 1992 Class Proceedings Act to reach the trial stage. Accordingly, from the very beginning, they were in uncharted procedural waters of some considerable complexity.

¶ 11 The second aspect is that the complexity of the matter was significantly enhanced by virtue of the strategy, tactics, and positions taken by the defendant. The defendant chose to fight the plaintiff class every inch of the way, raising all available procedural hurdles and raising substantive arguments of considerable ingenuity with respect to the merits of the claim. While I was not involved in the pre-trial stage, it is apparent from the material before me and from the submissions of counsel that the combination of procedural novelty and defence tactics created a situation requiring a very considerable expenditure of time on the part of the solicitors for the plaintiff class. The defendant left no stone unturned in an effort to discourage the plaintiff class from proceeding with the action and to defeat the plaintiff's claim on the merits. The defendant not only counterclaimed against the individual members of the plaintiff class on the basis of its "package deal" argument relating its final closing package, but also counterclaimed against the condominium corporations themselves. Ms. Windisman's affidavit, filed in support of this motion, states that she perceived these strategies to be intended to scare off members of the plaintiff class and it is significant that in his affidavit, Mr. Cukierman chose not to deny those allegations (although they were strenuously resisted by counsel). While in my view, the defendant was legally entitled to take these steps and to advance these arguments, there is no doubt that the posture of the defendant throughout this proceeding considerably increased the legal costs of prosecuting the matter to completion.

¶ 12 Mr. Fine characterized the hours docketed by the solicitors for the plaintiff during argument before me as a "docketing frenzy" and urged me to drastically reduce the fee claimed. I find that the while hours claimed are on the high side and subject to some reduction, many more hours were expended than would otherwise have been recorded solely by reason of the various procedural and substantive positions taken by the defendant.

#### Responsibility assumed

¶ 13 With respect to the degree of responsibility assumed by the solicitors, a relevant factor is the obvious one that this was a class proceeding. While the solicitors were legally entitled to deal with the representative plaintiff, the reality of the situation was that there were over 500 members of the plaintiff class, some of whom had a lively and active interest in the prosecution of the action. There can be little doubt but that managing a matter involving this added element of complexity increases the degree of responsibility assumed by the solicitors.

#### Monetary value

¶ 14 The monetary value of the matters in issue was substantial if one makes reference to the total amount of the claim. As indicated, the plaintiff class succeeded in obtaining a judgment in the approximate amount of 2.6 million dollars. While the average amount for each member of

the class is just under five thousand dollars, this was a class proceeding and the relevant value to consider with respect to costs is the total amount of the claim.

### Importance to Client

¶ 15 Similar considerations apply to determining the importance of the matter to the client. These claims would, in all likelihood, not have been adjudicated had it not been for the availability of the class action. In light of the strenuous resistance to the claims on the part of the defendant, it is virtually inconceivable to imagine how an individual plaintiff with a claim of five thousand dollars could have contemplated prosecuting the action. However, a claim of five thousand dollars is a significant one to almost any citizen and, in my view, as this is a class action, it is appropriate to look at the importance of the issues to the plaintiff class as a whole. From that standpoint, the matter was one of some considerable significance to over 500 individuals.

### Skill and competence

¶ 16 The solicitors demonstrated skill and competence in the manner in which the action was prosecuted. While Mr. Fine submitted during argument that the solicitors had shown a lack of experience and care in the manner in which this action was prosecuted, it is my view that the facts do not bear out that submission. The case was considerably expedited by virtue of a summary judgment motion which, although unsuccessful, had the beneficial effect of narrowing the issues requiring evidence. The plaintiff class served a notice to admit and, with the assistance of Winkler J. who had heard the summary judgment motion, was able to streamline the trial action to some considerable extent. An agreed statement of facts ensued following the summary judgment motion, notice to admit and intervention of Winkler J. A trial that could have taken much longer was heard in approximately six days. Counsel for the plaintiff class relied largely upon a detailed written argument which admirably set out the issues and applicable authorities and significantly shortened the time taken for argument. In fairness to the defendant, it should be noted that the agreed statement of facts required the defendant's cooperation. However, this saving of court time came about as a direct result of the efforts of the solicitors for the plaintiff class and is indicative of skill and competence which benefited the court as well as the parties.

### Results achieved

¶ 17 The results achieved were excellent. While the plaintiff class did not succeed in its argument that interest should be paid on a compound basis, it did succeed in all other respects and, as indicated, secured a very substantial judgment.

### Ability to pay and client's expectation

¶ 18 The written retainer agreement indicates that the client did have some indication as to the amount of the fee to be charged and the evidence of Ms. Windisman is that she was kept very current with respect to the progress of the litigation and the charges she might expect as this

matter proceeded. On this motion, Ms. Windisman testified and indicated on behalf of the plaintiff class that she thought the amounts claimed by the solicitors to be reasonable.

## Conclusion

¶ 19 Taking all of these factors into account, I conclude as follows. In my view, the number of hours docketed is high and there must be some reduction. However, as I have indicated, there are a number of reasons for substantial expenditure of time beyond the control of the solicitors and, in light of those reasons, it would be unfair to the solicitors to reduce by any substantial extent the base fee which they claim. In my view, a reasonable fee, taking all of these factors into account, is \$300,000 plus GST.

### (b) Multiplier

¶ 20 The Class Proceedings Act makes a clear break with the past in authorizing contingency arrangements. The rationale for such an arrangement is fully explained in the report of the Ontario Law Reform Commission which led to the enactment of the Class Proceedings Act. As the example of this action demonstrates, the claim of an individual plaintiff may be significant but not sufficient to warrant that individual undertaking civil proceedings. The very purpose of class action procedure is to enhance access to the courts by individuals with such claims. As the Ontario Law Reform Commission Report indicates, the purpose of contingency arrangements permitting solicitors to undertake such actions on the basis that they are only to be paid if successful is to provide the necessary economic incentives to ensure that the goal of providing access to justice will be fulfilled. In *Nantais v. Teletronics Propriety (Canada) Limited* (1996), 28 O.R. (3d) 523, Brockenshire, J. stated as follows:

I am here dealing with a contingency fee arrangement, which is a new concept in Ontario. Mr. Justice Cory, in an unreported motion decision of the Supreme Court of Canada dated August 8, 1994 in *Coronation Insurance Company v. Florence*, had this to say regarding contingency fees:

"The concept of contingency fees is well established in the United States although it is a recent arrival in Canada. Its aim is to make court proceedings available to people who could not otherwise afford to have their legal rights determined. This is indeed a commendable goal that should be encouraged.

For many years it has been rightly observed that only the very rich and those who qualify for Legal Aid can afford to go to court. This point was brought home with shocking clarity by Mr. Justice George Adams in his paper presented the week of July 11th at the Cornell Lectures. .... Truly litigation can only be undertaken by the very rich or the legally aided. Legal rights are illusory and no more than a source of frustration if they cannot be recognized and enforced. This suggests that a flexible approach should be taken to problems arising from contingency fee arrangements, if only to facilitate access to the courts for more Canadians. Anything less would be to preserve the court's facilities in civil matters for the wealthy

and powerful."

¶ 21 In view of the Act and this purpose, it seems to me that the solicitors for the plaintiff class are clearly entitled to a multiplier. In determining the appropriate multiplier, reference must be had to the degree of risk undertaken: s. 33 (7)(b). At the start, this did not appear to be a particularly risky proceeding. As initially framed, the claim was only for a higher rate of interest, and did not include the claims for interest on the parking and storage unit deposits or the claim for compound interest. The plaintiff class had the benefit of the decision of the Ontario Court of Appeal in the Ackland case in its favour. However, the risk of continuing the action significantly increased at each step of the way by virtue of the strenuous defence advanced by the defendant. While the defendant conceded the point decided in Ackland, it insisted on presenting, both by way of defence and by way of counterclaim against individual members of the class, its elaborately conceived "closing package" argument. It became clear that nothing short of a final judgment disposing of the issues would persuade the defendant to pay Ackland interest and the risk of proceeding with the litigation was thereby enhanced. While I found the "closing package" argument to be without merit, it was hardly something the solicitors for the plaintiff could ignore. In my view, they are entitled to be compensated for the risk inherent in litigating a case against a recalcitrant defendant. The claim for interest on parking and storage deposits clearly involved a higher degree of risk. While I found this claim to be well-founded, there were no prior decisions on the point and, again, this claim was strenuously resisted.

¶ 22 In my view, in light of the nature of the claims advanced and the positions taken by the defendant from both a procedural and substantive perspective, the solicitors for the plaintiff are entitled to a significant multiplier to compensate them for the risk of prosecuting this action. I find that the multiplier claimed, namely, 2.5, is appropriate. This would result in a fee of \$750,000 which, in my view, is "fair and reasonable" within the terms of s. 33(7)(b) for the risk incurred in undertaking and continuing this proceeding.

#### (c) Disbursements

¶ 23 I am satisfied that the solicitors also incurred disbursements in the amount claimed, namely, \$10,641.69, although that amount is to be reduced by \$132 paid to file the Notice of Cross-Appeal, for a net claim of \$10,509.69. This amount includes disbursements incurred by the plaintiff, Anita Windisman, in the amount of \$541.28 which, in my view, is properly chargeable against the plaintiff class.

2. Is the representative plaintiff, Anita Windisman, entitled to compensation from the plaintiff class for the time and effort she expended in relation to this action?

¶ 24 The solicitors also claim, as a component of their fees, \$13,275 as compensation to Anita Windisman for the time and effort she expended in relation to this action.

¶ 25 At the solicitors' suggestion, Anita Windisman recorded her time and docket type entries indicating the manner in which her time was expended were submitted to me. A total of 81.2 hours were docketed and Ms. Windisman estimates her unrecorded time at a further 25 hours. Compensation is claimed at \$125 per hour.

¶ 26 It is submitted on behalf of Ms. Windisman that proceedings of this nature may involve a very considerable expenditure of time and effort on the part of the representative plaintiff and that the very purpose of the Class Proceedings Act could be frustrated if representative plaintiffs are, in effect, left out of pocket at the end of the day.

¶ 27 Is there a basis in law for this claim? The Class Proceedings Act makes no reference to compensation for the representative plaintiff, and the issue appears not to have been considered by the Ontario Law Reform Commission in its very detailed report. In the United States, some courts have been prepared to make "incentive awards" to the class representative which have the dual function of encouraging class actions and compensating representative plaintiffs for their effort and for having assumed risks during the course of the litigation: see Dickerson, *Class Actions: The Law of the 50 States*, para. 2.02[5]; *Enterprise Energy Corp. v. Columbia Gas Transmission Corporation* 137 F.R.D. 240 (S.D. Ohio 1991). Commentators have suggested that such awards are justified, but only in special circumstances:

... such awards should only be made when the court supervising the award concludes, after taking all factors into account, that such an award is appropriate because of the special circumstances of the individual case. Awards should not be made as a matter of course. They should be granted only when the court finds unusual factors such as that the named plaintiff made an unusual contribution to the case (e.g. particular expertise or extraordinary time commitments), or that it was unlikely that other plaintiffs would have brought or continued the class action. Courts should also take into account whether there was unusual personal risk and whether the statutory scheme suggests that Congress intended to encourage class actions.

(The Report of the Commission on Professional Responsibility, Association of the Bar of the City of New York, "Financial Arrangements in Class Actions, and the Code of Professional Responsibility" 20 *Fordham Urb. L.J.* 831 (1993); see also Solovy, "The Head of The Class" (1990) vol. 12, no. 51 *National Law Journal* 13.)

¶ 28 Ordinarily, an individual litigant is not entitled to be compensated for the time and effort expended in relation to prosecuting an action. In my view, there is an important distinction to be drawn with reference to class proceedings. The representative plaintiff undertakes the proceedings on behalf of a wider group and that wider group will, if the action is successful, benefit by virtue of the representative plaintiff's effort. If the representative plaintiff is not compensated in some way for time and effort, the plaintiff class would be enriched at the expense of the representative plaintiff to the extent of that time and effort. In my view, where a representative plaintiff can show that he or she rendered active and necessary assistance in the preparation or presentation of the case and that such assistance resulted in monetary success for the class, the representative plaintiff may be compensated on a quantum meruit basis for the time spent. I agree with the American commentators that such awards should not be seen as routine. The evidence here is that Ms. Windisman took a very active part at all stages of this action. It seems clear that the case would not have been brought but for her initiative. She assumed the risk of costs and she devoted an unusual amount of time and effort to communicating with other

class members, acting as a liaison with the solicitors, and assisting the solicitors at all stages of the proceeding. She kept careful records of her time and effort.

¶ 29 On the other hand, I find that the amount claimed by way of compensation for Ms. Windisman at the rate of \$125 per hour is excessive. It bears no relation to Ms. Windisman's usual rate of compensation. In my view, the rate should be purely compensatory and, in that light, a rate of \$40 per hour seems appropriate. There should also be a modest reduction in the time to exclude matters not strictly necessary to the prosecution of the action, such as dealing with the media after the judgment was rendered. For the very considerable amount of time and effort Ms. Windisman devoted to this matter, I would award her a total compensation of \$4,000 which amount is to be deducted from the net recovery to the plaintiff class.

3. Is the plaintiff class entitled to party and party costs and, if so, on what scale and in what amount?

(a) Entitlement

¶ 30 In my view, there is no reason why the plaintiff class, as the successful party, should not be awarded party and party costs against the defendant. Such awards are clearly contemplated by the Class Proceedings Act and by Rule 12.

(b) Scale

¶ 31 The plaintiff class relies on an offer to settle dated May 10, 1995 in which the plaintiff class offered to settle all issues for the amount of the interest differential claim, namely, \$590,054.08. It is undisputable that the plaintiff class did significantly better than the offer. In my view, the ordinary consequences should follow. There is nothing in the Rules of Court or Act to exclude this possibility. Reference was made in argument to the reservations in the Ontario Law Reform Commission Report as to the application of the payment into court and offer to settle rules. As I read the Ontario Law Reform Commission Report, its concern was that defendants might take unfair advantage of the plaintiff class if there were not some judicial scrutiny. Those concerns had no application to offers made by plaintiffs and, in any event, those recommendations of the commission were not adopted.

¶ 32 The material submitted by the plaintiff class indicates that approximately two thirds of the hours devoted to this matter were expended prior to the date of the offer to settle. The offer to settle was served very shortly after the certification order was made. The plaintiff class takes the position that it could not have served an offer any earlier as there would be no basis upon which the offer could be made or accepted absent a court order certifying the class as appropriate. However, Mr. Hodder did not go so far as to suggest that this factor was itself sufficient to warrant an order of solicitor and client costs effective at a date earlier than the offer. He did, however, suggest that the court should take into account the conduct of the defendant and that the combined effect of the defendant's conduct in this proceeding and the fact that an offer was made at the earliest possible opportunity was sufficient to justify an award of solicitor and client costs throughout.

¶ 33 I have already reviewed the manner in which the defendant chose to defend this proceeding. The defendant chose to mount a strenuous defence using every available argument and procedural tactic. However, the defendant did not, in my view, resort to illegal or dishonest tactics, nor did the conduct of the defendant amount to an abuse of the process of the court. A strenuous but unmeritorious defence is not grounds for ordering costs on a solicitor and client scale: *Foulis v. Robinson* (1979), 21 O.R. (2d) 769 (C.A.). The positions taken by the defendant do not, in my view, qualify as "harassment of another party by the pursuit of fruitless litigation" so as to bring the case within the principle of *Apotex Inc. v. Egis Pharmaceuticals and Novapharm Ltd.* (1991), 4 O.R. (3d) 321 at 324. I have no doubt that many of the stratagems adopted by the defendant were designed to discourage the plaintiff class. I have already taken these tactics into account in fixing the reasonableness of the solicitor's fee which will be reflected in the amount of party and party costs I award but, in my view, it would be wrong to go further and to impose a significant sanction of an order of solicitor and client costs throughout.

¶ 34 Accordingly, I find that the plaintiff class is entitled to be paid solicitor and client costs from the date of the offer which I fix at \$100,000. The plaintiff class is entitled to party and party costs incurred prior to the date of the offer which I fix at two thirds of the \$200,000 awarded as the base fee to the solicitors for that period, or \$133,000. Accordingly, the plaintiff class is entitled to an award of party and party costs fixed at \$233,000 plus GST and disbursements in the amount of \$10,509.69.

¶ 35 Mr. Hodder submitted that any award of solicitor and client costs should include the multiplier if it is to achieve its stated purpose of giving the plaintiff class complete indemnity. In my view, this would be out of keeping with the scheme created by the Class Proceedings Act which provides for the multiplier and contingency arrangements with reference only to the fees chargeable to the solicitor against the plaintiff class. The rationale for a contingency fee arrangement is that the solicitor and the plaintiff class should be permitted to share in the potential recovery as a device to finance the litigation. Because the solicitor assumes the risk of not being paid, he or she is entitled to a premium. In my view, these arrangements are strictly a matter between the plaintiff class and the solicitor. As already noted, they are intended to create the incentives necessary to facilitate access to the courts and attainment of that objective in no way depends upon holding the defendant liable for more than the usual measure of costs. Moreover, I fail to see any basis for putting a defendant at greater risk with respect to costs when sued in an action brought on a contingency basis than where more usual fee arrangements are in place, a matter entirely beyond the control of the defendant.

¶ 36 Similarly, it is my view that the amount I have ordered by way of compensation to Anita Windisman for the time and effort she expended in relation to these proceedings is not a proper heading of costs awarded as against the defendant. It is conceded that there is nothing in the Act or Rules that would justify imposing those costs on the defendant and the basis for awarding those costs is that her effort benefited the class, a matter extraneous to the defendant.

4. Other terms relating to distribution and similar issues

¶ 37 It remains to settle the formal judgment and resolve certain issues regarding distribution. The parties filed written submissions in this regard but as there appear to be matters requiring argument, a further attendance before me is to be arranged to resolve those questions.

#### Conclusion

¶ 38 For the foregoing reasons I find as follows:

1. The solicitors for the plaintiff class are entitled to a fee of \$750,000 plus GST and disbursements in the amount of \$10,509.69.
2. The representative plaintiff, Anita Windisman is entitled to compensation from the fund recovered on behalf of the plaintiff class in the amount of \$4,000.
3. The plaintiff class is entitled to recover costs from the defendant fixed at \$233,000 plus GST and disbursements in the amount of \$10,509.69.

SHARPE J.