COURT FILE NO.: CV-21-00000810-00CP
DATE: 20240527

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: John Prins, Plaintiff

AND

LG Electronics Canada, Inc., Defendant

BEFORE: Justice Spencer Nicholson

COUNSEL: C. Smith and M. Baer for the Plaintiff

I. Ishai, N. Butz and P. Douglas for the Defendant

A. Eckart for Christina Beltrano

HEARD: March 6, 2024

REASONS ON MOTION FOR CLASS ACTION SETTLEMENT APPROVAL

NICHOLSON J.:

[1] The parties to this class action proceeding have reached a settlement of all issues and seek to have that settlement approved by the Court pursuant to s.27.1 of the *Class Proceedings Act, 1992,* S.O. 1992, c.6 ("*CPA*").

[2] Ms. Beltrano, a member of the proposed class, objects to the proposed settlement.

[3] Section 27.1 of the *CPA* requires a settlement of a class proceeding to be approved by the court. A settlement that is approved by the court binds every member of the class who has not opted out of the proceeding, unless the court orders otherwise. The court is required to determine whether the proposed settlement is fair, reasonable and in the best interests of the class members.

[4] Subsection 27.1 (7) obligates the moving party to make full and frank disclosure of all material facts, including their best information with respect to certain, non-exhaustive matters.

Nature of the Proceeding:

[5] In this proceeding, the representative plaintiff alleges that certain refrigerators manufactured by LG Canada between January 30, 2014 to present suffer a defect that causes them

to fail to maintain temperature levels necessary to preserve food, beverages, medicine or other perishables. Those alleged failures shall be termed "no-cooling events".

[6] LG Electronics Canada Inc. ("LG") denies the allegations.

Proposed Settlement:

[7] The action was commenced by statement of claim dated May 3, 2021.

[8] Settlement discussions ensued and after four months of formal arm's length negotiations, the parties agreed in principle to a settlement on August 9, 2022. The parties exchanged drafts of the settlement agreement and a final Settlement Agreement was executed on August 3, 2023.

[9] There had been similar litigation in the United States. A comparable, but different, settlement was entered into to resolve that litigation.

[10] The proposed settlement before me would resolve all Canadian class action litigation relating to the allegedly defective compressors in certain models of LG refrigerators. The Settlement Agreement describes a claims process by which settlement class members may submit a claim for compensation for the losses they incurred following one or more no-cooling events that occurred within two years of the date of purchase of the models covered by the settlement.

[11] I will not set out the settlement in full.

[12] However, there are six non-exclusive categories of loss established for eligible settlement class members, with individual compensation ranging from $50 to $4,459 per successful claimant. The Settlement Agreement includes a detailed and workable claims process to allow claims to be made and payments issued efficiently.

Certification:

[13] In order to ratify the proposed settlement, the court must certify the class action for the purposes of settlement. The defendant consents to certification for the purpose of settlement only.

[14] Section 5 of the *CPA* sets out the test for certification. The Court *shall* certify an action as a class proceeding where:

(a) The pleadings disclose a cause of action;
(b) There is an identifiable class of two or more persons that would be represented by the representative plaintiff;
(c) The claims of the class members raise common issues;
(d) A class proceeding would be the preferable procedure for the resolution of the common issues; and
(e) There is a representative plaintiff who,

(i) would fairly and adequately represent the interests of the class;
(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding; and
(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[15] In the context of settling a class action, the requirements for certification are not rigorously applied. The test is satisfied where there is a *prima facie* case favouring certification (see: *Gariepy v. Shell Oil Co*., [2002] O.J. No. 4022, at para. 27; *Bonanno, v. Maytag Corp*., [2005] O.J. No. 3810, at para. 13).

[16] The cause of action in this case is founded on the *Consumer Protection Act, 2002*, the *Competition Act*, the *Sale of Goods Act*, negligent misrepresentation, negligence, breach of contract and unjust enrichment. In *Banman v. Ontario*, 2023 ONSC 6187, at para. 201, Perell J. described that the "plain and obvious" test is used to determine whether a proposed class proceeding discloses a cause of action for the purposes of s. 5(1)(a) of the *CPA*. A claim will be satisfactory unless it has a radical defect, or it is plain and obvious that it could not succeed.

[17] I am satisfied that, assuming the facts pleaded are true, the causes of action as pleaded are capable of being proven. The first of the requirements is met.

[18] A class must be defined in such a way as to:

(i) identify the persons who have a potential claim against the defendant;
(ii) define the parameters of the lawsuit so as to identify those persons bound by the result of the action; and
(iii) describe who is entitled to notice.

(*Banman*, at para. 263)

[19] In this case, the proposed class membership is objectively capable of being identified with some precision. It is neither unnecessarily broad or over-inclusive nor unnecessarily narrow or under-inclusive. In fact, the defendant, I am advised, is able to ascertain the identities of the class members. The second criterion is met.

[20] The common issue proposed is:

"Do the Covered Models suffer from a common defect that can cause them to fail to maintain temperature levels necessary to preserve food, beverages, medicine or other perishables?"

[21] The common issue question must be necessary to the resolution of each class member's claim. Resolution of the common issue must be a substantial ingredient of each class member's claim, facilitating judicial economy and access to justice (*Banman*, at paras. 275-278).

[22] The proposed common issue meets those concerns. The third criterion is met.

[23] In terms of preferable procedure, the court is concerned with judicial economy, behaviour modification and access to justice. Here, the class proceeding advances the claim in a fair, efficient and manageable manner and is more practicable than any other available means of resolving the class members' claims. Determining all of these claims in one proceeding spares limited court resources, is a check on corporate behaviour and promotes access to justice because the size of individual claims means that claims that might be unpursued have redress.

[24] I am satisfied that a class proceeding is a preferable method of resolving this dispute.

[25] Finally, I have already appointed Mr. Prins, by order dated October 23, 2023, as Representative Plaintiff as he satisfies the requirements of s. 5(1)(e).

[26] Accordingly, on consent of the defendant for settlement purposes only, and without objection by any proposed class members, I certify this action as a class proceeding for the purpose of settlement.

Is the Settlement Fair and Reasonable and in the Best Interests of the Settlement Class:

[27] Cullity J., in *Nunes v. Air Transat A.T. Inc*., summarized the principles to be considered in determining whether or not to approve a settlement in a class proceeding, as follows, at para. 7:

> (a) Is it fair, reasonable, and in the best interests of the class;
> (b) The resolution of complex litigation through the compromise of claims is encouraged by the courts and favoured by public policy;
> (c) There is a strong initial presumption of fairness when a proposed class settlement, negotiated at arm's-length by counsel for the class, is presented for court approval;
> (d) To reject the terms of the settlement and require the litigation to continue, a court must conclude that the settlement does not fall within a zone of reasonableness;
> (e) There must be appropriate consideration for the class in return for the surrender of their litigation rights against the defendant. However, the court must balance the need to scrutinize the settlement against the recognition that there may be a number of possible outcomes within a zone or range of reasonableness. All settlements are the product of compromise and a process of give and take and settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and costs obligation.
> (f) It is not the court's function to substitute its judgment for that of the parties or to attempt to renegotiate a proposed settlement. Nor is it the court's function to litigate the merits of the action or, on the other hand, to simply rubber-stamp a proposal.
> (g) The burden of satisfying the court that a settlement should be approved is on the party seeking approval;

(h) In determining whether to approve a settlement, the court considers factors such as:

(i) the likelihood of recovery or likelihood of success;
(ii) the amount and nature of discovery, evidence or investigation;
(iii) the proposed settlement terms and conditions;
(iv) the recommendations and experience of counsel;
(v) the future expense and likely duration of litigation;
(vi) the recommendation of neutral parties, if any;
(vii) the number of objectors and nature of objections;
(viii) the presence of arm's length bargaining and the absence of collusion;
(ix) information conveying to the court the dynamics of, and the positions taken by the parties during, the negotiations; and
(x) the degree and nature of communications by counsel and the representative plaintiff with class members during the litigation.

[28] The court, without making findings of facts on the merits of the litigation, examines the fairness and reasonableness of the proposed settlement and whether it is in the best interests of the class as a whole in the context of the claims and defences in the litigation and any objections raised. An objective and rational assessment of the pros and cons of the settlement is required (see: *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corporation*, 2014 ONSC 5812 at para. 33).

[29] Counsel for both the class and the defendant argue that the settlement is fair and reasonable. They point to the similarities between this settlement and the US settlement. The differences in the settlements are due to the longer warranty period available under US law. In the within settlement, the defendant is agreeing to a *de facto* extension of the warranty period by a year.

[30] It is also noted that the settlement provides an efficient and expeditious manner of resolving the individual claims. Accordingly, the class members will be able to quickly make their claims and recover their compensation. Some of the class members will not even need to show documentation.

[31] It is argued that counsel in this case are experienced in class actions generally and had the guidance from the US settlement. It is further noted that there were three years of litigation and two years of arm's length negotiations to achieve this settlement in its final form. As the proceeding is still at the pre-certification stage, absent this settlement the case would continue on for several more years.

[32] As noted, there is one objector. Counsel for the class and defendant argue that this recognizes that most members of the class are satisfied with the proposed settlement.

[33] Ms. Beltrano's objections, however, should not be overlooked or minimized. She argues that the proposed settlement provides no consideration for class members that are in her situation, that is, for those individuals who suffered a non-cooling event more than two years after the date of purchase.

[34] Mr. Eckhart, for Ms. Beltrano, argues that the parties have failed to meet the evidentiary requirements of s. 27.1 (7) of the *CPA*. That section obligates the moving party to make full and frank disclosure of all material facts, including their best information about certain enumerated matters.

[35] In particular, Ms. Beltrano argues that the plaintiff has failed to provide the number of class members that would be expected to receive settlement funds and who would not be expected to receive settlement funds. She suggests that the number of persons in her position could be lessened by modifying the class definition to benefit more people.

[36] Ms. Beltrano's loss in this case is $292 as a result of her alleged defective refrigeration unit.

[37] The moving party responds that until claims are made under the process set out, it is impossible to know with precision how many claimants there will be. Thus, they have provided the best information that they possess.

[38] It is important to note the position of the defendant. The defendant has agreed to the proposed settlement as a compromise of a case that it feels is defensible. It is the defendant's position that there is no defect in its products. Furthermore, LG believes that causation becomes a problem for those claimants that had no-cooling events that occurred more than two years after purchase.

[39] Thus, if the settlement were to be amended, for example, by amending the definition of the class to make it narrower as suggested by Ms. Beltrano, then LG would not settle the case. It would leave too many potential litigants that could still pursue claims. Simply put, LG would never agree to a settlement that left it substantially exposed.

[40] The proposed settlement extends the Canadian warranty period by one year. This is something that the purchasers of the product did not bargain for or pay for.

[41] Respectfully to Mrs. Beltrano, "fairness is not a standard of perfection". While I accept that she is not the only individual left out of this settlement, I am satisfied that her $292 claim should not hold up the recoveries of those that would benefit from the settlement. The settlement provides timely recovery to the class members and will avoid risky, complex litigation that has an uncertain outcome.

[42] The proposed settlement also provides for an opt-out period so that class members in the circumstances of Ms. Beltrano will have the ability to opt out of the settlement pursue their claims independently.

[43] I am of the view that the settlement meets the test of being fair, reasonable and in the best interests of the class.

Class Counsel Fees:

[44] Mr. Prins, the representative plaintiff in this case, executed a retainer agreement with counsel on May 7, 2021. That retainer agreement provides for a contingency fee of 30% of the value of the benefits recovered, plus disbursements and taxes. Obviously, contingency fee agreements place significant risk on the law firm prosecuting the claim in terms of counsel time and disbursements.

[45] The retainer agreement satisfies the requirements of the *CPA* and is consistent with contingency fee arrangements in class actions generally. I approve the retainer agreement here.

[46] In this particular settlement, the defendant has agreed to pay class counsel's fees over and above the compensation provided for within the Settlement Agreement. Thus, the compensation available to the eligible settlement class members will not be reduced by the amount of the counsel fees. The proposed negotiated counsel fees are $475,000, all-inclusive. This is less than the 30% contemplated under the retainer agreement.

[47] This works out to $3.14 per class member.

[48] Counsel advises the court that its work-in-progress is $283,288 to date, plus disbursements and taxes. The disbursements are not very high at this point.

[49] In my view, the sought class counsel's fees and disbursements meet the test of being fair and reasonable, recognizing the results achieved, the time spent, and the risks involved in this type of litigation. Access to justice is furthered by rewarding law firms prepared to take on the risk of class action litigation.

[50] Accordingly, I approve the fees of $475,000 all-inclusive.

Honorarium to Mr. Prins:

[51] I am asked to approve an honorarium of $700 to Mr. Prins as the representative plaintiff.

[52] Mr. Prins falls within the category of purchasers whose no-cooling event occurred outside the two-year window. He will not be compensated under the settlement for his own claim.

[53] The evidence before me is that Mr. Prins was significantly involved with counsel in reaching this settlement. Counsel argue that without his efforts, it was unlikely that any settlement class member would have received compensation.

[54] It is proposed that the $700 honorarium would be paid out of class counsel's fees, as opposed to coming from the settlement members' claims.

[55] Honorariums are designed to recognize representative plaintiffs that demonstrate a level of involvement and effort that goes beyond what is normally expected and is truly extraordinary, or

where there is evidence that they were financially harmed because they agreed to be a class representative (see: *Casseres v. Takeda Pharmaceutical Company*, 2021 ONSC 2846). The cases have determined that honorariums are rare and must be proportionate, for fear of a perceived conflict of interest between the representative plaintiff and the balance of the class members (see, for example, *Doucet v. The Royal Winnipeg Ballet*, 2023 ONSC 2323).

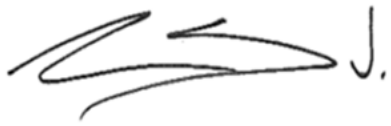
[56] On the evidence before me, while I am satisfied that Mr. Prins was an integral part of this class action whose efforts greatly assisted reaching the achieved settlement, I am not satisfied that Mr. Prins' involvement went sufficiently beyond what is demanded of any representative plaintiff. For example, he did not endure significant additional personal or financial hardship in connection with prosecuting the claim, nor expose himself to re-traumatization for the benefit of the class.

[57] While I am not minimizing Mr. Prins' efforts, I am not satisfied that this is one of the rare cases in which an honorarium ought to be awarded.

Disposition:

[58] For those Reasons, I will execute the draft Order provided certifying the class action for settlement purposes and approving the settlement.

[59] I will also sign an order approving counsel fees, but not the honorarium. I would ask that counsel please provide me with an amended draft order that does not include paragraphs 5 and 6 which deal with the honorarium.



Justice Spencer Nicholson

Date: May 27, 2024