

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
DANIEL BENNETT) *Adrienne Boudreau* for the Plaintiff
)
Plaintiff)
)
- and -)
)
LENOVO (CANADA) INC. and) *Jeff Galway and Kiran Patel* for the
SUPERFISH INC.) Defendant Lenovo (Canada) Inc.
)
Defendants)
)
Proceeding under the *Class Proceedings Act, 1992*) **HEARD:** In writing
)

PERELL, J.

REASONS FOR DECISION – COSTS

[1] The Plaintiff Daniel Bennett moved for certification of a proposed national class action under the *Class Proceedings Act, 1992*¹ against Lenovo (Canada) Inc., a computer manufacturer, and against Superfish Inc., a software developer in Palo Alto, California, that developed a computer program known as Visual Discovery. The certification motion was a success.²

[2] Mr. Bennett claims the costs for the certification motion. He claims legal fees on a partial indemnity basis (60% of full indemnity) of \$58,201.80, plus disbursements of \$1,738.36, plus HST of \$9,148.32. The total claim for costs is \$69,088.48.

[3] Lenovo (Canada) submits that the costs awarded to the Plaintiff in respect of this motion should be reduced to \$35,000 in fees (of which \$15,000 would be payable in the cause) plus disbursements.

[4] In *Das v. George Weston Limited*,³ I set out at some length the principles that guide the court in awarding costs in a class proceeding, and in my opinion, the costs claim in the immediate case is consistent with those principles, fair and reasonable, and an award of \$69,088.48 is well within the expectations of the unsuccessful party.

¹ S.O. 1992, c. 6.

² *Bennett v. Lenovo (Canada) Inc.*, 2017 ONSC 5853.

³ 2017 ONSC 5583.

[5] Generally speaking, distributive costs awards are to be avoided and while I agree with *Lenovo (Canada)* that there are nevertheless occasions when the court may reduce the successful party's award for costs or where it would be appropriate to make a hybrid order providing that some costs are paid forthwith and a portion of the costs is payable in the cause and thus dependent on the outcome, I disagree that the case at bar is an appropriate one to reduce Mr. Bennett's award for costs. He is a successful party that has genuinely earned a costs award of \$69,088.48.

[6] It is not uncommon in class actions, as was the situation in the immediate case, that the unsuccessful party enjoys a measure of success because it has reduced the class size or prevented the class from expanding or because it has had an influence in shaping the common issues or the litigation plan, but this measure of success does not necessarily mean that the court should reflect the unsuccessful party's measure of success by diminishing what in every other respect is a fair claim for costs by the successful party. I am not persuaded that there should be any reduction in the costs award claimed.

[7] Accordingly, I grant the costs as requested.



Perell, J.

CITATION: Bennett v. Lenovo (Canada) Inc., 2017 ONSC 6839
COURT FILE NO.: CV-15-523714-CP
DATE: 20171120

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SUPERIOR COURT OF JUSTICE**

BETWEEN:

DANIEL BENNETT

Plaintiff

- and -

LENOVO (CANADA) INC. and SUPERFISH INC.

Defendants

REASONS FOR DECISION – COSTS

PERELL J.

Released: November 20, 2017