

COURT FILE NO.: 42665 CP
DATE: 20050118

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:)	
)	
Gary Kelman and Janis Kelman)	Charles Wright and Michael Robb, for the
)	Plaintiffs
)	
)	
Plaintiffs)	
)	
- and -)	
)	
)	
The Goodyear Tire and Rubber Company and)	Paul Martin and John Morin, for the
Goodyear Canada Inc.)	Defendants
)	
)	
Defendants)	
)	
)	
)	HEARD: November 2, 2004 with
)	Additional Materials in Writing, November
)	25, 2004

Proceeding under the *Class Proceedings Act, 1992*

REASONS FOR DECISION

WINKLER RSJ:

Nature of the Motion

[1] This action was certified by this court as a class proceeding for the purposes of effecting a settlement on November 17, 2003. On November 2, 2004, the plaintiffs brought motions for approval of the settlement and class counsel fees. I approved the settlement, with reasons to

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follow, and reserved on the motion relating to fees pending delivery of further materials from class counsel. On November 24, 2004, class counsel filed the additional materials requested regarding the fees. My reasons for approval of the settlement and class counsel fees follow.

Background

[2] The action was commenced by a Statement of Claim issued on September 23, 2003. The claim alleges that the defendants, The Goodyear Tire & Rubber Company and Goodyear Canada Inc. (collectively "Goodyear"), were negligent in designing, manufacturing and selling a heating product known as Entran II hose. The plaintiffs allege, *inter alia*, that the product was not fit for its known and foreseeable use and that Goodyear failed to warn consumers of the known and potential defects associated with the product.

[3] Similar litigation was commenced in British Columbia, Alberta, and across the United States. On November 17, 2003, this Court ordered that the action be certified as a class proceeding for settlement purposes. On February 2, 2004 and February 5, 2004 respectively, the actions in British Columbia and Alberta were stayed on consent pending the outcome of this proceeding. The litigation in the United States had been ongoing for some time. The court has been advised that class counsel worked with counsel in the United States litigation to negotiate a settlement which applies to class members across Canada and to the class plaintiffs in the United States litigation. The effect of that cooperative approach has been the creation of a single Settlement Fund against which both Canadian and United States class members may make claims for compensation.

[4] From the evidence filed on the motion, and from earlier motions in this court, it is clear that some hurdles had to be overcome on the road to settlement. This is most evident in the fact that the settlement is now referred to as the Amended Settlement Agreement by the parties. However, it is equally clear that the hurdles incurred were mainly related to procedural matters in the United States and did not impact significantly on the Canadian aspect of the litigation. In any event, the settlement was finally approved by Justice Chesler of the United States District Court for the District of New Jersey on October 19, 2004.

The Settlement

[5] The Amended Settlement Agreement provides for a Settlement Fund of US\$300 million inclusive of costs, legal fees, expenses of claims administration and notice against which claims may be made. The plan for the allocation and distribution of the Fund is based on a recognition of the fact that the Entran II product was installed using several different methods. Class members who meet the qualifying criteria will receive compensation relative to the nature of the installation of the product and category of problems experienced as a result.

[6] Since this is, in essence a product liability action without a personal injury element, the settlement is intended to compensate for product replacement and property damage costs and is, therefore, relatively straightforward. There will be a maximum limit for each claim, to be determined by pre-set formula that will be applied equitably to all class members. It is estimated

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that the total of the actual compensation received by each qualified claimant will be a percentage of the maximum limit applicable to his or her claim.

[7] The claims will be grouped in three categories. Category I will be claimants who have suffered less serious property damage, Category II claimants will be those who have experienced serious or catastrophic failures of their heating systems resulting in property damage, and Category III will be reserved for claims where the class members have not yet qualified for either Category I or II. Category III claimants will also have an opportunity to file claims in either Category I or II if they so qualify within the claims period.

[8] Based on estimates of class size, it is anticipated that Category I class members will likely receive total compensation of 34.1% of the maximum limit applicable to their respective claims. Category II claimants will likely receive 52.6% of the applicable maximum limit. The Category III claims will be limited to compensation of US\$10 million in the aggregate. Based on this, it is likely that Category III claimants will receive a total of 16.9% of the maximum limit. Compensation will be paid in stages and may vary according to the number of claims made.

[9] There is a five-year period in which class members may advance a claim. All communications with class members regarding their claim will be done via telephone or by written correspondence. No personal attendance is required by any claimant to file, substantiate, or appeal any claim. The Claims Administrator has a toll-free information line and website, both of which are available for use in English and French.

[10] A form of notice regarding this settlement, along with a notice distribution program, was approved by this court in June 2004. The notice also included information regarding the opt-out entitlement for any member of the proposed class and extended the opt-out period until September 10, 2004. The court is advised by counsel that none of the proposed Canadian class members exercised the right to opt-out. In addition, proposed class members were given notice of a right to file an objection regarding the settlement but none were received. Further, the representative plaintiffs support the approval of the settlement agreement.

Law and Analysis

[11] It is now trite law that a settlement in a class proceeding ought to be approved where it is fair, reasonable and in the best interests of the class. The plaintiffs contend that this settlement meets that criteria. I agree but with a caveat relating to the multi-jurisdictional aspect of the settlement that I will address later in these reasons.

[12] When considering the approval of negotiated settlements, the court ought to have regard to a number of factors, including:

- (i) Likelihood of recovery or likelihood of success;
- (ii) Amount and nature of discovery, evidence or investigation;
- (iii) Settlement terms and conditions;
- (iv) Recommendation and experience of counsel;

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- (v) Future expense and likely duration of litigation and risk;
- (vi) Recommendation of neutral parties, if any;
- (vii) Number of objectors and nature of objections;
- (viii) The presence of good faith, arms length bargaining and the absence of collusion;
- (ix) The degree and nature of communications by counsel and the representative plaintiffs with class members during the litigation; and
- (x) Information conveying to the court the dynamics of and the positions taken by the parties during the negotiation.

(See *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.) at 440-44; *Parsons v. The Canadian Red Cross Society*, [1999] O.J. No. 3572 (Sup. Ct.) at para. 71 and 72.)

[13] However, these factors provide a guide for analysis rather than a rigid set of criteria that must be applied to every settlement. In practice, it may well be the case that all of the factors are not applicable or, alternatively, should not be given equal weight. (See *Parsons* at para. 73.)

[14] The record establishes that this settlement was a product of extensive arms length negotiation with experienced counsel involved on behalf of the class members. The history of the action, and the settlement discussions, renders factors related to discovery, communication with class members and bargaining positions of little concern. In fact, given the nature of the action and the issues, it is my view that the most important factors to be considered in the approval process are those related to the settlement terms and conditions.

[15] In particular, despite the lack of objectors or opt-outs, the item that is of most concern to the court is the amount of compensation to be paid in respect of each claim. The claimants are subject in effect to two limitations on claims. First, an arbitrary maximum limit has been established for each claimant depending on the nature and type of installation. Secondly, the likely payout for each claim is anticipated to be a fraction of the maximum limit.

[16] However, the plaintiffs have provided evidence that explains the reasons for these limitations. From that material, it is clear that the overriding concern was the ability of the defendants to pay a larger amount by way of settlement without putting their solvency at risk. Bruno De Vita, one of the counsel for the British Columbia sub-class, filed an affidavit in support of the motion for approval. At paragraph 62 of his affidavit, he states:

“Class counsel were concerned about Goodyear’s insolvency and the risk of non-payment. Publicly available documents, as well as documents and financial information provided by Goodyear, and analyzed by Plaintiffs’ financial experts, clearly evidenced that virtually every Goodyear asset that might otherwise be available to satisfy a judgment was cross collateralized to secure more senior debt. Outside of insurance proceeds, collections of sizeable verdict was questionable.”

[17] In consideration of the limits on funds available for settlement, and the other risk factors inherent in litigation, I am satisfied that the plaintiffs achieved through the negotiation the maximum available amount for satisfaction of the claims in total, short of trial. (See *Parsons* at para. 91.) Further, there is some evidence that had the matter proceeded to trial, although a judgment for a larger amount may have been obtained, the actual recovery by the class may have been significantly less because of the solvency issues of the defendants.

[18] Therefore, as was the case in *Parsons*, the issue is whether the global settlement amount has been fairly allocated amongst the claimants. In my view, the allocations are equitable in consideration of the institution of categorization for claims, the provision for subsequent claims and the sliding scale of compensation based on severity of loss or damage. Accordingly, I find that the settlement is fair, reasonable and in the best interests of the class as a whole. However, because of the multi-jurisdictional nature of the settlement, the analysis cannot end there.

[19] The settlement contemplates that the claims administration will be headquartered in the United States. Claims will be processed and assessed pursuant to the settlement terms by the Administrator. Denied claims may be appealed to a special master appointed by the U.S. court to hear such matters. None of this presents any particular difficulty. It is on its face a fair process specifically directed at removing procedural burdens for class members.

[20] Nonetheless, where a Canadian class action is settled by providing the Canadian class members with access to a joint settlement fund meant to span both American and Canadian jurisdictions, it raises the question: "In which jurisdiction must Canadian class members seek relief should a situation arise that is not contemplated by the express terms of the settlement agreement?" That question in turn requires an analysis of the current state of the law regarding jurisdictional issues.

[21] The jurisdiction of Canadian courts and the enforcement of the orders or judgments of foreign courts in Canada have been the subject of numerous cases at the appellate level. The Supreme Court of Canada has considered the issues in several cases, including *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077; *Amchem Products v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897; *Beals v. Saldanha*, [2003] 3 S.C.R. 416.

[22] The thrust of those cases is to effectively delineate the positions that can be taken by a court regarding its jurisdiction to hear or deal with a proceeding. On the one hand, a court may determine that it has jurisdiction *simpliciter*, that there is no other forum that is clearly more appropriate in which the matter may be heard and, therefore, proceed to deal with the matter. Alternatively, a court may determine that it has sufficient connection to the subject matter or the litigants to take jurisdiction but decline to do so on the basis that there is another clearly more appropriate forum, with concurrent jurisdiction, in which the matter would be more properly heard. In the further alternative, which in reality follows from the jurisdiction *simpliciter* analysis, a court may find that it is without jurisdiction and, accordingly, must decline to become involved with the proceeding. (See *Roth v. Interlock Services, Inc.* (2004), 1 C.P.C. (6th) 373 (B.C.C.A.)).

[23] These appear to be the only options available to a court with respect to a particular proceeding. This action clearly falls into the first category of cases. Quite apart from the fact that the parties have attorned to the jurisdiction for the purposes of dealing with this proceeding, the class proceeding was commenced in Ontario, and although it is framed as a national class, it

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involves, *inter alia*, Ontario class members, and damages suffered in Ontario by the class members.

[24] However, the structure of the settlement suggests that the jurisdiction of this court extends only to approving the terms of the settlement, thus binding the Canadian class members, but thereafter leaving this court without any further supervisory role in the implementation or administration. I cannot accede to this proposition.

[25] There is no authority in the case law for the proposition that once an Ontario court has taken jurisdiction over a matter it may subsequently cede that jurisdiction to another court in a different forum. This should not be confused with a situation in which a stay is sought in one jurisdiction pending a resolution of a proceeding involving the same parties and same issues in another jurisdiction. In the present situation, for all intents and purposes, by way of the settlement and its approval, the parties have concluded the litigation in this jurisdiction. Therefore, any analogy to the law regarding stays of proceedings has no application. To similar effect, the *Class Proceedings Act 1992*, S.O. 1992, c.6, s. 26(7) states in pertinent part that “[t]he court shall supervise the execution of judgments and the distribution of awards under” the Act. Thus, where an Ontario court is involved in approving a settlement of a class proceeding, it must retain jurisdiction over the implementation of that settlement. Simply put, where the court has sanctioned a cross-border settlement of a class proceeding under the CPA, it cannot decline to exercise its continuing statutory jurisdiction over the parties and the settlement merely because the administration of the settlement is in the United States.

[26] Accordingly, the court has taken steps to assert its supervisory role over the implementation of the settlement. Further steps will be taken as necessary.

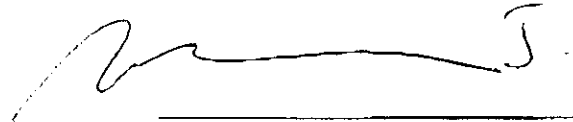
Fees

[27] In the additional materials filed, class counsel sought approval of fees totalling approximately US\$1.8 million. In my view, given the nature of the proceeding, the most appropriate method to assess the reasonableness of these fees is by a percentage comparison to the actual dollar value of the judgment to the Canadian class members. (See *Crown Bay Hotel Ltd. Partnership v. Zurich Indemnity Co. of Canada* (1998), 40 O.R. (3d) 83 (Gen. Div.)).

[28] The evidence indicates that approximately 12% of the Entran II hose was sold or used in Canada. By a straight mathematical calculation, this means that the Canadian class could ultimately receive 12% of the settlement fund, or US\$36 million. However, the potential recovery amount for all claimants will be diminished by the counsel fees to be paid overall including those of US counsel, which total US\$90 million. Although Canadian counsel’s share of those fees is limited to the stated \$1.8 million, the impact to be felt by class members is that 70% of the fund will be available for distribution. In terms of the Canadian class, this would mean a potential total recovery of US\$25.2 million. Accordingly, the Canadian class counsel fee being sought is still less than 8% of the total potential recovery for the Canadian class.

[29] I find this to be a reasonable fee in consideration of the risk undertaken by counsel and the result achieved for the class. Although there was a negotiation bent to this litigation by the time Canadian counsel became involved, that alone does not eliminate the risk factor for counsel. (See *Parsons*). I find the efforts of counsel resulted in the litigation being brought to a successful conclusion for the class members.

[30] For the foregoing reasons, the motions for approval of the settlement and class counsel fees are granted.



Winkler RSJ

Released: January 18, 2005

COURT FILE NO.: 42665 CP

SUPERIOR COURT OF JUSTICE

BETWEEN:

GARY KELMAN and JANIS KELMAN

Plaintiffs

-and-

THE GOODYEAR TIRE AND RUBBER
COMPANY and GOODYEAR CANADA
INC.

Defendants

REASONS FOR DECISION

WINKLER RSJ

Released: January 18, 2005