Court File No. CV-12-9667-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED, AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SINO-FOREST CORPORATION

Court File No. CV-11-431153-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

THE TRUSTEES OF THE LABOURERS' PENSION FUND OF CENTRAL AND EASTERN CANADA, THE TRUSTEES OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 793 PENSION PLAN FOR OPERATING ENGINEERS IN ONTARIO, SJUNDE AP-FONDEN, DAVID GRANT and ROBERT WONG

Plaintiffs

- and -

SINO-FOREST CORPORATION, ERNST & YOUNG LLP, BDO LIMITED (formerly known as BDO MCCABE LO LIMITED), ALLEN T.Y. CHAN, W. JUDSON MARTIN, KAI KIT POON, DAVID J. HORSLEY, WILLIAM E. ARDELL, JAMES P. BOWLAND, JAMES M.E. HYDE, EDMUND MAK, SIMON MURRAY, PETER WANG, GARRY J. WEST, PÖYRY (BEIJING) CONSULTING COMPANY LIMITED, CREDIT SUISSE SECURITIES (CANADA), INC., TD SECURITIES INC., DUNDEE SECURITIES CORPORATION, RBC DOMINION SECURITIES INC., SCOTIA CAPITAL INC., CIBC WORLD MARKETS INC., MERRILL LYNCH CANADA INC., CANACCORD FINANCIAL LTD., MAISON PLACEMENTS CANADA INC., CREDIT SUISSE SECURITIES (USA) LLC and MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED (successor by merger to Banc of America Securities LLC)

Defendants

AUTHORITIES OF THE UNDERWRITERS
Ernst & Young LLP Settlement Approval and Certification Motion
(returnable February 4, 2013)

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Dabbs v. Sun Life Assurance Co. of Canada

Paul Dabbs, Plaintiff and Sun Life Assurance Company of Canada, Defendant

Ontario Court of Justice, General Division

Sharpe J.

Heard: May 4-5 and June 5, 1998
Judgment: July 3, 1998[FN*]
Docket: 96-CT-022862

Proceedings: set aside or quashed *Dabbs v. Sun Life Assurance Co. of Canada* (September 14, 1998), CA C30326, M22971, M23028 (Ont. C.A.)**Proceedings: refused leave to appeal *Dabbs v. Sun Life Assurance Co. of Canada* (October 22, 1998), 26855 (S.C.C.)**

Counsel: *Michael A. Eizenga*, *Michael J. Peerless* and *Charles M. Wright*, for the plaintiff.

H. Lorne Morphy and *Patricia D.S. Jackson*, for the defendant.

Michael Deverett, for three objectors.

Gary R. Will and *J. Douglas Barnett*, for eleven objectors.

Subject: Civil Practice and Procedure; Insurance

Practice --- Parties — Representative or class actions — General

Parties settled plaintiff's proposed class action — Parties moved for certification of action as class proceeding and approval of settlement — Plaintiff claimed that defendant misrepresented period for which premiums were payable with respect to "vanishing premium" life insurance policies — Plaintiff's statement of claim disclosed cause of action respecting common issue shared by identifiable class of plaintiffs — Class proceeding was most efficient manner to deal with potential claims of 141,000 class members in Ontario — No basis existed for denying certification — Agreement did not fail to provide for subclass of plaintiffs who had additional claim for further improprieties respecting sale of insurance policies — Right to opt out of settlement provided adequate protection to any class member who wished to pursue further or alternative claim against defendant — Action was certified as class proceeding.

Practice --- Disposition without trial — Settlement — General

Insured and insurer settled proposed class action for alleged misrepresentation in sale of life insurance policies — Parties moved for approval of settlement — Settlement merits approval where in all circumstances it is fair, reasonable and in best interests of those affected by it — Settlement was strongly recommended by experienced counsel — Same settlement agreement had been approved by courts of British Columbia and Quebec — Under settlement, class members had right to receive either "no proof" benefits or benefits determined according to summary claims resolution process — Alternatively, class members had right to opt out of settlement and sue on own behalf — Proposed settlement was approved.

Cases considered by *Sharpe J.*:

London & South Western Railway v. Blackmore (1870), L.R. 4 H.L. 610, 39 L.J. Ch. 713 (U.K. H.L.) — referred to

Podmore v. Sun Life Assurance Co. (January 16, 1998), Tannenbaum J. (Que. S.C.) — considered

Romanchuck v. Sun Life Assurance Co. (November 28, 1997), Brenner J. (B.C. S.C.) — considered

Statutes considered:

Class Proceedings Act, 1992, S.O. 1992, c. 6

Generally — pursuant to

s. 5 — referred to

s. 5(1) — considered

MOTION by plaintiff and defendant for certification of plaintiff's action as class proceeding and for approval of settlement agreement reached by parties.

***Sharpe J.*:**

1. Nature of Proceedings

1 This action is a proposed class proceeding pursuant to the *Class Proceedings Act 1992*, S.O. 1992, c. 6. The claim arises from the sale of so-called "vanishing premium" life insurance policies. The plaintiff alleges that in marketing these policies, the defendant Sun Life Assurance Company of Canada ("Sun Life") and its agents represented to purchasers that dividends to policy holders would pay the required premiums within a specified number of years. Sales illustrations projected a "premium offset date" after which no further premiums would be required. In fact, in the plaintiff's case and in a large number of similar cases, dividends have been lower than projected and policy holders have been or will be required to pay premiums for a longer period than the projected premium offset date. The defendant Sun Life has made it clear that it denies the allegations of misrepresentation.

2 Together with similar Quebec and British Columbia actions, this action was settled by written agreement, dated June 16, 1997. The settlement is subject to and conditional upon court approval in all three provinces. The settlement has been approved in Quebec and British Columbia. On this motion, the plaintiff and defendant seek

certification of the action as a class proceeding and approval of the settlement.

3 Following my earlier ruling on the procedure to be followed on this motion, released February 24, 1998, further material was filed by the plaintiff and by certain of the objectors. The motion was then heard over three days in accordance with the terms set out in my procedural ruling. I am now in a position to rule on certification and the request for approval of the settlement.

2. Certification

4 The test for certification is set out in the following terms in the *Class Proceedings Act*, s. 5:

> 5 (1) The court shall certify a class proceeding on a motion under section 2, 3, or 4 if,
>
> (a) the pleadings or the notice of action discloses a cause of action;
>
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
>
> (c) the claims or defences 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 or defendant 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.

5 The defendant supports the motion for certification, but only on the condition that the settlement be approved at the same time. Subject to certain submissions relating to the subclass issue discussed below, the objectors focused their attention on the settlement and did not seriously contend that this was not a case for certification.

(a) Cause of Action

6 I am satisfied that the statement of claim discloses a cause of action. The plaintiff asserts claims on his own behalf and on behalf of a proposed class for alleged breach of contract and negligent misrepresentation arising out of the manner in which whole life participating insurance policies with a premium offset option were sold. The allegations in the action primarily concern the use of sales illustrations, combined with oral and written representations made by the defendant and its agents with respect to the date upon which dividends would be sufficient to fully pay up the policies. While it is clear from the position it has taken on this motion that the defendant would deny these allegations if the action were to proceed, the plaintiff does plead a tenable cause of ac-

tion.

(b) Identifiable Class

7 The plaintiff proposes that the class be defined as follows:

> all owners of Class Policies purchased in Ontario, or who are resident in Ontario on April 30, 1997 and whose Class Policy(ies) were purchased outside Quebec or British Columbia.
>
> "Class Policy" is defined as
>
> any participating whole life policy issued by Sun Life in Canada between January 1, 1980 and December 31, 1995 which is in force as of April 30, 1997 (a "Current Class Policy") or which has become a Lapsed Policy between January 1, 1990 and April 30, 1997 (a "Lapsed Class Policy"), except those policies in respect of which the owners have released Sun Life from claims related to premium offset or to the sale of the policies.

8 The proposed definition of the class does, I find, represent an identifiable class of two or more persons that would be represented by the representative plaintiff. It is common ground that there are approximately 141,000 members of the proposed class in Ontario and approximately 400,000 class members in Canada.

(c) Common Issue

9 I also find that the statement of claim does raise a common issue, namely the following:

> Did the use of illustrations and/or any representations, in writing or verbal, create an obligation on the part of Sun Life with respect to a specified offset date despite the terms of the policy itself and the terms of any illustration?

(d) Preferable Procedure

10 I find that a class proceeding is the preferable procedure for the resolution of the common issue. As already noted, there are approximately 141,000 class members in Ontario and approximately 400,000 class members in Canada. The litigation of these claims on an individual basis would be costly and time consuming. Indeed, if these claims had to be litigated on an individual basis, few members of the class would be able to present their claims because of the costs, risks and delays involved. I have no doubt that a class proceeding is the most efficient manner to deal with these claims from the perspective of both the litigants and the court, and that a class proceeding will result in increased access to justice.

(e) Representative Plaintiff

11 Mr. Dabbs filed an affidavit on this motion and was cross-examined before me. Mr. Dabbs impressed me as being an honest and informed lay person with a genuine perception of having been mislead by an agent as to the number of premiums he would have to pay. I am satisfied on the basis of all the evidence that he has made a sincere and genuine effort to represent the interests of the proposed class and that he has no conflict of interest with other members of the class. I find as well that the representative plaintiff has produced a proper plan for the resolution of this proceeding.

(f) Subclass

12 Mr. Deverett submitted that certification should be denied on the ground that the agreement failed to provide for a subclass for those who have claims for "twisting", a practice whereby a policy holder is improperly induced by an agent to replace an existing policy with a new policy of less value to the policy holder. In my view, there is no evidence that would indicate that there has been a significant problem with "twisting" among Sun Life policy holders. Class counsel did not ignore the issue. The statement of claim contains an allegation that would deal with twisting. However, Mr. Ritchie testified that from class counsel' s interviews with over 200 policy holders, there emerged no evidence of a systemic problem. In my view, in the absence of any evidence or reasonably supported belief that twisting may be a wide-spread problem among class members, there is no basis for denying certification on the ground that there is no subclass for "twisting". The right to opt out provides adequate protection to any class member who wishes to pursue a claim for "twisting".

3. Terms of the Settlement

13 The settlement agreement is a document of some considerable complexity, but it will facilitate analysis to provide a simplified explanation of it main features.

(a) Right to Opt Out

14 Under the terms of the settlement, all class members retain the right to opt out of the settlement and sue on their own behalf for whatever claim they wish to assert. The right to opt out arises at two stages. A class member may opt out immediately and have nothing to do with the settlement. There is also a right to opt out that arises in one area of the alternative claim resolution process, discussed in greater detail below.

(b) Global Benefits

15 The proposed settlement contains two types of benefits for class members. First are Global Benefits. These might be described as "no-proof" benefits. They are available to all class members without inquiry as to the nature of the representations that were made to the class member at the time he or she purchased the policy. All members of the class are automatically entitled to an annual dividend improvement of 50 basis points ($^1/_2$ %) higher than would otherwise apply for a period of three years. For a special category of policies known as "enhanced policies", there is a further benefit of a 25% reduction in the cost of term insurance for the enhanced term of such policy.

16 A member of the class may also elect the Optional Dividend Benefit. This is also a "no-proof" benefit, available without inquiry as to the nature of the representations that were made to the class member at the time he or she purchased the policy. This benefit entitles the policy holder to an annual dividend interest rate that is 75 basis points (3/4%) higher than would otherwise apply for the term of the policy. However, to obtain this benefit, the policy holder must waive the Special Maturity Dividend. The Special Maturity Dividend is not a right secured by any policy, but an enhancement the defendant has voluntarily provided to its policy holders. It represents an enhanced cash value or payment on death determined by the length of time the member has held the policy. To determine the relative values of the Optional Dividend Benefit and the Special Maturity Dividend the policy holder must give up, it is necessary to examine the policy holder's individual circumstances. The plaintiff and the defendant submit that in most cases, the value of the Optional Dividend Benefit will greatly exceed the value of the Special Maturity Dividend. I will return to the question of the value of the Optional Dividend Benefit below.

(c) Alternative Claims Resolution Process

17 The second type of benefit is that available through the Alternative Claims Resolution Process ("ACRP"). The ACRP provides a mechanism whereby a policy holder presents evidence of the nature of the actual misrepresentation made at the time of sale of the policy. A class member who elects to submit an ACRP claim is, subject to an exception described below, not entitled to receive the "no-proof" benefits just described. The ACRP provides for submission of a claim on the basis of affidavit from the policy holder and certain documentary evidence.

18 The settlement agreement contemplates that a policy holder who submits an ACRP claim will be placed in one of five categories. These are described in greater detail and with more precision in the agreement, but for present purposes, the following simplified definitions will suffice:

> *Category 1*: the member provides evidence showing that the defendant or its agent made a written representation that the policy would be fully paid-up after a specified number of premiums had been paid.
>
> *Category 2*: the member provides affidavit evidence that the defendant's agent made an oral representation that the policy would be fully paid-up after a specified number of premiums had been paid and the agent confirms that such representation was made.
>
> *Category 3*: the member provides affidavit evidence that the defendant's agent made an oral representation that the policy would be fully paid-up after a specified number of premiums had been paid but the agent neither confirms nor denies that such representation was made.
>
> *Category 4*: the member provides affidavit evidence that the defendant's agent made an oral representation that the policy would be fully paid-up after a specified number of premiums had been paid but the agent provides an affidavit denying that such representation was made.
>
> *Category 5*: the member provides affidavit evidence that the defendant's agent made an oral representation that the policy would be fully paid-up after a specified number of premiums had been paid and there is evidence that a written statement was provided at the time of sale which contradicts the member's version of the misrepresentation.

19 The rights and benefits attaching to these classifications is as follows. Category 1 and 2 claimants are entitled to the same premium offset entitlement that was represented to them. Category 3 claimants are entitled to a premium offset date which is half way from the premium offset date represented at the time of sale to the premium offset date shown as applicable on the first policy anniversary date after March 1, 1997. Category 4 and 5 claimants are entitled to no relief. However, Category 4 claimants have two options available after their claims have been classified as falling into Category 4. First, they have the right to opt out of the settlement entirely, thereby preserving any common law action right they may have. Second, Category 4 claimants have the right to re-elect and take either of the "no-proof" benefits described above.

20 The settlement agreement provides for a summary and mechanical process whereby claims are to be assessed and classified. The ACRP does not allow for viva voce evidence, nor does it permit a right to cross-examine and or include any right to make oral representations. The defendant Sun Life is required to establish a Claims Administration Facility which bears primary responsibility for determining the claims. The Claims Administration Facility is, however, subject to audit by class counsel and rejected claims are subject to review by a

Review Panel consisting of a lawyer designated by Sun Life and a designated member of settlement class counsel. In the event of disagreement between the members of the review panel, there is further review by the "Designate", defined as a retired judge or comparable individual.

21 The agreement requires the parties to provide to the court for approval a list of statements which are to be considered to constitute clear and unqualified guarantees as contemplated for Category 1 and 2 claims. To protect the integrity of the ACRP, the lists are filed with the court under seal, but I have reviewed them. I find that they represent a useful, fair and reasonable collection of the sort of statement that would meet the standard required under the agreement.

22 Sun Life is also required to provide a toll free telephone information line on which class members may make inquiries and obtain policy status information. Class counsel are required to monitor that "hot line" to ensure that appropriate information is given to class members. I note as well that class members who opt for the ACRP are entitled to access to the Sun Life file. Counsel for Sun Life stated to the court that before having to decide whether to accept the Global Benefits, elect the Opitional Dividend Benefit or pursue a claim under the Alternative Resolution Process, a class member would be able to obtain from Sun Life a print-out setting out information as to the class member's policy that would include the value of the Special Maturity Benefit.

(d) Value of the Optional Dividend Benefit

23 The value of the "Optional Dividend Benefit" is of considerable significance. It is available to all policy holders on a "no-proof" basis and as it provides the fall-back position available to those policy holders who swear that a misrepresentation was made but who are denied any relief under the ACRP when met with a sworn denial by the agent.

24 I asked for further evidence of the value of this benefit. The plaintiff answered this request with a further affidavit from an actuary who had been retained to provide an expert opinion on the overall worth of the settlement. It is apparent that the actuary's opinion is based upon background information with respect to policies, dividends and benefits provided by the defendant. While neither of the groups of objectors showed any concern about the value of the Optional Dividend Benefit until I raised the point, both counsel submitted that there should be a more searching inquiry into the background information that had been provided to Mr. Huff. The defendant takes the position that this information is of a confidential nature and that if it were to be made a matter of public record, the defendant would suffer thereby. Upon Mr. Huff depositing with the Registrar of the Court copies of the material and information he had been provided by the defendant, I reserved my decision on the appropriate course to follow.

25 My ruling on this point is that the question I asked has been answered by Mr. Huff's evidence and that without looking at the material provided by the defendant to Mr. Huff, I have been provided sufficient information to permit me to assess the fairness of this settlement. I reach this conclusion for the following reasons. First, Mr. Huff impressed me as a reliable witness who took his role as an independent expert seriously. He did not exaggerate or use the witness stand as a platform to advocate the cause of the party that retained him. His evidence was measured and balanced. He indicated that by its very nature, virtually all of the information he needed to formulate his opinion had to come from the defendant. There is simply no independent source for the number and types of policies, the rights attached to those policies and the formulae for calculation of benefits. To the extent possible, he was able to verify that the information provided by the defendant was internally consistent and the necessary actuarial calculations were tested.

26 I was urged by the objectors represented by Mr. Deverett to question the reliability of data supplied by the defendant because of an adverse credibility finding made against a senior officer of the defendant by another judge of this court in another action. In my view, it would be entirely inappropriate to accept such a submission. Each case falls to be decided on its own merits and on the evidence presented and the information at issue here is not the same as the evidence rejected in that other proceeding.

27 I am satisfied that an honest and significant effort has been made to respond to the question I asked. Mr. Huff and his associates devoted over 100 hours of professional time, 50 hours of paraprofessional time and 30 hours of clerical time, the greater part of which was related to the verification of offset dates. No further review is required. I would add that inherent in the approval of a settlement is the need to assess issues on a less than complete factual record. To require proof of all relevant facts to the standard required at trial would defeat the very notion of a settlement where the parties ask the court to approve an arrangement reached on a less than perfect record.

28 Mr. Huff's evidence is that over 90% of policy holders would achieve offset reductions of between 30% and 70% through the Optional Dividend Benefit. The weighted average reduction for policies he tested with meaningful offset reductions (ie. excluding those where the current offset was the same as that indicated at the time of issue) was 56%. It is apparent that these are averages and that to assess the situation of any individual policy holder, it would be necessary to consider the particulars of that individuals situation. Mr. Huff confirmed that the examples provided by Sun Life in the Question and Answer booklet provided to Class members are accurate.

(e) Lapsed Policies

29 The agreement also makes provision for lapsed policies. The holder of a lapsed policy who is able to provide evidence of insurability is entitled to a new policy similar to the lapsed policy with a 50% reduction in the first annual premium. The holder of a lapsed policy may also apply under the ACRP. If the member's claim is classified as Category 1,2 or 3, the policy may be reinstated without evidence of insurability upon payment of past due premiums, loans and interest.

4. Analysis of the Proposed Settlement

(a) The standard for approval

30 In my previous ruling I indicated that the standard to be met by the parties seeking approval of the settlement is whether in all the circumstances the settlement is fair, reasonable and in the best interests of those affected by it. A settlement of the kind under consideration here will affect a large number of individuals who are not before the court, and I am required to scrutinize the proposed settlement closely to ensure that it does not sell short the potential rights of those unrepresented parties. I agree with the thrust of Professor Watson's comments in "Is the Price Still Right? Class Proceedings in Ontario", a paper delivered at a CIAJ Conference in Toronto, October, 1997, that class action settlements "must be seriously scrutinized by judges" and that they should be "viewed with some suspicion". On the other hand, 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 of litigation.

31 I have had the benefit of three full days of cross-examination of deponents on affidavits filed in support

of the settlement and submissions by counsel representing the parties and the objectors. I have received answers to certain questions I posed to the parties. After considerations of the points that have been made both in favour of and against approval of the settlement, for the reasons that follow, I have reached the conclusion that this settlement should be approved.

(b) Recommendation of Class Counsel

32 The fact that this settlement is strongly recommended by experienced class counsel is certainly a factor in its favour. The recommendation of class counsel is clearly not dispositive as it is obvious that class counsel have a significant financial interest in having the settlement approved. Still, the recommendation of counsel of high repute is significant. While class counsel have a financial interest at stake, their reputation for integrity and diligent effort on behalf of their clients is also on the line. Moreover, in the case at bar, the settlement was not the result of a solo effort. As there were proceedings brought in British Columbia and Quebec as well, there was a team of class counsel from three different provinces. Moreover, class counsel also sought and obtained the advise of counsel from the United States who have experience in "vanishing premium" litigation.

(c) Risks of Proceeding to Trial

33 While the plaintiff presents an arguable case, there is no doubt that there is a risk that if the case went to trial, the common issue would be resolved against the class. Misrepresentation is often difficult to prove. Here, the standard sales illustration which forms the basis of most claims contains an explicit waiver which the members of the class would have to overcome. While the specific terms vary, typical language is: "This illustration assumes a continuation of the current scale of dividends and Special Maturity Dividends (SMD). Dividends may be higher or lower; they will be based on Sun Life's interest, expense, and mortality experience." The policies themselves typically contain language indicating that the premium is payable throughout the term of the policy: "Total Premiums payable by owner due [Month, Day and Year] and yearly thereafter while life insured lives." It is certainly possible that the defendant might persuade a court that such language provided class members with a clear statement that the dividends might or might not be sufficient to fulfill the hoped for result of the illustration. In addition to the legal and factual risks are certain practical concerns. The case would be factually, legally and procedurally complex. It would almost certainly take several years to get to trial and to then exhaust ap- peals.

(d) Fairness of the ACRP

34 The ACRP is at the core of this agreement. It plainly does not offer the procedural guarantees of a trial as there is no right to cross-examine, present oral evidence or to make oral submissions. On the other hand, there would be no point to the settlement if it did not provide for some form of summary resolution of claims. The provision of a cost-free process to claimants who would otherwise be forced to abandon their claims or bear the costs of litigation represents a significant benefit.

35 In my view, there can be little doubt that the ACRP offers a fair and reasonable resolution of claims falling in Categories 1 and 2 which afford the claimant precisely the offset date that was represented. I would also find it difficult to question the fairness of the result of a Category 3 claim where the claimant is given half-way relief on the basis of nothing more that the claimants own sworn statement that an oral representation was made. Similarly, I see no reason to question the fairness of a Category 5 claim where there is evidence that a written statement was provided at the time of sale which contradicts the claimant's version of the misrepresentation. It is only fair that there be some control on the extent to which a class member can secure a benefit in the strength of

his or her own affidavit. I note here that in answer to a question I posed, it was stated to the court that it was not intended that language of the explicit waiver in the standard sales illustration quoted above would be sufficient to bring the claim within Category 5.

36 The contentious issue is the fairness of Category 4. Mr. Will focused his attention on this point and submitted that, in effect, the agent was given a veto over the rights of the policy holder. It was his submission that there should be some control or constraint on the extent to which agents could defeat a claim by simple denial. The right to confront and cross-examine the agent could be granted, or there could be a points system that would discount agent denials where the same agent denied more than one claim.

37 In my view, there are a number of factors which have to be considered here. First is the fact that the agent must make the denial on oath. This means that the agent who lies is subject to the threat of perjury. Second, it is not apparent that all agents will perceive it to be in their interest to favour the interests of Sun Life over their clients. Third are the very significant options that remain to a class member whose claim is denied by the agent. The class member has, at that point, the right to opt out and sue the defendant with full knowledge of the case he or she will have to meet. In that sense, the class member loses nothing because of the settlement but gains advance discovery of the case to be met. The class member also has the very significant right to abandon the ACRP and elect the "no-proof" benefits which, as noted, will frequently result in achieving half-way relief. In my view, when considered in light of the balance of the settlement, it cannot be said that the situation of the Category 4 claimants renders this settlement unfair.

38 It is my view, that considered as a whole, the ACRP does provide for an efficient and fair process.

(e) Approval in British Columbia and Quebec

39 Another factor which favours approval of the settlement is that the same agreement has been approved by the courts of British Columbia and Quebec. In the companion case in British Columbia, *Romanchuck v. Sun Life Assurance Co.* (Nov. 28, 1997), Brenner J. (B.C. S.C.) Brenner J. found that:

> ... the settlement is reasonable, fair and adequate. A considerable degree of creativity has been demonstrated by the parties in putting in place, among other things, a form of alternative dispute resolution to allow a cost effective method of resolving the claims in this case...

In the Quebec case, *Podmore v. Sun Life Assurance Co.* (January 16, 1998), Tannenbaum J. (Que. S.C.) Tannenbaum J. of the Quebec Superior Court found that the agreement was "raisonnable, équitable, approprié et dans le meilleur intérêt du groupe visé."

(f) Absence of Statement of Defence and Discovery

40 This settlement was reached at a very early stage of the proceedings. No statement of defence was filed and there has been no discovery. The position of the defendant has not been put formally on the record and has been known to class counsel only through the settlement process. In my view, this is not a reason for refusing approval. It is clearly not the law that a settlement requiring court approval cannot be made at such an early stage of the proceedings. Moreover, I am satisfied that class counsel did adequately consider the position of the defendant. There is evidence before me that before recommending the settlement, class counsel interviewed hundreds of potential class members and a number of Sun Life agents. I am satisfied that a serious and diligent effort has been made to determine the facts. This is by no means the first "vanishing premium" case litigated in

North America and class counsel took advice from others with experience in the area.

(g) Exclusion of Other Possible Claims

41 I have already dealt with the matter of "twisting" in relation to certification. It is unnecessary to add anything here except that the settlement preserves the right of any class member to opt out and pursue any such claim.

42 Mr. Deverett also suggested that the failure of the Sun Life policies to perform as indicated in the standard sales illustration might be the fault of Sun Life itself as it has the unfettered right to determine the dividends that are to be paid. Again, I find that the evidence before me fails to show that there is any serious prospect that this is a potentially valid source for a claim by class members. Sun Life does business in a competitive market. The failure of life insurance policies of the kind at issue here to perform was not restricted to Sun Life. There was an industry wide problem which has been linked to collapse of unusually high interest rates of the 1980's and which produced a number of actions in North America against a long list of insurance companies.

43 A related issue concerns the question of how Sun Life, a mutual insurance company, would pay for the benefits to be conferred upon the policy holders. While that issue was not dealt with in the agreement itself, Mr. Ritchie testified that an understanding was reached during the negotiation of the settlement that future dividend scales would not be affected. That understanding was confirmed by a letter to Mr. Ritchie dated August 29, 1997 from counsel for Sun Life stating:

> I confirm the information provided during the negotiation process.
>
> Sun Life has specified that future dividend scales will be determined as if the settlement had never taken place. No attempt to recoup the costs of the settlement will be made in any manner affecting the existing participating policy holders (including Class Members).

44 That undertaking was confirmed by counsel for Sun Life before me at this hearing. In light of possible demutualization by Sun Life, a further letter from Sun Life's counsel to Mr Ritchie dated May 1, 1998 repeats the above undertaking and states:

> Given the possibility of demutualization, Sun Life has instructed us to advise that the statements made earlier are still true, with the (obvious) clarification that the costs of the agreement may have an impact on the value of the company, which value will be distributed to all eligible policyholders in the event that demutualization proceeds.

45 Another point made in relation to the prospect of other potential claims is that the terms of the release to be given to Sun Life under the agreement are broad. Sun Life and its agents are to be released "from any liability or damages for representations, omissions or other conduct ... that occurred during the purchase or sale of any Settled Class Policy, or in connection with the offering of Global Benefits, the Optional Dividend Benefit, or other benefits or resolutions pursuant to the Agreement." A release in these terms consequent upon a settlement is not unusual or unexpected, and in any event, is subject to being interpreted in accordance with recognized legal principles. It is well established that a release must be interpreted with reference to the context in which it was drafted and that a release will not be construed as applying to facts not known to the claimant at the time the release was drafted: *London & South Western Railway v. Blackmore* (1870), L.R. 4 H.L. 610 (U.K. H.L.). These principles, together with the right of any policy holder who now believes he or she has a claim against Sun Life

that is not embraced by the settlement to opt out, provide an adequate answer to this objection.

(h) Analysis of the Proposed Settlement - Conclusion

46 I find that the plaintiff and the defendant have satisfied the burden of demonstrating that the proposed settlement is fair, reasonable and in the best interests of those affected by it. The Global Benefits afford significant relief to class members on a "no-proof" basis. The ACRP provides for a summary but fair disposition of claims advanced on the basis of representations that were made.

4. Conclusion

47 For these reasons, there shall be an order for the relief requested in paragraphs (a) to (i) of the Notice of Motion appointing Paul Dabbs as a representative plaintiff, certifying this action as class proceeding, approving the proposed settlement and for the further related orders requested.

48 In my February 24, 1998 ruling, I made reference to the issue of costs. Any party who wishes to claim costs shall serve and file a concise written brief within 20 days of the release of these reasons outlining the claim that is made and the basis for the claim. Reply submissions are to be made 10 days thereafter. A date for a hearing of any such claims will be arranged. Failing any such submissions, there shall be no order as to costs of this motion.

49 I will remain seized of this matter for the purpose of any further approvals that are required, including the approval of the arbitration award relating to the fees and disbursements of class counsel.

Motion granted.

FN* Judgment set aside/quashed (1998), 165 D.L.R. (4th) 482, 113 O.A.C. 307, [1999] I.L.R. I-3269, 41 O.R. (3d) 97 (C.A.); leave to appeal refused (October 22, 1998), Doc. 26855 (S.C.C.).

END OF DOCUMENT

TAB 2

Case Name:

Airia Brands Inc. v. Air Canada

Between
Airia Brands Inc., Startech.com Ltd., and QCS-Quick Cargo Service GMBH, Plaintiffs, and
Air Canada, AC Cargo Limited Partnership, Societe Air France, Koninklijke Luchtvaart Maatschappij N.V. dba KLM, Royal Dutch Airlines, Asiana Airlines Inc., British Airways PLC, Cathay Pacific Airways Ltd., Deutsche Lufthansa AG, Lufthansa Cargo AG, Japan Airlines International Co., Ltd., Scandinavian Airlines System, Korean Airlines Co. Ltd., Cargolux Airline International, Lan Airlines S.A., Lan Cargo S.A., Atlas Air Worldwide Holdings Inc., Polar Air Cargo Inc., Singapore Airlines Ltd., Singapore Airlines Cargo Pte Ltd., Swiss International Airlines Ltd., Qantas Airways Limited, and Martinair Holland N.V., Defendants

[2011] O.J. No. 4787

2011 ONSC 6286

Court File No. 48161

Ontario Superior Court of Justice

L.C. Leitch J.

Heard: October 13, 2011; written submissions, October 17, 2011 by the defendants Qantas, Scandinavian, Singapore and Cargolux.
Judgment: October 26, 2011.

(65 paras.)

Civil litigation -- Civil procedure -- Parties -- Class or representative actions -- Certification -- Settlements -- Approval -- Motion by plaintiffs certifying class action for settlement purposes and approval of settlements allowed -- Plaintiffs alleged defendants conspired to fix air freight shipping prices -- Consent certification orders granted, as requirements for certification were met -- Class proceeding was preferable procedure, adequate representative plaintiffs existed and settlement agreements set out workable resolution -- Settlements were fair, reasonable and in best interests of class in light of procedural and litigation risks -- Amounts paid reflected significant portion of fuel surcharges imposed on air

freight shipping services -- Proposed form of bar order was appropriate and preserved rights of non-settling defendants.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 5

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36,

Ontario Rules of Civil Procedure, Rule 21

Counsel:

Charles M. Wright, Linda Visser, and Kerry McGladdery Dent for the Plaintiffs.

Katherine Kay, for the defendants Air Canada and AC Cargo Limited Partnership.

Jeffrey Feiner, for the defendant Cathay Pacific Airways Ltd.

Aaron Dantowitz, for the defendants Atlas Air Worldwide Holdings Inc. and Polar Air Cargo Inc.

Adam S. Goodman, for the defendant Korean Airlines Co. Ltd.

Lisa Parliament, for the defendant Société Air France and Koninklijke Luchtvaart Maatschappij N.V. dba KLM.

Randy Sutton, for the defendant LAN Airlines S.A., LAN Cargo.

S.A. Vera Toppings, for the defendant Asiana Airlines Inc.

Denes Rothschild, for the defendant British Airways PLC.

Christopher Naudic for the defendants, Singapore Airlines Ltd.
and Singapore Airlines Cargo Pte Ltd. ("Singapore").

David Quayat, for the defendant, Cargolux Airline International ("Cargolux").

Jason Wadden, for the defendant, Scandinavian Airlines System ("SAS").

Margaret Waddell, for the defendant Qantas Airways Limited, ("Qantas").

REASONS FOR JUDGMENT

RE: Consent Certification and Settlement Approval with SAS, Qantas, Cargolux and Singapore

1 L.C. LEITCH J.:-- The plaintiffs move for an order certifying this action as a class proceeding for settlement purposes and approval of four settlement agreements described below. This action was commenced by Statement of Claim issued May 12, 2006, and subsequently amended. In particular, the Statement of Claim was amended on June 13, 2008, to add Startech.com Ltd. as a plaintiff. Leave was granted on May 19, 2009, to file a third Fresh as Amended Statement of Claim to substitute the plaintiff Nutech Brands Inc. with Airia Brands Inc. and add the plaintiff QCS-Quick Cargo Service Gmbh.

2 Leave was granted on May 18, 2011, to file a fourth Fresh as Amended Statement of Claim to add Qantas Airways Limited and Martinair Holland N.V. as defendants without prejudice to any position, objection or defence such defendants may take or assert with respect to the fourth Fresh as Amended Statement of Claim.

3 The plaintiffs settled this action with Deutsche Lufthansa AG, Lufthansa Cargo AG and Swiss International Airlines Ltd. (collectively referred to as "Lufthansa") pursuant to an agreement entered into on December 30, 2006, (the "Lufthansa settlement agreement"). The settlement was approved by the Court on February 19, 2009.

4 After the settlement with Lufthansa, the plaintiffs settled the action with Japan Airlines International Co., Ltd. ("JAL") pursuant to a settlement agreement dated July 8, 2010 (the "JAL settlement agreement"). The JAL settlement

agreement was approved by Campbell J. who supervised proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 relating to JAL.

5 The plaintiffs entered into a settlement agreement with Scandinavian Airlines System ("SAS") on November 26, 2010 (the "SAS settlement agreement").

6 Thereafter the plaintiffs entered into a settlement agreement with Qantas Airways Limited ("Qantas") on May 6, 2011 (the "Qantas settlement agreement"). As noted above, Qantas was not originally a named defendant in this action and it was added as a defendant to facilitate the settlement,

7 In addition, the plaintiffs entered into a settlement agreement with Cargolux Airline International ("Cargolux") on May 10, 2011 (the "Cargolux settlement agreement").

8 Finally, the plaintiffs entered into a settlement agreement with Singapore Airlines Ltd., Singapore Airlines Cargo PTE Ltd. (collectively referred to as "Singapore") on June 24, 2011 (the "Singapore settlement agreement").

9 All of the settlement agreements are subject to court approval in Ontario, British Columbia and Quebec.

Consent Certification

10 SAS, Qantas, Cargolux and Singapore have consented to certification solely for settlement purposes. It is clear from the case law that the certification requirements under s. 5 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 are not as rigorously applied in a settlement context where certification is consented to for settlement purposes.

11 I am satisfied that the requirements of s. 5 of the *Class Proceedings Act* are met on this motion and this action should be certified for settlement purposes with SAS, Qantas, Cargolux and Singapore.

12 For reasons given for the order for the consent certification relating to the Lufthansa settlement, I find that the plaintiffs have satisfied the Rule 21 test and that the Statement of Claim discloses a cause of action.

13 Again, for the reasons given in relation to the Lufthansa certification order, I find that there is an identifiable class defined as follows:

> All Persons, other than members of the Quebec Settlement Class or the B.C. Settlement Class, who purchased Air Freight Shipping Services during the Settlement Class Period, including those Persons who purchased Air Freight Shipping Services through freight forwarders or from any air cargo carrier, including without limitation, the Defendants, and specifically including the [SAS, Quantas, Cargolux and Singapore Defendants]. Excluded from the Ontario Settlement Class are the Defendants and their respective parents, employees, subsidiaries, affiliates, officers and directors, and Persons who validly and timely opted out of the Ontario Action in accordance with the order of the Ontario Court dated March 6, 2008.
>
> Air Freight Shipping Services means air freight cargo shipping services for shipments within, to, or from Canada, but specifically excluding air freight cargo shipping services for shipments to or from the United States.

14 In respect of the Qantas order, the Settlement Class will exclude persons who fall within the parameters of the Australian Class Action which is ongoing in Australia where Qantas' head office is located and I approve the additional exclusion contained in the form of order presented by counsel.

15 The Settlement Classes for these consent certification orders are substantially the same as the class approved for the Lufthansa and JAL settlements.

16 I find, for the reasons given in relation to the Lufthansa settlement, that the following common issue is identified, which is substantially the same as that approved in respect of the Lufthansa and JAL settlements.

> Did [SAS, Quantas, Cargolux and Singapore] conspire to fix, raise, maintain or stabilize the prices of, Air Freight Shipping Services during the Class Period [or Purchase Period] in violation of Part VI of the *Competition Act* and the common law? If so, what damages, if any did, Settlement Class Members suffer?

17 Finally, for the reasons given in relation to the Lufthansa order, I find that a class proceeding is the preferable procedure; there are adequate representative plaintiffs and the settlement agreements set out a workable method of resolving the proceeding.

18 Accordingly, consent certification orders shall go in the form presented by the plaintiffs in relation to the settlement with each of SAS, Qantas, Cargolux and Singapore.

Notice of the Certification and Settlement Approval Hearing

19 The notice programme implemented in respect of the Lufthansa settlement informed putative Class Members of their rights to opt out of this action and that no further right to opt out would be provided.

20 With respect to the notice relating to the hearing of these motions, an order was made August 2, 2011, respecting the notice of the Certification and Settlement Approval Hearing. The notice contained a date by which Settlement Class Members could object to the proposed settlements. The deadline for such objections was October 3, 2011, and no objections have been received.

Summary of the Settlement with SAS

21 As class counsel advised, the settlements with SAS and Qantas have the same rationale and outcome.

22 Pursuant to the SAS settlement, SAS will pay $300,000 Canadian for the benefit of settlement class members. In assessing this amount, it is significant that SAS did not operate any flights into or out of Canada during the relevant period. SAS's shipments between Canada and other countries were routed through the United States. As outlined in the materials in support of the settlement approval motion, given the small size of SAS's commerce to and from Canada during the relevant period, a primary objective for class counsel in negotiating the settlement with SAS was receiving cooperation in the continued prosecution of the litigation. The terms of that cooperation are outlined more fully in the materials filed on the motion.

23 The amount being paid by SAS reflects a significant portion of the fuel surcharges imposed on Airfreight Shipping Services

Summary of the Settlement with Qantas

24 As noted above, the rationale behind the settlement with Qantas according to plaintiffs' counsel was very similar to that respecting the settlement with SAS. Both Qantas and SAS were very minor participants in the Canadian air cargo market. However, the plaintiffs have claimed damages on a joint and several basis, thus all defendants are exposed for joint and several liability. Qantas has agreed to pay $$237,000 for the benefit of Settlement Class Members, which represents approximately the total fuel surcharges imposed by Qantas on Air Freight Shipping Services during the relevant period.

25 For reasons outlined in the materials filed on the motion respecting the degree of involvement of Qantas in the alleged conspiracy, and the fact that Qantas is discharging the full value of relevant fuel surcharges, while Qantas has agreed to provide cooperation to the plaintiffs in the continued prosecution of the litigation, its obligations are less onerous than those of the other settled and settling defendants.

Summary of the Settlement with Cargolux

26 Class counsel advised that the settlements with Cargolux and Singapore have the same settlement dynamics. However, only Cargolux has pleaded guilty in Canada and settled the U.S. litigation whereas Singapore is defending the U.S. litigation and has not pled guilty. In relation to the Cargolux settlement, class counsel had access to the numbers utilized in relation to the U.S. settlement and had the precedent of the U.S. settlement available to them.

27 Cargolux has agreed to pay $1,800,000 Canadian for the benefit of Settlement Class Members.

28 Cargolux will also provide substantial cooperation to the plaintiffs in the continued prosecution of the litigation.

29 As set out in the affidavit filed on the motion from class counsel's perspective, the Cargolux settlement is intended to roughly equate to the Cargolux settlement in the United States, plus a contribution to notice and administration costs. The Singapore settlement similarly is intended to roughly equate to the Cargolux settlement.

30 As class counsel noted, these are similar settlements at similar stages to the U.S. settlement.

Summary of Settlement with Singapore

31 As class counsel set out, the position of Singapore was different to Cargolux in two material respects. Firstly, in contrast to Cargolux, Singapore has not pled guilty to any offence in Canada and secondly, it has not entered into any settlement of a class proceeding in the United States.

32 Pursuant to the plaintiffs' settlement with Singapore, Singapore has agreed to pay $1,050,000 Canadian of which up to $250,000 Canadian is allocated towards Singapore's proportionate share of administration and notice costs without refund should such costs be less. It is now known that the costs were significantly less - $46,638.34 - with the result that the additional amount is added to the settlement amount to be distributed to Settlement Class Members.

33 Class counsel had access to the fuel and security surcharges during the relevant period and class counsel were satisfied that the Singapore settlement roughly reflects the relative terms of the Cargolux settlement in the United States with appropriate accommodation for Singapore's particular circumstances in Canada. In particular, that Singapore was a smaller defendant in this matter and had a smaller volume of commerce relative to Cargolux in Canada during the class period.

34 Singapore also will provide cooperation to the plaintiffs in the continued prosecution of the litigation but such cooperation will be delayed until after the delivery of the relevant documents or information in the U.S. litigation.

Assessment of the Settlements with SAS, Qantas, Cargolux and Singapore

(i) The Relevant Case Law

35 As outlined in the reasons respecting approval of the Lufthansa settlement, in *Dabbs v. Sun Life Assurance of Canada*, [1998] O.J. No. 1598 (Gen. Div.) [*Dabbs*], Sharpe J. provided a procedural framework for hearing a motion for approval of a settlement in a class proceeding. While Sharpe J. indicated that his ruling was intended to provide guidance to the parties and objectors in that case, the factors he outlined and his statement of the overall test for approval (that in all the circumstances the settlement is fair, reasonable and in the best interests of those affected by it) have been endorsed by many other courts on settlement approval motions (see *Parsons v. Canadian Red Cross* Society (1999), 40 C.P.C. (4th) 151 [*Parsons*]; *Nunes v. Air Transat A.T. Inc.* (2005), 20 C.P.C. (6th) 93 (S.C.J.) [*Nunes*]; *Ford v. F. Hoffman - La Roche Ltd.* (2005), 74 O.R. (3d) 758 [*Ford*]).

36 At para. 13 of *Dabbs,* Sharpe J. endorsed the following criteria listed in *Newberg on Class Actions,* 3rd ed. (Shepherd's/McGraw Hill, 1992) at para. 11.43:

1. Likelihood of recovery, or likelihood of success
2. Amount and nature of discovery evidence
3. Settlement terms and conditions
4. Recommendation, and experience of counsel
5. Future expense and likely duration of litigation
6. Recommendation of neutral parties, if any
7. Number of objectors and nature of objections
8. The presence of good faith and the absence of collusion

37 In *Parsons,* Winkler J. (as he then was) at para. 72, sets out two additional factors which may be considered in the settlement approval process:

i) The degree and nature of communications by counsel and the representative plaintiff with class members during the litigation; and
ii) Information conveying to the court the dynamics of, and the positions taken by the parties during the negotiation.

38 In *Nunes,* Cullity J. provided a very helpful summary of the principles to be applied on a motion for settlement approval. As he noted, the party seeking approval has the burden of satisfying the court that the settlement should be approved. The court must be satisfied that the proposed settlement is fair, reasonable and in the best interests of the class. The court does not simply rubber-stamp a proposal, but it is not the court's function to substitute its judgment for that of the parties or to attempt to renegotiate a proposed settlement. As Cullity J. described it at para. 7, in order to reject a proposed settlement "and require the litigation to continue, a court must conclude that the settlement does not fall within a zone of reasonableness." As he continued, courts encourage "resolution of complex litigation through the compromise of claims" and such an approach is also "favoured by public policy." It is fair to say, as he noted, that a pro-

posed settlement "negotiated at arm's-length by class counsel" has "a strong initial presumption of fairness." Finally, while he noted that the settlement must provide "appropriate consideration" to the class for the release of its rights in the litigation, it must be recognized "that there may be a number of possible outcomes within a zone or range of reasonableness; all settlements are the product of compromise" and in a settlement parties rarely receive "exactly what they want." Therefore, "fairness is not a standard of perfection" and "reasonableness allows for a range of possible resolutions." As he noted "a less than perfect settlement may be in the best interests of those affected ... when compared to the alternative of the risks and costs obligation."

39 It is appropriate to consider non-monetary benefits in the assessment of the reasonableness of a settlement agreement (*Irving Paper Limited et al v. Atofina Chemicals Inc. et al* (October 15, 2008), London 47025 (Ont. S.C.), at para. 26; *Crosslink Technology, Inc. v. BASF Canada et al* (November 30, 2007), London, 50305CP (Ont. S.C.) at para. 22 (citing *Rideout v. Health Labrador Corp.*, [2007] N.J. No. 292 (S.C.T.D.); and *Ford*).

40 The non-monetary benefit from a settlement was also acknowledged in *In re Linerboard Antitrust litigation,* 292 F. Supp. 2d 631 (E.D. Pa. 2003), and *In re Corrugated Container Antitrust Litigation,* 1981 WL 2093 (S.D. Tex.) [*Corrugated Container*]

41 Since February 2009, when the Lufthansa settlement was considered, the above-noted factors have been consistently applied in considering approvals of settlements (see for example, *Osmun v. Cadbury, Adams, Canada Inc.*, [2010] O.J. No. 1877(S.C) at para. 33).

42 I am satisfied that the settlements with SAS, Qantas, Cargolux and Singapore are fair, reasonable and in the best interests of the Settlement Class for the following reasons.

43 As noted in the context of the Lufthansa settlement, the recommendations from experienced class counsel are given considerable weight. Class counsel recommends approval of these proposed settlements as being fair, reasonable and in the best interests of the Settlement Class noting that they will result in significant monetary compensation for Settlement Class Members as well as providing the non-monetary benefit of substantial cooperation in the continued litigation.

44 The procedural and litigation risks in relation to this action, as outlined in Ms. DeKay's affidavits filed in support of these motions, were considered by class counsel in recommending approval of the proposed settlements.

45 No formal discovery has yet taken place, however, class counsel have advised that they have had significant information available to them to evaluate the merits of these settlements including the terms of previous settlements in Canada and the United States; the financial circumstances of each of the settling defendants; the amount of the revenues and fuel surcharges obtained by the settling defendants during the relevant period; the sales information provided during negotiations; industry information and reports and information provided by Lufthansa pursuant to the Lufthansa settlement agreement, and, the guilty pleas and findings in Canada, the United States, Europe and elsewhere.

46 As with the Lufthansa settlement, these settlements resulted from extensive arms length negotiations and again to repeat the words used by Cullity J. in *Nunes* as I referred to in relation to the Lufthansa settlement, the proposed settlements have "a strong initial presumption of fairness".

47 Further, there are no objections which speak to the reasonableness of the settlements.

48 Again, as I did in relation to the Lufthansa settlement, I accept the submission of class counsel that the distribution of the settlement amounts will be very expensive and it is in the best interests of the class to wait for a distribution plan to be approved as the litigation progresses. It is anticipated, that a distribution will be made in the near future.

49 The deposit of the settlement funds with an escrow agent for the benefit of the class pending approval of the settlements and now pending distribution to the class will add value to the settlements considering the interest that will accrue on those funds.

(ii) The Bar Order

50 As was the case in relation to the Lufthansa settlement, the settlements with SAS, Qantas, Cargolux and Singapore contain a bar order which, if granted, will bar all claims for contribution and indemnity against each of SAS, Qantas, Cargolux and Singapore (excluding claims made by persons who have opted out of the settlement).

51 The plaintiffs, Lufthansa and the non-settling defendants, agreed on the terms of the bar order contained in the Lufthansa settlement approval order.

52 The non-settling defendants who have the right to make submissions to the court concerning a proposed bar order, took no issue with the provisions of the bar order itself which paralleled the bar order in the Lufthansa settlement. However, there was a contentious issue with respect to paragraph 21 of the proposed form of order in relation to the SAS, Cargolux and Singapore settlement approval orders and paragraph 20 of the Qantas settlement approval order.

53 The Lufthansa order provided the non-settling defendants with the absolute right to documentary and oral discovery and to serve a request to admit against Lufthansa. These proposed forms of settlement orders do not provide the non-settling defendants with a *de facto* entitlement to such relief but require them to bring a motion in advance.

54 The non-settling defendants objected to the form of bar order sought by SAS, Qantas, Cargolux and Singapore.

55 The Lufthansa order provided the non-settling defendants with the right to seek documentary and oral discovery and to serve a request to admit without the necessity of a motion before the court and a motion was only required to seek an order requiring a Lufthansa representative to testify at trial and be subject to cross-examination by the non-settling party. In the contentious paragraphs in the SAS, Cargolux, Singapore and Qantas settlement approval orders, the non-settling defendants' right to pursue documentary and oral discovery and to serve a request to admit requires a motion to the court to be brought on at least ten days' notice which is to be determined as if SAS, Cargolux and Singapore are parties to the action. The contentious paragraph in the Qantas settlement approval order contains the same requirement for a motion, however, such motion is to be on 30 days' notice and there is no inclusion of the phrase "determined as if Qantas were a party to the action".

56 The subsequent paragraphs in the SAS, Qantas, Cargolux and Singapore settlement approval orders provide that the settling defendant retains all rights to oppose the motions by the non-settling defendants and, on any motion brought, the court may make such orders as to costs and other terms as it considers appropriate. The orders also provide that a non-settling defendant may affect service of the motions on the settling defendant by service on counsel of record in the action.

57 I agree with counsel for the settling defendants that it is significant that the Lufthansa bar order was made before the most recent amendments to the rules which incorporate the concept of proportionality into all exercises of discretion and interpretation of the rules.

58 As counsel submits, the proposed form of order is reasonable, appropriate and reflects a proportionate balancing of the interest of the settling defendants and the discovery interests of non-settling defendants. The requirement of the non-settling defendant to bring a motion on ten days' notice provides the settling defendants with a mechanism to ensure that any discovery requests are proportionate and consistent with the terms of the settlement agreement.

59 Counsel for the settling defendants also point out that the proposed form of wording in their orders is identical to the wording approved in the *Osman* decision, which I am advised is the most recent decision in respect of bar orders. They also note that similar forms of orders were approved in *Gariepy v. Shell Oil Company et al* (2002), 26 C.P.C. (5th) 358 (S.C.) and *Crosslink, supra.*

60 Indeed, as pointed out by counsel for the settling defendants, in *Ontario New Home Warranty Program v. Chevron Chemical Co.*, [1999] O.J. No. 2245 (S.C.) in what I agree is the seminal case in Ontario regarding the balancing of interests between settling and non-settling defendants through the use of bar orders, Justice Winkler, (as he then was) outlined information that non-settling defendants might be able to obtain on motion to the court. Clearly, in my view, he contemplated that such information would be available by motion and subject to the court's supervision. The fact that it was otherwise agreed to in respect of a Lufthansa settlement does not detract from the fact that the consistent view of the court where this issue has been considered is that the non-settling defendants have no *de facto* rights but must satisfy the court on motion that the discovery they seek is reasonable and appropriate.

61 Furthermore, as counsel for the non-settling defendants noted, by virtue of the terms of the bar order there is no longer any cause of action between the settling defendants and the non-settling defendants thereby diminishing any potential need to obtain documentary or oral discovery from the settling defendants. In addition, because of the obligations of each settling defendant to cooperate with the plaintiffs pursuant to the terms of the settlement agreement, any documents or information obtained by the plaintiffs will be discoverable by the non-settling defendants with the result that limited, if any, discovery of the settling defendants will be necessary by the non-settling defendants.

62 Accordingly, I agree with counsel for the settling defendants that the proposed form of order balances the rights of the non-settling defendants and the settling defendants. It preserves the non-settling defendants' rights to seek an order for documents or discovery from the settling defendants, if necessary, while ensuring that the settling defendants are not disproportionately exposed to undue burden and expense in respect of discovery related matters in an action which they have settled to avoid further expense of litigation and to achieve a final resolution of the claims asserted against them.

63 There are unique issues raised relating to Qantas. Qantas was not a party to the proceeding and, as a result, Qantas submits that the non-settling defendants are not losing any procedural entitlement as against Qantas that was otherwise in place. It is important that Qantas did not oppose being added as a party to the action for the purposes of facilitating court approval of the settlement agreement but it expressly reserved its right to assert any defence or challenges that it might have in respect of the actions. It is specifically stated in the Qantas settlement agreement that in addition to making no admissions of liability, it entered into the settlement agreement to avoid the further expense, inconvenience and burden of these actions and agreed to pay approximately all of the total fuel surcharges it imposed on Air Freight Shipping Services during the class period in order to achieve full and final resolutions with the plaintiffs and "put to rest this controversy."

64 I agree with counsel for Qantas that these facts set the Qantas settlement apart and distinguish it from the other settlements being considered on this motion and other cases in which bar orders have been considered and approved. I agree with Qantas that it is not fair and reasonable to allow the non-settling defendants to assert any type of discovery rights against Qantas pursuant to the settlement approval order as if Qantas remained a party to the action.

65 Accordingly, I approve the proposed form of order respecting the Qantas settlement as presented by counsel.

L.C. LEITCH J.

cp/e/qlafr/qlvxw

TAB 3

Ontario New Home Warranty Program et al. v. Chevron Chemical Company et al.* [Indexed as: Ontario New Home Warranty Program v. Chevron Chemical Co.]

46 O.R. (3d) 130

[1999] O.J. No. 2245

Court File No. 22487/96

Ontario Superior Court of Justice

Winkler J.

June 17, 1999
*This judgment was recently brought to the attention of the editors.

Civil procedure -- Class actions -- Approval of settlement -- Proposed settlement containing "bar order" -- Bar order precluding claims for contribution and indemnity between settling defendants and non-settling defendants -- Court having jurisdiction to approve settlement with bar order -- Settlement fair and reasonable and in interests of class members -- Settlement approved subject to terms that addressed procedural objections of non-settling defendants -- Negligence Act, R.S.O. 1990, c. N.1, ss. 1, 3, 5 -- Class Proceedings Act, 1992, S.O. 1992, c. 6, ss. 5, 12, 13.

The Ontario New Home Warranty Program ("ONHWP") and two individuals commenced a proposed class proceeding under the Class Proceedings Act, 1992 to advance a product liability claim on behalf of a class of some 11,000 Ontario homeowners who had installed mid-efficiency furnaces with allegedly defective plastic venting pipes. As a consequence of a safety order issued by the Ministry of Consumer and Commercial Relations, the owners of the furnaces had been required to replace the defective piping. ONHWP's claim was a subrogated claim in place of homeowners whom it paid to replace the defective piping.

In early 1996, and thereafter, there were settlement discussions in the action and settlements were reached between the plaintiffs and some of the defendants, the "settling defendants". The plaintiff intended to discontinue the action against certain defendants but to continue the litigation against seven defendants, the "non-settling defendants". The plaintiffs moved for certification against the settling defendants and for approval of the settlement in accordance with s. 29(2) of the Act. The proposed settlement provided for compensation of $800 per unit, and the plaintiffs and the settling defendants agreed that the proportionate liability of the settling defendants was to be fixed at 65 per cent of $800 plus amounts for party and party costs, disbursements, interest, and claims administration. The settlement provided for a simple claims approval process. The settlement also contained a provision described as a "bar order" that would prevent non-settling defendants from making claims for contribution or indemnity. Under the bar order, the plaintiffs agreed to make only several claims against the non-settling defendants such that the plaintiffs shall be limited to the degree of liability proven against the non-settling defendants at trial, but in no event shall such liability be greater than 35 per cent of the total damages proven at trial as against each non-settling defendant.

The bar order precluded claims over in respect of the subject-matter of the class action by or against non-settling defendants or settling defendants.

The settling defendants supported the plaintiffs' motion as long as the judgment approved the entire settlement agreement. The non-settling defendants opposed only the bar order provision of the settlements. The non-settling defendants submitted that the bar order would prejudice them substantively by derogating from their rights under the Negligence Act and procedurally by depriving them of their ability to bear only their fair share of any liability to the plaintiffs. Specifically, they asserted that they would be precluded from conducting effective discovery and denied evidence necessary to establish the respective degrees of fault as between themselves and the settling defendants.

Held, the motion should be granted subject to terms.

The proceeding against the settling defendants met the requirements for certification as set out by s. 5 of the Class Proceedings Act. Subject to the legitimate concerns of the non-settling defendants, the settlement agreement taken as a whole was fair and reasonable and in the interests of the class members, and it brought a significant degree of resolution to a protracted proceeding. The concerns of the non-settling defendants could be addressed without rejecting the settlement.

Section 13 of the Class Proceedings Act, 1992, which provides that a court may stay any proceeding related to the class proceeding, provides a mechanism through which the objectives of a "bar order" could be achieved. This broad discretion was supported by s. 12 of the Act, which permits the court to make such orders as are necessary to ensure the fair and expeditious determination of the class proceeding. The court, however, did not have any jurisdiction under the Act to derogate from the substantive rights of the parties, but in the immediate case, there was no derogation of substantive rights nor substantive prejudice. When the bar order was considered in total, it was apparent that did not affect any claim of the non-settling defendants that could be successfully asserted against the settling defendants under the Negligence Act or otherwise. Under the settlement agreement, there would be no claim against the non-settling defendants for contribution and indemnity and since they would be required to pay damages in accordance with their own negligence and liability to the plaintiff, if any, they would have no claim for contribution and indemnity against the settling defendants or against third parties. Because of s. 3 of the Negligence Act, under which the court shall apportion liability, the non-settling defendants could not successfully assert a claim in damages against any party based upon their own negligence, no matter how the claim was characterized.

As to the non-settling defendants' objections based on procedural prejudice, these objections could be addressed without rejecting the settlement agreement because the court had the necessary power under the Act to adapt procedures to ensure that the interests of all parties can be adequately protected in situations where those interests conflict. The procedural concerns could be adequately addressed through the terms of approval for the settlement. Accordingly, judgment should be granted approving the settlement but subject to terms upon which the non-settling defendants could obtain documentary discovery, oral discovery, requests to admit and an undertaking to produce a representative to testify at trial.

Cases referred to

British Columbia Ferry Corp. v. T & N plc (1995), 16 B.C.L.R. (3d) 115, [1996] 4 W.W.R. 161, 27 C.C.L.T. (2d) 287 (C.A.); Canada v. Curragh, [1994] O.J. No. 1452 (Gen. Div.); Carom v. Bre-X Minerals Ltd. (1999), 43 O.R. (3d) 441, 30 C.P.C. (4th) 133, [1999] O.J. No. 281 (Gen. Div.); Chace v. Crane Canada Inc. (1997), 44 B.C.L.R. (3d) 264, 14 C.P.C. (4th) 197 (C.A.); Dabbs v. Sun Life Assurance Co. (No. 1), [1998] O.J. No. 1598 (Gen. Div.); Dabbs v. Sun Life Assurance Co. (No. 2) (1998), 40 O.R. (3d) 429, 22 C.P.C. (4th) 381, [1998] I.L.R. 1-3575 (Gen. Div.); Sparling v. Southam Inc. (1988), 66 O.R. (2d) 225, 41 B.L.R. 22 (H.C.J.)

Statutes referred to

Class Proceedings Act, 1992, S.O. 1992, c. 6, ss. 5, 12, 13, 29(2)
Negligence Act, R.S.O. 1990, c. N.1, ss. 1, 5

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Authorities referred to

Cheifetz, Apportionment of Fault in Tort (Aurora: Canada Law Book, 1981), p. 18
Newberg on Class Actions, 3rd ed. (Shepard's/McGraw Hill, 1992), ss. 11.45-46
Report of the Attorney General's Advisory Committee on Class Action Reform, p. 37

MOTION for certification and for approval of a settlement under the Class Proceedings Act, 1992, S.O. 1992, c. 6.

C. Scott Ritchie, Q.C., and Michael Eizenga, for plaintiffs.
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Robert B. Bell and Peter D. Ruby, for Hart & Cooley Inc.
Lawrence E. Thacker, for Selkirk Metalbestos.
Markus Koehnen and Kathryn Manning, for Underwriters' Laboratories of Canada.
Paul J. Martin, for Underwriters Laboratories Inc.
Marilyn Field-Marsham, Randy A. Pepper and Stephen Lamont, for Armstrong Air Conditioning Inc., Evcon Supply Inc., Inter-City Products Corporation (Canada), Inter-City Products Corporation (U.S.), RHEEM Manufacturing, York International Ltd. and Lennox Industries.
John E. Callaghan, for Consolidated Industries, Welbilt Industries and Nordyne Inc.
F. Paul Morrison and Frank J. McLaughlin, for General Electric Company.
J.A. Prestage, for Carrier Canada.
C. Stephen White and Ellen J. Bessner, for Goodman Manufacturing and Quietflex Manufacturing Company, L.P.
James G. Norton, for Wabco Trane Standard Inc.
John C. Cotter, for American Water Heater Group.
Dominic T. Clarke, for The Canadian Gas Association, Canadian Gas Research Institute, International Approval Services Canada Inc.
Jean C.H. Iu, for Her Majesty the Queen in Right of Ontario.
Cynthia R. Sefton and Murdoch R. Martin, for Consumers Gas Utilities Ltd.
Glenn F. Leslie, for Union Gas Ltd. and Centra Gas Ontario Inc.
No one appearing for CMIL Industries Inc., Superior Propane, Slant/Fin Ltd./Ltée and Weil-McLean division of Marley Canadian Inc.

WINKLER J.: --

The Nature of the Motion

[1] This is a motion to approve the settlement of this action between the plaintiffs and Chevron Chemical Company, Hart & Cooley, Inc., Eljer Manufacturing Inc. c.o.b. as Selkirk Metalbestos, General Electric Company, Her Majesty the Queen in Right of Ontario, Goodman Manufacturing Co. Ltd., CMIL Industries Inc. c.o.b. as DMO Industries, Nordyne Inc., Wabco Standard Trane Inc., Carrier Canada Limited, Slant/Fin Ltd/ Ltée, Weil-McLean division of Marley Canadian Inc. and Underwriter's Laboratories Inc. (the "settling defendants").

[2] The plaintiffs also seek class certification pursuant to s. 5 of the Class Proceedings Act, 1992, S.O. 1992, c. 6 with respect to the settling defendants.

[3] The plaintiffs seek to discontinue the action against certain other defendants, namely Consumers Gas Utilities Inc., Union Gas Limited, Centra Gas Ontario Inc., Superior Propane Inc., the Canadian Gas Association, the Canadian Gas Research Institute and International Approval Services Canada Inc. This motion was adjourned at the hearing pending the disposition of the motions for certification and settlement approval.

[4] The plaintiffs propose to bring a subsequent motion for certification for litigation purposes with respect to the non-settling defendants which consists of a group of furnace manufacturers represented by one law firm and Underwriters' Laboratories of Canada ("ULC").

The Nature of the Claim

[5] This is a product liability claim concerning residential mid-efficiency gas or propane furnaces, boilers and hot water heaters with high temperature plastic vent ("HTPV") exhaust systems. The claim alleges negligent design, manufacture, negligent misrepresentation, breaches of warranty and misrepresentation, negligent approval, breach of fiduciary duty, and failure to warn.

[6] The action is a proposed class proceeding brought by the Ontario New Home Warranty Program ("ONHWP") and two individuals, as representative plaintiffs. The plaintiff class consists of some 11,000 Ontario homeowners who installed mid-efficiency furnaces with the allegedly defective plastic venting pipes.

[7] ONHWP makes a subrogated claim in place of many new homeowners whom it paid to repair or replace appliances and HTPV piping. The two individual representative plaintiffs were homeowners with heating systems using HTPV. The settling defendants include Chevron, Hart and GEC, three companies against which allegations have been made relating to HTPV. The non-settling defendants are primarily furnace manufacturers, namely, Armstrong Air Conditioning Inc., Evcon Supply Inc., Evcon Industry Inc., Inter-city Products Corporation (U.S.), Lennox Industries (Canada) Ltd., RHEEM Manufacturing Company and York International Ltd. In addition, the defendant Underwriters Laboratory is included in the non-settling group.

Background

[8] Prior to the 1980s, gas- or propane-heating appliances used chimneys or vertical metal vents to carry exhaust gases out of homes and other buildings. In the early 1980s, mid- and high-efficiency appliances were introduced into the marketplace. These appliances could be vented horizontally through the side walls of buildings. The exhaust gas of a mid-efficiency furnace is vented at a high temperature. With the horizontal vent pipes, there was a possibility that the exhaust gas would cool during the venting process, and that the by-products in the gas would form acidic condensates in the horizontal vent pipes. These acidic condensates were known to be corrosive to metal vent pipes.

[9] In response to this problem of corrosion, high temperature plastic venting ("HTPV") was developed. As a result of the low cost and the corrosion resistance of HTPV, heating systems combining HTPV and mid-efficiency appliances came into wide-spread use.

[10] The plaintiffs allege that mid-efficiency gas or propane appliances, vented with HTPV, result in a defective product (the "heating system"). As a result of residual stresses incurred during manufacture, thermal expansion and contraction of the pipe, and a build-up of acidic condensate during in-service use, HTPV pipes in the heating system were prone to cracking or separating at the joints. This had the potential to release poisonous carbon monoxide gas into the building. Neither the appliances nor the venting pipes were designed with any type of safety device which would prevent defective operation.

[11] Prior to being marketed, these heating systems were submitted to the relevant regulatory bodies for product approval. The National Standards System, a Federation of independent organizations working towards the development of voluntary standardization in Canada is coordinated by the Standards Council of Canada ("SCC"). The SCC delegates the function of setting standards and approving testing procedures to various standards organizations which appoint key people from the relevant industry to develop standards in relation to particular products.

[12] Once a standard has been agreed upon by SCC delegated members, a final draft of the standard is published. This standard must be accepted by the Ministry of Consumer and Commercial Relations ("MCCR") in the Province of Ontario before a product can be marketed. After the standard is accepted by the MCCR, manufacturers submit their product to testing and certification agencies to test the product against the standard accepted by the MCCR, in order to certify that the product meets the relevant standard.

[13] In addition to the requirement for the certification of heating systems, each appliance manufacturer must approve and specify one or more vent products to be installed in combination with its appliances. No vent product other than those which are approved and specified by the appliance manufacturer is permitted to be installed in combination with the appliance.

[14] All of the HTPV products which are the subject of this proceeding went through the process set out above. However, in response to a series of complaints concerning defective heating systems, the MCCR compiled inspection reports and found a high failure rate in the HTPV. As a result, in March 1994 the MCCR issued a consumer alert warning about the possibility that vent pipes found in the heating systems might crack or separate at the joints allowing poisonous gases to escape into homes.

[15] On September 12, 1995, the Ontario Government, through the Ministry of Consumer and Commercial Relations, issued a Director's safety order in respect of heating systems with HTPV. The Director's safety order stated that certain brands of plastic heating vents had been found to be defective and required all homeowners whose furnaces incorporated those vents to replace them by August 31, 1996. Pursuant to the order, natural gas utilities and propane distributors were prohibited from supplying gas after August 31, 1996 to any building in which the vents had not been replaced. The Director's safety order states in relevant part:

> Director's Safety Order
>
> Heating Systems with High-Temperature Plastic Vents
>
> Mounting engineering and technical evidence in Ontario and elsewhere confirms that heating systems using high-temperature plastic vents are defective, that permanent failure of the vents will take place and that the risk of failure increases with length of service. Specific heating systems using plastic vents bearing the name Plexvent, Sel-vent and Ultravent are affected. Over the past two years, four bulletins and a number of consumer advisories have been issued in Ontario as this evidence has been accumulating.
>
> To eliminate the risk associated with these systems, owners are required to correct them with a fully approved heating system prior to August 31, 1996. The options for correction consist of: (a) an existing appliance with an approved alternate vent, if available, or (b) a replacement heating system consisting of vent and appliance. Temporary repairs made using improved plastic materials are not acceptable corrections after August 31, 1996.
>
> After August 31, 1996, natural gas utilities and propane distributors will no longer be permitted to supply gas to these defective systems in Ontario.

[16] In consequence, all owners of such furnaces were required to replace the vents by the Director's deadline.

[17] In response to the Director's safety order relating to the defective heating systems, the ONHWP was required to establish a program to identify, administer and repair those heating systems covered by the ONHWP warranty program.

[18] Where there was an approved alternative vent product available, the predominant corrective measure involved the replacement of the HTPV with B-Vent and a side-wall power venter, although owners were given a choice of receiving a credit towards the installation of a high efficiency heating system as an alternative. In situations where there was no approved alternative venting product, ONHWP replaced the defective heating system with a high-efficiency heating system.

[19] Not all of the homeowners with defective heating systems had the benefit of ONHWP coverage. Nevertheless, these homeowners were also required to comply with the Director's safety order. In order to comply with the Director's safety order, repairs similar to those described above were effected by the non-covered homeowners at their own cost.

Settlement Discussions

[20] In early 1996, and continuing thereafter, settlement discussions have taken place in this action. To facilitate this process and to bring it to a conclusion, a mediation was conducted in July 1998 before a prominent American mediator, Mr. Kenneth Feinberg, who is experienced in resolving complex litigation proceedings. All defendants were invited to participate in this process but the non-settling defendants, other than Underwriters Laboratory, chose not to attend or make submissions.

[21] The mediation before Mr. Feinberg resulted in a settlement with the defendants GEC, Hart and Chevron. Subsequent to the execution of the settlement agreement by these defendants, the plaintiffs have settled their claims with the following additional defendants:

-- Eljer Manufacturing Inc., c.o.b. as Selkirk Metalbestos;

-- Her Majesty the Queen in Right of Ontario, represented by the Ministry of Consumer and Commercial Relations;

-- Nordyne Inc.;

-- Weil McLean division of Marley Canadian Inc.;

-- Wabco Standard Trane Inc.;

-- Slant/Fin Ltd./LtÚe;

-- American Water Heater;

-- Underwriter's Laboratories Inc.

[22] In addition to these settlements, the plaintiffs have reached an agreement with the defendant DMO Industries, within the context of the receivership affecting that corporation, for a $50,000 payment.

[23] The plaintiffs have also reached agreements with the defendants Goodman and Carrier, who have each conducted voluntary self-administered repair programs.

[24] The plaintiffs propose to discontinue the action against the following defendants:

(a) Canadian Gas Association;
(b) Canadian Gas Research Institute;
(c) International Approval Services Canada Inc.
(d) Consumers Gas Utilities Ltd.;
(e) Union Gas Ltd.;
(f) Centra Gas Ontario Inc.;
(g) Superior Propane Inc.; and
(h) Superior Propane Inc./Superieur Propane Inc.

[25] The plaintiffs intend to continue with the litigation against the following defendants:

(a) Underwriter's Laboratories of Canada
(b) Armstrong Air Conditioning
(c) Evcon Supply Inc./Evcon Industry Inc.
(d) Lennox Industries
(e) RHEEM Manufacturing
(f) Inter-City Corp.(Canada)/Inter-City Corp. (U.S.)
(g) York International Ltd.

The Settlement

[26] The plaintiffs now seek certification against the settling defendants, concurrently therewith approval of the settlement in accordance with s. 29(2) of the Class Proceedings Act, and judgment in accordance with the provisions of the settlement agreement achieved through the mediation process. The settlement provides compensation both to ONHWP and to those individual claimants who were not covered by ONHWP and were thus forced to replace the defective heating systems at their own cost.

[27] The compensatory amounts provided through the settlement are based upon ONHWP's costs to repair the defective systems. ONHWP's total repair costs averaged $1,160 per unit, plus internal administrative costs of $170 per unit.

The mediated settlement figure is $800 per unit, exclusive of administration costs. This settlement figure takes into consideration litigation risk, the delays associated with this complex multi-party litigation, and the settling defendants' assertion that the replacement costs were unreasonably high.

[28] From the mediated amount of $800 per unit, the settling defendants and the plaintiffs agreed that the settling defendants proportionate liability was to be fixed at 65 per cent. Consequently, ONHWP's claim as against the settling defendants was settled on the basis of a lump sum payment for all such claims on the 65 per cent proportionate share of the $800, plus amounts for party and party costs, disbursements, interest, and claims administration. The total ONHWP settlement figure amounts to $5,230,000.

[29] The non-ONHWP claims were also settled on this basis, that is, 65 per cent of the mediated $800 repair cost figure.

[30] In addition, the settling defendants will be responsible for payment of the costs of administering the claims approval process for non-ONHWP claims. The proposed claims administrator is Business Response Inc., a company located in St. Louis, Missouri ("BRI"). BRI is also the claims administrator in a similar action in the United States and is experienced in administering this type of settlement.

[31] Non-ONHWP claimants will be able to take advantage of a simple claims approval process in which they will be compensated upon producing a proof of repair. This process will reduce legal and administrative costs and will allow claims to be processed quickly without the need for individual claimants to engage a lawyer. The period for claims submission will be five months from the mailing of the notice of certification and settlement approval.

[32] A non-ONHWP class member may be excluded from the agreement by completing an opt-out form which may be obtained from the claims administrator. The opt-out deadline will be 60 days from the mailing of the notice of certification and settlement approval.

[33] By virtue of this settlement, class members will be eligible to receive payments within a few months of the notice of certification and settlement approval. Absent this agreement, in the face of complex multiparty proceedings, it could be a matter of years before any benefits are received by the class.

[34] The settling defendants support the plaintiff's motion for approval of the settlement, as long as the judgment approves the entire settlement agreement, especially those provisions which would prevent the non-settling defendants from making any further claims for contribution and indemnity against the settling defendants in respect of any damages award to the plaintiffs at trial.

[35] These clauses are the only aspects of the settlement agreement that are subject to opposition by the non-settling defendants in this proceeding. Under the contested provisions, the court would be issuing an order preventing the non-settling defendants from making any further claims against the settling defendants in relation to any damages suffered by the plaintiffs.

[36] The contentious provisions are contained in cl. 13 of the settlement agreement. They state, in pertinent part:

> . . . all claims for contribution, indemnity, subrogation or other claims over shall be barred in accordance with the following terms:
>
> . . . . .
>
> d) The plaintiffs shall not make joint and several claims against the Non-Settling Defendants or Joining Defendants but shall restrict their claims to several claims against the Non-Settling Defendants such that the plaintiffs shall be limited to the degree of liability proven against the Non-Settling Defendants at trial, but in no event shall such liability of the Non-Settling Defendants be greater than 35% of the total damages proven at trial as against each Non-Settling Defendant.
>
> e) All claims for contribution, indemnity, subrogation or other claims over, whether asserted or unasserted or asserted in a representative capacity, inclusive of interest, GST and costs, for or in respect of the subject matter of the Class Actions by or against any Non-Settling Defendants or any other person or party are barred by or against the Settling Defendants and Joining Defendants. CLARITY NOTE: The bar order deals only with claims over and is not intended to bar bona fide independent and direct claims and causes of action between settling and non-settling defendants for damages other than those claimed by the Representative Plaintiffs and the Plaintiff Class.

f) Except as otherwise provided herein, nothing in this Judgment shall prejudice or in any way interfere with the rights of the Settlement Class Members to pursue all of their other rights and remedies against persons and/or entities other than Settling Defendants and Joining Defendants.

g) Nothing in this Judgment affects any rights that the Non-Settling Defendants may have to move for leave for discovery and production of documents respecting the Settling Defendants and Joining Defendants pursuant to the Rules of Civil Procedure and, in particular, Rules 31.10 and 30.10.

[37] The plaintiffs and settling defendants contend that the settlement, taken as a whole, is fair and reasonable. They assert that the contested provisions contain adequate safeguards for the non-settling defendants. They point to the fact that the remaining claims of the plaintiffs have been converted from "joint and several" to several claims and that under this "several" approach, the liability of the non-settling defendants will be capped at 35 per cent of the total damages proven at trial. Indeed, the plaintiffs and the settling defendants state that the non-settling defendants can only benefit from this provision because it limits their maximum exposure to liability in damages to the plaintiffs regardless of the ultimate apportionment of the liability as determined by the trial judge.

[38] The plaintiffs and settling defendants characterize the prohibitive provisions as a "bar order". In support of their submissions urging the court to accept these provisions, they rely on "substantial U.S. Authority". The plaintiffs assert in their factum that "bar orders are a common mechanism used by the courts in the United States to assist in the management of complex litigation, and to encourage settlement and provide certainty to litigants while enabling them to reduce litigation costs."

[39] I am unable to accept these American authorities as being dispositive of the issue here. In many instances, the American cases turn on specific statutes providing for the issuance of "bar orders". Furthermore, even where such orders have been granted on a common law basis in the United States, the influence of the statutory regime cannot be ignored.

[40] I do, however, find that the underlying principles on which "bar orders" are granted in the American cases have some application to these proceedings. Moreover, the Class Proceedings Act provides a specific mechanism through which these objectives can be achieved in class proceedings in Ontario. Under s. 13 a court may "stay any proceeding related to the class proceeding before it, on such terms as it considers appropriate". This broad discretion is buttressed by s. 12 which permits the court, on a motion by a party or class member, to make such orders as are necessary to ensure the fair and expeditious determination of the class proceeding.

[41] By including ss. 12 and 13 in the Act, the legislature has given the court a flexible tool for adapting procedures on a case specific basis. As stated in the Report of the Attorney General's Advisory Committee on Class Action Reform at p. 37:

> [These sections describe] the general power of the Court to control its own process and to develop procedures as needed from case to case.

(Emphasis added)

[42] In view of the fact that it is apparent that a court has the statutory discretion to issue the order asked for, on appropriate terms, I turn to the objections raised by the non-settling defendants. These defendants oppose the order sought on the grounds that the prohibitive provisions would prejudice them, substantively and procedurally, in presenting any defence that they might have. The non-settling defendants do not object to any other terms of the settlement.

[43] The plaintiffs and the settling defendants take the position that the settlement agreement must either be approved in toto or rejected by the court. Sharpe J., relying on Court of Appeal authority, enunciated this approach in Dabbs v. Sun Life Assurance Co. (No. 1), [1998] O.J. No. 1598 (Gen. Div.). He stated at para. 6:

> It has often been observed that the court is asked to approve or reject a settlement and that it is not open to the court to rewrite or modify its terms; Poulin v. Nadon, [1950] O.R. 219 (C.A.) at 222-3.

[44] In respect of the contention of substantive prejudice, the non-settling defendants assert that they have certain rights under ss. 1 and 5 of the Negligence Act, R.S.O. 1990, c. N.1 to pursue claims against the settling defendants for contribution and indemnity. Thus, they state, this court has no jurisdiction to prohibit the Negligence Act claims because to do so would derogate from a substantive right. Derogation of substantive rights, it is argued, is beyond the power bestowed on the court by the provisions of the purely procedural Class Proceedings Act. In addition, they contend that they have independent claims founded in negligence and negligent misrepresentation against the settling de-

fendants and that part of the damages claimed, based upon these causes of action, will include amounts they may be required to pay to the plaintiffs as a result of the trial.

[45] Moreover, the non-settling defendants claim that the prohibiting provisions contained in the settlement agreement are fundamentally unfair at a procedural level because the provisions deprive them of the ability to effectively ensure that they bear only their fair share of any liability to the plaintiffs. Specifically, they assert that they will be precluded from conducting effective discovery and denied evidence at trial necessary to establish the respective degrees of fault as between themselves and the settling defendants. This is especially prejudicial, they contend, in a context where the main issue at trial will be the nature of alleged defects in products manufactured by the settling defendants, rather than by the non-settling defendants.

[46] As a practical necessity, I will deal with the contested provisions of the settlement agreement prior to determining the other issues on this motion. If the provisions must be rejected on the basis of the objections raised by the non-settling defendants, then the other issues will be rendered moot.

Analysis

[47] The non-settling defendants contend that this court lacks jurisdiction to approve the settlement and issue a concomitant order containing the prohibitive provisions because of the substantive prejudice that will enure to them. The prejudice arises in part, they assert, because the contested provisions represent an abrogation of their rights under the ss. 1 and 5 of the Negligence Act.

[48] These sections provide:

> 1. Where damages have been caused or contributed to by the fault or neglect of two or more persons, the court shall determine the degree in which each of such persons is at fault or negligent, and, where two or more persons are found at fault or negligent, they are jointly and severally liable to the person suffering loss or damage for such fault or negligence, but as between themselves, in the absence of any contract express or implied, each is liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent.
>
> . . . . .
>
> 5. Wherever it appears that a person not already a party to an action is or may be wholly or partly responsible for the damages claimed, such person may be added as a party defendant to the action upon such terms as are considered just or may be made a third party to the action in the manner prescribed by the rules of court for adding third parties.

[49] I bear in mind the words of Farley J. in Canada v. Curragh, [1994] O.J. No. 1452 (Gen. Div.), in another context, as a starting point in the analysis of the jurisdictional objection raised by the non-settling defendants. He stated at para. 1:

> . . . jurisdiction cannot be conferred by agreement. Jurisdiction will only be assumed (i.e. undertaken) by this Court when the Court determines that it truly has jurisdiction based upon the legal principles applicable. It will not be taken by this Court merely because it will convenience the parties.

[50] Moreover, this court has noted on multiple occasions that there is no jurisdiction conferred by the Class Proceedings Act to supplement or derogate from the substantive rights of the parties. It is a procedural statute and, as such, neither its inherent objects nor its explicit provisions can be given effect in a manner which affects the substantive rights of either plaintiffs or defendants.

[51] While I have full regard to the preceding caveats, in my view, the non-settling defendants assertion that the Negligence Act affords them substantive rights which will be abrogated by the proposed settlement agreement is untenable. When the prohibitive provisions contained in the agreement are considered in total, it is apparent that they affect no claim of the non-settling defendants that could be successfully asserted against the settling defendants under the Negligence Act or otherwise.

[52] In essence, a claim for contribution and indemnity as between joint tortfeasors is a derivative claim. As stated by David Cheifetz in Apportionment of Fault in Tort (Aurora: Canada Law Book, 1981) at p. 18:

> The basis of the claim for contribution and indemnity is a breach of duty owed by the tortfeasor subject to the claim of the injured person not to the tortfeasor claiming contribution.

[53] Entitlement to the claim only flows from a finding of joint liability between tortfeasors, and a requirement to pay damages, to the plaintiff. In those cases, the trial judge apportions liability as between the defendants, but the plaintiff may obtain satisfaction of the entire judgment from either of them. In the absence of a contractual obligation for indemnification, each of the defendants, on the other hand, has a right to claim contribution and indemnity from the other in accordance with the apportionment of liability found at trial. However, neither defendant may recover from the other any amount attributable to its own negligence. The responsibility for the negligence of each defendant must therefore be borne by that defendant.

[54] Here, the settling defendants have abandoned any claim for contribution and indemnity as against the non-settling defendants. In addition, the plaintiffs have chosen to seek damages only in the amount for which the non-settling defendants are "severally" liable.

[55] In the result, the rights provided to the non-settling defendants under s. 1 of the Negligence Act form part and parcel of the settlement agreement. There will be no claim for contribution and indemnity as against them by the settling defendants. On the other hand, since they will only be required to pay damages in accordance with their own negligece and liability to the plaintiff, if any, they will have no claim for contribution and indemnity against the settling defendants in respect of any such payment.

[56] The right provided under s. 5 of the Negligence Act is of a different nature in that it allows the non-settling defendants to join third parties who are not already party to the action. It is apparent, however, that the intent of this section is to permit a defendant to have the opportunity of limiting its liability to the plaintiff to that for which it is actually responsible. As such, there can be no concern that the rights under s. 5 will be abrogated in this case. The protections it affords have likewise been incorporated into the settlement agreement. The settling defendants have been party to the proceedings and are now attempting to settle their liability and extricate themselves. In so doing, they have accepted a proportion of the liability but, more so, by virtue of their agreement with the plaintiffs, there are clauses which prevent the plaintiffs from obtaining any damages from the non-settling defendants in excess of the non-settling defendants' actual liability to the plaintiffs.

[57] The non-settling defendants have not delivered a statement of defence to the plaintiffs' claim, nor a statement of claim against the settling defendants in these proceedings. In argument on this motion, counsel for the non-settling defendants gave an undertaking that it is their intention to commence an action against the settling defendants alleging causes of action in negligence and negligent misrepresentation as against them.

[58] The non-settling defendants assert that the settling defendants owed them a duty of care which was negligently breached. This negligence, it is stated, is the direct cause of any damages that the non-settling defendants may be required to pay to the plaintiffs. In consequence, the non-settling defendants contend that this negligence gives rise to an independent tort claim, separate and apart from a claim for contribution and indemnity against the settling defendants. It is the position of the plaintiffs and the settling defendants that such a claim would be nothing more than a claim for contribution and indemnity by another name and, therefore, would be prohibited by the clauses in the settlement agreement.

[59] I do not necessarily accept this characterization of the potential claim of the non-settling defendants. In my view, however, the thrust of the submissions of the plaintiffs and the settling defendants with respect to the effect of the provisions of the settlement agreement is correct. The non-settling defendants cannot successfully assert a claim in damages against any party based upon their own negligence, no matter how such a claim is characterized, because of s. 3 of the Negligence Act. It provides:

> 3. In any action for damages that is founded upon the fault or negligence of the defendant if fault or negligence is found on the part of the plaintiff that contributed to the damages, the court shall apportion the damages in proportion to the degree of fault or negligence found against the parties respectively.

In the result, in any claim against the settling defendants, any damages of the non-settling defendants attributable to their own negligence cannot be recovered.

[60] On the other hand, damages which have been incurred by the non-settling defendants independent of any liability to the plaintiffs in a concurrent tort can be pursued and are not foreclosed by the contested provisions of the settlement agreement. The clarity note appended to cl. 13(e) of the agreement speaks to this.

[61] For these reasons, I do not find that there is any substantive prejudice caused to the non-settling defendants by the contested provisions, nor is there any deprivation of any protections conferred upon them by the Negligence Act.

[62] I turn next to the non-settling defendants' contention that the contested provisions will prejudice them on a procedural level. In support of this contention, the non-settling defendants rely on a decision of the British Columbia Court of Appeal in British Columbia Ferry Corp. v. T & N plc, [1996] 4 W.W.R. 161, 16 B.C.L.R. (3d) 115 (C.A.). Although they rely on this case in support of their assertion of procedural prejudice, I observe that the decision supports the above reasons in so far as the allegation of substantive prejudice is concerned.

[63] In the B.C. Ferry case, the plaintiffs had sued a group of asbestos manufacturers. The manufacturers sought to add the installers of the asbestos to the action by way of third party proceedings. The plaintiffs entered into agreements with several of the third parties, in which the plaintiffs agreed that they would not seek to recover from the manufacturers any portion of the damages which a court attributed to the fault of the third parties.

[64] The manufacturers sought contribution and indemnity from the third parties, and in addition, damages for the out of pocket expenses incurred in defending the plaintiffs' claim as well as a declaration as to the degree of fault, if any attributable to each third party. The third parties, in a series of proceedings, moved successfully for dismissal of all of the claims against them.

[65] On appeal the court upheld the dismissal of the claim in contribution and indemnity, on the basis that the agreement between the plaintiffs and the third parties saved the defendants "harmless from any damages caused or contributed to by the fault of the concurrent tortfeasor", thus eliminating any "basis upon which the right to contribution or indemnity . . . could be exercised." In addition, the dismissal of the claim in damages for out of pocket expenses for defending the plaintiffs' claim was upheld. The court found that the trial judge had correctly determined that there was no duty of care existing between the defendants and the third parties such that the claim could be asserted.

[66] However, the appeal in respect of the claim for declaratory relief was allowed because of considerations of fairness to the defendants. Wood J.A. stated at pp. 175-76:

> It would, in my view, be manifestly wrong if a private accord between plaintiff and third party could work to deprive a defendant of the ability to establish an element of proof essential to a just resolution of the action on which all parties had joined issue. But that is precisely what will occur here if the defendants are denied the declaratory relief they seek. . . . In those circumstances, I am of the view that the third party claims for declaratory relief should be allowed to proceed.

[67] In respect of submissions that declaratory relief could not issue because there was no lis between the parties, Wood J.A. stated at p. 175:

> While I am of the view that the general rule against sanctioning actions brought for purely procedural relief will always be an important consideration governing the exercise of the court's discretion to grant declaratory relief, I do not accept the proposition that it must be regarded as a controlling consideration in all cases. There will be instances, albeit rarely, where the declaratory relief should be granted notwithstanding the fact that it is needed only for such purpose.
>
> . . . . One has only to consider the importance to the process of proof of such procedures as the right of discovery, the notice to admit and the ability to call parties as adverse witnesses, to realize that there will be circumstances in which the need to resort to such procedures will meet the expanded definition given to the term "relief" by Lord Justice Bankes in the Guaranty Trust Company of New York case.

[68] The agreement at issue in the B.C. Ferry case was much the same in effect as the provisions of the agreement between the plaintiffs and the settling defendants at issue here. However, the Court of Appeal was able to address the issue of procedural prejudice, without negating the agreement, in such a manner so that the fairness to the defendants was not compromised. Although the decision is not binding on this court, it provides an enlightened guide in the current context.

[69] The procedural objection raised by the non-settling defendants brings to bear the requirement of balancing the interests of the plaintiff class, on the one hand and the defendants, on the other, in a complex class proceeding. The objects of the Class Proceedings Act must be met without prejudice to either the plaintiff class or the defendants.

[70] However, the settlement of complex litigation is encouraged by the courts and favoured by public policy. Indeed, according to Callaghan A.C.J.H.C. in Sparling v. Southam Inc. (1988), 66 O.R. (2d) 225 at pp. 230, 41 B.L.R. 22 (H.C.J.):

> . . . the courts consistently favour the settlement of lawsuits in general. To put it another way, there is an overriding public interest in favour of settlement. This policy promotes the interests of litigants generally by saving them the expense of trial of disputed issues, and it reduces the strain upon an already overburdened provincial court system.

[71] In consideration of the interests which must be balanced, it is my view that the procedural objections raised by the non-settling defendants can be addressed without a wholesale rejection of the proposed settlement agreement.

[72] This court has pointed out in Carom v. Bre-X Minerals Ltd. (1999), 43 O.R. (3d) 441, [1999] O.J. No. 281 (Gen. Div.), in another context, that [at p. 451], "the CPA is a procedural statute replete with provisions guaranteeing order and fairness".

[73] The Class Proceedings Act is meant to provide a mechanism for the redress of mass wrongs which are linked by an element of commonality. This is such a case. The court must remain flexible and exercise its inherent jurisdiction to meet the needs of the parties and to achieve the purpose of the statute.

[74] The settlement before this court meets the underlying objective of the Act. There is no objection to its terms, save for the prohibitive provisions. However, if these provisions are not approved, the entire settlement will fail. This will seriously prejudice the plaintiff class in terms of delay and costs of litigation and further, expose the plaintiffs to the risks of litigation. Conversely, to ignore the procedural concerns advanced by the non-settling defendants would unfairly prejudice those parties.

[75] The Class Proceedings Act is sui generis legislation which envisions the balancing of interests between the parties. Through legislative foresight, the court has been given the necessary power to adapt procedures to ensure that the interests of all parties can be adequately protected in situations where those interests conflict. Here, the benefits of the settlement to the plaintiffs favour the approval of the settlement as presented, including the contentious prohibitive provisions. As I have stated above, these provisions do not occasion any substantive prejudice to the defendants. The procedural concerns may be adequately addressed through the terms on which the settlement is approved.

[76] Accordingly, I am prepared to grant judgment on the basis of the settlement agreement, subject to terms I set out below. The prohibitive provisions will be entered as a "stay of proceedings", as against the settling defendants under s. 13 of the Act, subject to compliance by the settling defendants with the following terms as they relate to the conduct of the remaining portions of the action.

[77] These terms, generally described, are that the non-settling defendants may, on motion to this court, obtain:

1. documentary discovery and an affidavit of documents in accordance with the Rules of Civil Procedure from each of the settling defendants;
2. oral discovery of a representative of each of the settling defendants, the transcript of which may be read in at trial;
3. leave to serve a request to admit on each settling defendant in respect of factual matters;
4. an undertaking to produce a representative to testify at trial, with such witness to be subject to cross-examination by counsel for the non-settling defendants.

[78] In addition, the fact of the settlement, but not the terms thereof, shall be disclosed to the trial judge at the commencement of trial.

[79] Furthermore, pursuant to its case management powers under the Act, this court shall maintain an ongoing supervisory role in this action. In the event that any settling defendant fails to comply with an order of this court made pursuant to the above terms, the court may, in addressing any such failure, lift the stay of proceedings in respect of that defendant.

Certification

[80] The next consideration is whether the proceeding against the settling defendants meets the requirements for certification as a class proceeding. The elements of the test for certification are set out in s. 5 of the Class Proceedings Act.

> 5(1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
>
> (a) the pleadings or the notice of application discloses a cause of action;
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
> (c) the claims or defences 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 or defendant 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.

(i) Cause of action

[81] The statement of claim discloses a cause of action. The plaintiffs claim damages against the settling defendants arising from, inter alia, their negligent design, manufacture, and failure to establish appropriate and safe standards relating to the heating systems, as well as breaches of statutory duties, warranties and representations, and negligent misrepresentations. The plaintiffs also claim that these defendants failed to warn the public of the potential safety hazard presented by the defective product; to report these defects to the Ministry of Consumer and Commercial Relations; and to recall the defective and dangerous product.

(ii) Identifiable class

[82] The plaintiffs propose that upon certification, the class be defined as

> ONHWP and all persons or entities in the Province of Ontario, Canada who have incurred or will incur remediation expenses as a result of owning a natural gas or propane fired appliance installed with high-temperature plastic venting under the trade names PLEXVENT, ULTRAVENT or SELVENT (manufactured or sold by Chevron, Hart&Cooley and Eljer Manufacturing respectively).

This class definition meets the second element of the test for certification.

(iii) Common issue

[83] The plaintiffs propose that the common issue for the class be defined as:

> What claims does the Settlement Class have arising from the Ministry of Consumer and Commercial Relations Director's Safety Order dated September 12, 1995.

The common issue proposed satisfies the third criterion of the certification requirements.

(iv) Preferable procedure

[84] A class proceeding is the preferable procedure for the resolution of the common issue as outlined above. The aggregate claims of the class are substantial but individually, these claims cannot be litigated economically. On a practical basis, should certification be denied, the result would be to deny access to the courts for many of the claims not covered by ONHWP. In addition to being expensive to litigate on an individual basis, the effect of multiple claims of

this nature coming forward would place a heavy burden on judicial resources. In this case, a class proceeding is the preferable procedure for providing members of the class with access to an effective remedy.

(v) Representative plaintiff

[85] Kathy Adetuyi and Andrew Duke are individuals who purchased heating systems with HTPV installed in conjunction with mid-efficiency appliances. Kathy Adetuyi's home was not enrolled in the ONHWP program and she bore the entire cost of complying with the Director's safety order. Andrew Duke's home was covered by ONHWP. As such, a portion of his cost to correct the defective heating system was borne by ONHWP.

[86] Kathy Adetuyi, Andrew Duke and ONHWP are all prepared to act as representative plaintiffs for the class. Collectively, their actions indicate that they have fairly represented the class and there is no evidence that they will not continue to do so. These proposed representative plaintiffs do not have interests which conflict with the interests of other class members and the settlement agreement provides a plan for the resolution of this proceeding. The proposed representative plaintiffs are acceptable to the court, thus meeting the final requirement for certification.

[87] Accordingly, all of the requirements of the Act regarding certification are met.

Settlement Approval

[88] Finally, I turn to the settlement. For a settlement to be approved it must be fair, reasonable and in the best interests of the class, and, as stated in Dabbs, will generally take into account factors such as:

1. likelihood of recovery or likelihood of success;
2. amount and nature of discovery, evidence or investigation;
3. settlement terms and conditions;
4. recommendation and experience of counsel;
5. future expense and likely duration of litigation;
6. recommendation of neutral parties, if any;
7. number of objectors and nature of objections; and
8. the presence of arms-length bargaining and the absence of collusion.

[89] The exercise of settlement approval does not lead the court to a dissection of the settlement with an eye to perfection in every aspect. Rather, the settlement must fall within a zone or range of reasonableness. The range of reasonableness has been described by Sharpe J. in Dabbs v. Sun Life Assurance Co. (No. 2) (1998), 40 O.R. (3d) 429, 22 C.P.C. (4th) 381 (Gen. Div.) as follows at p. 440:

> . . . 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 interest of those affected by it when compared to the alternative of the risks and costs of litigation.

[90] Furthermore, the recommendation of class counsel is a factor to be considered, though the potential for conflict must also be noted. Sharpe J. stated at p. 440:

> The recommendation of class counsel is clearly not dispositive as it is obvious that class counsel have a significant financial interest in having the settlement approved. Still, the recommendation of counsel of high repute is significant. While class counsel have a financial interest at stake, their reputation for integrity and diligent effort on behalf of their clients is also on the line.

[91] In Ontario, the courts have also recognized that the practical value of an expedited recovery is a significant factor for consideration. In Dabbs, Sharpe J. determined that in addition to the legal and factual risks, a practical concern favouring settlement includes the potential that the case would take several years to reach trial and exhaust all appeals.

[92] Evidence sufficient to decide the merits of the issue is not required because compromise is necessary to achieve any settlement. However, the court must possess adequate information to elevate its decision above mere conjecture. This is imperative in order that the court might be satisfied that the settlement delivers adequate relief for the class in exchange for the surrender of litigation rights against the defendants: see Newberg on Class Actions, 3rd ed. (Shepard's/McGraw-Hill, 1992), ss. 11.45-46.

[93] In the case at bar, the settlement proposed provides compensation to class members through a settlement mechanism that allows partial recovery for the damages of the class. I am satisfied that significant research and investigation was conducted in this matter prior to issuance of the statement of claim. Settlement negotiations between the settling parties have been ongoing since early 1996. These negotiations have been adversarial and protracted. The plaintiffs have been guided in their settlement negotiations by an understanding of the risks associated with the litigation, the potential future expense and the recommendation and experience of their counsel. Further, the terms of the settlement were arrived at as a result of intensive mediation conducted by an experienced arbitrator with specific knowledge of the factual background. The settlement benefits to the plaintiff class are well within the range of reasonableness.

[94] In conclusion, I find that the settlement is fair and reasonable and in the best interests of the class as a whole.

Disposition

[95] This action represents the quintessential class proceeding. It involves a single purpose product which is alleged to be defective. This core element of commonality is such that a determination of liability to the representative plaintiffs would be determinative of liability to the entire class. As stated in Chace v. Crane Canada Inc. (1997), 14 C.P.C. (4th) 197 at p. 202, 44 B.C.L.R. (3d) 264 (C.A.):

> This court recently observed that in a product liability case a determination that the product in question is defective or dangerous as alleged will advance the claims to an appreciable extent. . . . I agree with the chambers judge that is the situation here. The respondents are alleging an inherent defect. . . . This seems exactly the type of question for which a class action is ideally suited and remarkably similar to that concerning faulty heart pacemaker leads that was certified by the Ontario Court (General Division) in Nantais v. Telectronics Proprietary (Canada) Ltd. (1995) 25 O.R. (3d) 331 (Ont. Gen. Div.).

(Citations omitted)

[96] This product liability claim involves thousands of relatively small, nearly identical claims. In the absence of certification as a class proceeding, they would not present viable individual lawsuits because of the costs of litigation. Cost barriers to litigation impact on both access to justice and behavioural modification, two of the goals of the Act. Taken together with the nature of the claim and the element of commonality, the case cries out for certification. The motion for certification against the settling defendants is granted.

[97] The settlement agreement taken as a whole is fair and reasonable and in the interests of the class members. It brings a significant degree of resolution to a protracted proceeding. Although the non-settling defendants have raised some legitimate concerns about the prohibitive provisions, in light of the procedural protections available through the Class Proceedings Act, the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 and the terms attached to the stay granted in these reasons, these procedural concerns can be addressed without rejecting the settlement. Accordingly, the settlement is approved in its entirety, subject to the terms set out above.

[98] The motion raises a novel point of law and the result is divided. There shall be no order as to costs. I may be spoken to in respect of any other matters arising out of these reasons.

Order accordingly.

TAB 4

Case Name:

Lau v. Bayview Landmark Inc.

Between
Charmaine Siu Man Lau and Peter Kong, (plaintiffs), and Bayview Landmark Inc., Henry Lam and Linda Lam, Jeffrey Beber and Levitt, Beber, Kitman Developments Inc., Living Realty Inc., and Living Realty (H.K.) Limited, (defendants)

[2006] O.J. No. 600

34 C.P.C. (6th) 138

145 A.C.W.S. (3d) 1013

2006 CarswellOnt 835

Court File No. 96-CU-113906

Ontario Superior Court of Justice

C.L. Campbell J.

Heard: February 8, 2006.
Judgment: February 14, 2006.

(22 paras.)

Civil procedure -- Settlements -- Approval -- Motion by plaintiffs for approval of settlement with some of the defendants in class proceedings action dismissed -- Defendant which did not settle sought to limit its exposure to plaintiff to several, rather than joint and several, liability -- Proposed settlement would deprive non-settling defendant of substantive rights.

Motion by plaintiffs for approval of a settlement with some defendants in class proceedings action -- Action arose from failed real estate investment scheme -- Plaintiffs reached settlement with defendant real estate firm -- Defendant law firm which did not settle sought to limit its exposure to plaintiff to several, rather than joint and several, liability -- HELD: Motion dismissed -- Proposed settlement would deprive non-settling defendant of substantive rights -- Defendant law firm might have had good reason or restricting its defence to its several liability and avoiding a cross-claim from others -- Once real estate firm settled, defendant law firm would be deprived of benefits that would come from full discovery and evidence of real estate firm -- Case would then be different from one in which all defendants fully participated -- Defendant law firm could not procedurally or substantively be put back in position it would have been if there

was no settlement, for purpose of fully advancing its defence without any opportunities to amend pleadings and cross-claim, neither of which were permitted in settlement agreement.

Counsel:

Richard Quance, Samuel Marr, Keith Landy Q.C. for the plaintiffs.

Chris Stribopolous for Living Realty.

Tony Kelly, Q.C. for Levitt Beber.

REASONS FOR DECISION

1 **C.L. CAMPBELL J.**:-- The Plaintiffs seek Court approval of a settlement with some of the Defendants in this Class Proceeding Action.

2 With one exception, there is no opposition to the proposed settlement. Mr. Kelly for Levitt Beber seeks what has come to be known as a "bar order" with respect to potential exposure to claims of joint responsibility with the settling Defendants.

3 The action arises from a failed real estate investment scheme in which it is alleged that the settling Defendant real estate firm (Living Realty) is jointly and severally liable with non-settling Levitt Beber (a law firm) for breach of trust, fiduciary duty as well as negligence for release of investment funds to Bayview Landmark and the Lams.

4 Beber and Levitt Beber, the non-settling Defendants, seek to limit their exposure to the Plaintiffs to their several, as opposed to joint and several, responsibility. Counsel for the Plaintiffs submit that there is no valid reason to limit the Plaintiffs' claims as urged by the non-settling Defendants, given the aims and goals of the Class Proceeding Act. Both sides rely on the decision of Winkler J. in Ontario New Home Warranty Program v. Chevron Chemical Company et al., [1999] O.J. No. 2245.

5 The issue in Ontario New Home was whether the Court would approve a settlement with a "bar order" that would prevent non-settling defendants from making claims for contribution indemnity. Under the bar order, the plaintiffs agreed to make only several claims against non-settling defendants being limited to the degree of liability proven against the non-settling defendants but in no event greater than 35% of the total damages against each of the non-settling defendants proven at trial.

6 Winkler J. granted certification and approved the settlement, concluding that, since the non-settling defendants would not be required to pay damages beyond their own negligence and liability to the plaintiff, a claim for contribution and indemnity was therefore not necessary.

7 The procedural concerns that arose from the settlement in Ontario New Home supra were addressed by an Order to permit non-settling defendants to obtain discovery and testimony at trial from settling defendants.

8 Winkler J., as part of his decision, said at paragraph 50:

> Moreover, this court has noted on multiple occasions that there is no jurisdiction conferred by the Class Proceedings Act to supplement or derogate from the substantive rights of the parties. It is a procedural statute and, as such, neither its inherent objects nor its explicit provisions can be given effect in a manner which affects the substantive rights of either plaintiffs or defendants.

9 The settlement being approved was made conditional on approval of the procedural provisions summarized in paragraph 6 above.

10 In Gariepy v. Shell Oil Co., [2002] O.J. No. 4022, Nordheimer J. had a similar issue before him in a class proceeding. Again, he approved certification and settlement agreement on the basis of a bar order that contained the following language:

> 19(a) The Plaintiffs shall not make joint and several claims against the Non-Settling Defendants but shall restrict their claims to several claims against each of the Non-Settling Defendants such that the Plaintiffs shall be entitled to receive only those damages proven to have been caused solely by each of the Non-Settling Defendants

11 The settlement with one defendant DuPont arose in a context in which cross-claims, third party claims or claims for contribution and indemnity against DuPont were being barred. Nordheimer J. approved the bar order but with language that made it clear that the bar order was restricted to matters that could have been raised as part of the action and that it did not operate with respect to anyone who opted out of the settlement.

12 Counsel for the Plaintiffs seeks to factually distinguish the facts now before the Court from those in Ontario New Home and Gariepy, supra in support of their position that a bar order is not required. The distinction relied on is that in this case, the non-settling Defendants have not made cross-claims against the settling Defendants, and that without such claims being made, there is no reason to limit the claims of the Plaintiffs to simply the several liability of the non-settling Defendants.

13 I disagree. The effect of approving the settlement in the form sought by the Plaintiffs would in my view affect more than procedural rights of the non-settling Defendants but as well substantive rights.

14 The non-settling Defendants may well have had good reason for restricting their defence to their several liability to the Plaintiff and avoiding a cross-claim from others. From the allegations in the Statement of Claim, it would appear that the allegations against both settling and non-settling Defendants resemble those of concurrent rather than joint tortfeasors. Living Realty is a real estate firm with certain duties. Levitt Beber and Jeffrey Beber are lawyers with professional duties that may arise both in contract and negligence.

15 Whether or not the Defendants are joint as opposed to concurrent tortfeasors, the strategic reasons that the non-settling Defendants may have had for not seeking contribution and indemnity may well be significantly interfered with by the partial settlement. As long as the settling Defendants were in the action, the non-settling Defendants could rely on the focus the former would attract at trial in distinguishing their conduct from that of the settling Defendants.

16 With the settling Defendants absent from the trial in a meaningful way, the non-settling Defendants would be deprived of the benefits that would come from full discovery and evidence of those parties, which would be supportive of all Defendants vis-à-vis the Plaintiffs and of that evidence that would provide clear distinction between the Defendants. It would be a different case from one in which all Defendants were fully participating.

17 In the course of submissions, it was made clear that the Plaintiffs and settling Defendants were putting forward this settlement only and that if the Court were to approve a settlement that gave leave to the non-settling Defendants to pursue cross or third party claims if so advised, there would be no settlement.

18 I have concluded that the non-settling Defendants cannot procedurally or substantively be put back in the position that they would have been if there were no settlement, for the purposes of fully advancing their defence without any opportunities to amend pleadings and cross-claim, neither of which are before me or permitted in the agreement between the settling parties.

19 I accept the general premise of settlement of actions in part where settlement in whole may not be possible. Partial settlement can well result in shortened, less expensive trials and may well be the precursor to a full settlement. In this situation, the settlement sought by the Plaintiffs would deprive the non-settling Defendants of substantive rights.

20 The Court of Appeal for Ontario has recognized the principle of encouraging settlement in M. (J.) v. B. (W.), [2004] O.J. No. 2312. But in approving what has come to be known as a "Pierringer" agreement, the Court adopted the proposition that such partial settlements must achieve "the goal of the proportionate share agreement [being] to limit the liability of the non-settling party to its several liability." [See paragraph 31.]

21 The Court of Appeal in M. (J.) confirmed that while apportionment of liability may be made at trial even thought there is an absent defendant through settlement, that process must not create an unfairness. In my view, the settlement here as proposed without a bar order would create an unfairness.

22 The motion for approval is therefore dismissed. If the Plaintiffs are prepared to add the language sought by Mr. Kelly on behalf of Levitt Beber or other language that achieves the same purpose, the Court will be prepared to confirm the partial settlement sought, as the remaining terms are appropriate.

C.L. CAMPBELL J.

cp/e/qw/qltlc/qlhcs

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

Court File No. CV-12-9667-00CL

THE TRUSTEES OF THE LABOURERS' PENSION FUND OF CENTRAL AND EASTERN CANADA et al.	v.	SINO-FOREST CORPORATION et al.	Court File No. CV-11-431153-00CP
Plaintiffs		Defendants	

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at TORONTO

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