



**SUPERIOR COURT OF JUSTICE**  
**COUR SUPÉRIEURE DE JUSTICE**

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# **FAX COVER SHEET**

**Date: 17 August 2010**

**TO:**

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**FROM:**

Laurie Pietras, Secretary to The Honourable Mr. Justice Strathy

**TOTAL PAGES (INCLUDING COVER PAGE): 7**

**MESSAGE:**

**Re: Robinson et al v. Rochester Financial Limited et al**  
**Court file no. 08-CV-349792CP**

**See attached Endorsement released today.**

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**CITATION:** Robinson v. Rochester Financial Limited, 2010 ONSC 5116  
**COURT FILE NO.:** 08-CV-349792 CP  
**DATE:** 20100917

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Kathryn Robinson and Rick Robinson, Plaintiffs/Moving Parties  
Rochester Financial Limited et al., Defendants/Respondents

**BEFORE:** G.R. Strathy J.

**COUNSEL:** *David Thompson and Matthew G. Moloci*, for the Plaintiffs

*Robert Cohen*, for the Defendants Rochester Financial Limited, Banyan Tree Foundation, Promittere Asset Management Ltd. and Promittere Capital Group Inc.

*Glenn Smith*, for the Defendant Fraser Milner Casgrain LLP

**DATE HEARD:** September 10, 2010

**ENDORSEMENT**

(Motions heard September 10, 2010)

[1] This endorsement addresses several motions that were heard on September 10, 2010.

**Motion by Fraser Milner Casgrain LLP (“FMC”) for the Appointment of a Receiver**

[2] FMC moved for the appointment of Grant Thornton LLP (“GT”) as an interim receiver of the defendants Rochester Financial Limited, Banyan Tree Foundation, Promittere Asset Management Ltd. and Promittere Capital Group Inc. (collectively, the “Gift Program Defendants”). The motion was based on a reasonable concern about the potential dissipation of assets to the detriment of class members and FMC. A form of order appointing GT as Monitor has been negotiated between the parties. On consent of the Gift Program Defendants, I have approved and signed the order. The Monitor shall report to the Court on a date prior to October 29, 2010. Arrangements can be made through my assistant.

Validity of Certain Opt-Outs

[3] The plaintiffs brought a motion for an order declaring that certain opt-out forms delivered to the Opt-Out Administrator are invalid and for consequential relief. The evidence establishes that some 165 opt-out forms, out of a total of 257 delivered to date, were not on the court-approved form and appear to have been signed and dated before the mailing of the court-approved notice of certification and opt-out form. Many of those 165 forms do not contain proper contact information for the individuals named. The forms appear to have been faxed from a single fax machine operated by one of the Gift Program Defendants.

[4] Following oral argument, and while this matter was under reserve, counsel for the plaintiffs advised that the Opt-out Administrator had received a further 45 opt out forms from a single source, 44 of which are not on the correct form and do not contain proper contact information.

[5] While I am not prepared to find that these 209 forms were improperly solicited by the Gift Program Defendants, it appears that they were obtained by someone who had a relationship with them. In light of that circumstance, and the history of this matter, I am concerned that the opt-out forms do not reflect an informed decision by the persons who signed them. I will therefore order that they are invalid and void. Mr. Cohen on behalf of the Gift Program Defendants did not strenuously oppose that relief.

[6] The question then arises as to what action should be taken. Mr. Thompson requested that the opt-out period be extended to a date following the trial of the common issues. He expressed concern that class members may be confused by the several communications, potentially conflicting, that they have received to date. While I share that concern, I have concluded that it is preferable that class members be informed of and be aware of their rights immediately, so that they can govern themselves accordingly. I therefore order that the opt-out deadline be extended, in respect of the 209 affected individuals, to a date 45 days after mailing of a new notice and opt-out form, both of which shall be subject to my approval at a case conference.

Motion to Strike Statement of Defence of Gift Program Defendants

[7] The plaintiffs move to strike the statement of defence of the Gift Program Defendants as a result of their failure to comply with my order dated February 3, 2010, requiring those defendants to provide certain information and documentation, and for their failure to pay an outstanding costs award of Dambrot J. in the amount of \$12,000. I accept Mr. Cohen's submission that this is drastic relief which should be reserved for exceptional circumstances. In my view, the defendants should be given an opportunity to defend but, if they wish that privilege, they must comply with court orders. I will address that issue under the next heading.

Motion Regarding the Counterclaim

[8] The defendants have counterclaimed for a declaration that the loans made to class members and the promissory notes signed by class members are enforceable in accordance with their express terms. This appears to be a response to one of the common issues certified by Lax J., namely, "are all promissory notes executed by Class Members in favour of Rochester in connection with participation in the Gift Program void and unenforceable?"

[9] Counsel for the plaintiff submits that the counterclaim is improper because the issue has not been certified as a common issue. I accept this submission and the counterclaim will be struck, without prejudice to the right of the Gift Program Defendants to move for leave to amend the counterclaim and to add the claim as a common issue. As a condition of bringing such a motion, and in any event within 45 days, the Gift Program Defendants shall pay the costs awarded by Dambrot J. as well as the costs of these motions, discussed and fixed below. They shall also, within 45 days, provide the plaintiffs with a list of class members identifying the amount of the security deposit made by each class member.

Scheduling

[10] I was advised by counsel that a schedule has been agreed upon for the delivery of pleadings and affidavits of documents. The schedule should be forwarded to my assistant.

Costs

[11] Mr. Moloci, on behalf of the plaintiffs, made submissions as to the costs claimed for several motions that have been argued in this matter. The following sets out the amount claimed for each:

<b>Date</b>	<b>Relief Claimed</b>	<b>Scale of Costs</b>	<b>Amount Claimed</b>
Sept. 10, 2010	Disclosure and interim preservation	Partial indemnity	\$8,721.13
May 12, 2010	Production of list of class members	Substantial indemnity	\$5,924.50
June 25, 2010	Clarification notice arising out of Rochester's letter to class members	Substantial indemnity	\$17,004.00
August 17, 2010 (Adjourned to September 10, 2010)	Declaration of invalidity of opt-out forms	Substantial indemnity	\$8,237.75
Sept. 10, 2010	Motion to strike defence and	Partial indemnity	\$27,563.82

	counterclaim and other relief		
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[12] In considering the costs of these motions, I accept the following submissions of Mr. Moloci:

- this is an important and complex class action that involves substantial amounts – the damages claimed are \$50,000,000;
- the issues are important to some 3,000 class members, to the defendant FMC, and obviously to the Gift Program Defendants;
- the conduct of the Gift Program Defendants has caused delay and expense to the plaintiffs and the conduct of those defendants has made it necessary for the plaintiffs to bring several of the motions in question;
- the Gift Program Defendants have failed to comply with a court order concerning the payment of costs and have failed to provide information ordered by the court;
- the Gift Program Defendants made improper communications to class members which required a response by the plaintiffs and corrective action by the court; and
- plaintiffs’ counsel are experienced litigation counsel and specialists in the class action area – their rates claimed are reasonable.

[13] I would add to this that the work undertaken was necessary, reasonable, and performed with a high level of skill and diligence.

[14] I also accept some of Mr. Cohen’s submissions, with the qualifications set out below:

- there is no evidence that the Gift Program Defendants were directly responsible for obtaining the disputed opt-out notices, although they were faxed by one of those defendants and there is no evidence that those defendants took any steps to control communication with class members;
- there was likely some overlap in time between the services provided by Mr. Thompson and Mr. Moloci; and
- the motion to strike the statement of defence was not successful – although the motion to strike the counterclaim was successful, as was the motion regarding the opt-outs.

[15] In *Andersen v. St. Jude Medical Inc.* (2006), 264 D.L.R. (4<sup>th</sup>) 557,, [2006] O.J. No. 508, Lax J., giving the judgment of the Divisional Court, set out some of the principles applicable to costs awards at para. 22:

1. The discretion of the court must be exercised in light of the specific facts and circumstances of the case in relation to the factors set out in rule 57.01(1): *Boucher, Moon, Coldmatic*. [*Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291, [2004] O.J. No. 2634 (C.A.); *Moon v. Sher* (2004), 246 D.L.R. (4<sup>th</sup>) 440, [2004] O.J. No. 4651 (C.A.); *Coldmatic Refrigeration of Canada Ltd. v. Leveltek Processing LLC* (2005), 75 O.R. (3d) 638, [2005] O.J. No. 160 (C.A.).]

2. A consideration of experience, rates charged and hours spent (formerly a costs grid calculation) is appropriate, but is subject to the overriding principle of reasonableness as applied to the factual matrix of the particular case: *Boucher*. The quantum should reflect an amount the court considers to be fair and reasonable rather than any exact measure of the actual costs to the successful litigant: *Zesta Engineering*. [*Zesta Engineering Ltd. v. Cloutier* (2002), 21 C.C.E.L. (3d) 161, [2002] O.J. No. 4495 (C.A.).]

3. The reasonable expectation of the unsuccessful party is one of the factors to be considered in determining an amount that is fair and reasonable: rule 57.01(1)(0.b). [*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.]

4. The court should seek to avoid inconsistency with comparable awards in other cases. "Like cases, [if they can be found], should conclude with like substantive results": *Murano* at p. 249. [*Murano v. Bank of Montreal* (1998), 41 O.R. (3d) 222, [1998] O.J. No. 2897 (C.A.).]

5. The court should seek to balance the indemnity principle with the fundamental objective of access to justice: *Boucher*.

[16] The relevant principles are set out in rule 57.01 and in the authorities referred to and I do not propose to repeat them.

[17] I also note that the award of substantial indemnity costs is exceptional and should be awarded only in "rare and exceptional cases to mark the court's disapproval of the conduct of the party in the litigation": *Hunt v. TD Securities Inc.* (2003), 66 O.R. (3d) 481, [2003] O.J. No. 3245 (C.A.) at para. 123. The conduct in question must be "reprehensible, scandalous or outrageous": *Young v. Young*, [1993] 4 S.C.R. 3, 1993 CanLII 34, at para. 251; *United States of America v. Yemec* (2007), 85 O.R. (3d) 751, [2007] O.J. No. 2066 (Div. Ct.) at para. 30.

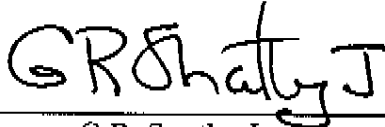
[18] In this case, the conduct of the Gift Program Defendants resulted in the plaintiffs being forced to incur expense that should have been unnecessary and to bring motions that ought to have been unnecessary. I will take that conduct into account as a relevant factor under rule 57.01(1)(e). I do not find, however, that the conduct of the Gift Program Defendants was so outrageous or reprehensible to warrant an award of substantial indemnity costs.

[19] It is also my view that the motion to strike the defence, while not ultimately successful, was brought reasonably, and was partially successful as regards the counterclaim. It was heard at the same time as the motion regarding the 165 opt outs and did not take a great deal of time. For that reason, the plaintiffs will be entitled to an award of some costs for that motion.

[20] In summary, I fix the costs as follows:

Date	Motion	Costs Awarded (Inclusive of Disbursements and Taxes)
Sept. 10, 2010	Disclosure and Interim Preservation	\$7,500
May 12, 2010	Production of list of class members	\$3,750
June 25, 2010	Clarification notice arising out of Rochester's letter to class members	\$10,000
August 17, 2010 (Adjourned to September 10, 2010)	Declaration of invalidity of opt-out forms	\$5,000
Sept. 10, 2010	Motion to strike defence and counterclaim and other relief	\$17,500

[21] Order to issue in accordance with the foregoing.

  
G.R. Strathy J.

**DATE:** September 17, 2010