CITATION: Cannon v. Funds for Canada Foundation, 2013 ONSC 7686
COURT FILE NO.: CV-08-362807-CP
DATE: 20131219

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: MICHAEL CANNON / Plaintiff / Moving Party

AND

FUNDS FOR CANADA FOUNDATION, MATT GLEESON AND SARAH STANBRIDGE as trustees for the DONATIONS CANADA FINANCIAL TRUST, PARKLANE FINANCIAL GROUP LIMITED, TRAFALGAR ASSOCIATES LIMITED, TRAFALGAR TRADING LIMITED, APPLEBY SERVICES (BERMUDA) LTD. as trustee for the BERMUDA LONGTAIL TRUST, EDWIN C. HARRIS Q.C., PATTERSON PALMER also known as PATTERSON PALMER LAW, PATTERSON KITZ (Halifax), PATTERSON KITZ (Truro), MCINNES COOPER, SAM ALBANESE, KEN FORD, RIYAD MOHAMMED, DAVID RABY, GREG WADE, GLEESON MANAGEMENT ASSOCIATES INC., MARY-LOU GLEESON, MATT GLEESON and MARTIN P. GLEESON / Defendants / Responding Parties

Proceeding under the Class Proceedings Act, 1992

BEFORE: Justice Edward Belobaba

COUNSEL: *Margaret Waddell, Samuel Marr and Andrew Lewis* for the Plaintiff

HEARD: October 18, 2013

APPROVAL OF LEGAL FEES

[1] In a short endorsement dated October 18, 2013 I approved the class action settlements with the FFCF-Gleeson Defendants and the Lawyer Defendants. I was satisfied that these settlement agreements were in the best interests of the class members. The class members will receive about $28.2 million. The class action will continue against the non-settling defendants.

[2] I also considered class counsel's motion for the approval of their legal fees on the settlements achieved. Based on the contingency fee retainer agreement, class counsel was asking for one-third of the settlement amount – about $9.4 million. Contingency fee awards of 25 per cent (sometimes 30 per cent) have been approved by Ontario courts. But, I was not aware of any decision that had approved a full one-third. I therefore advised class counsel I was prepared to approve legal fees in the amount of 25 per cent (because my sense of the case law was that the accepted range was 20 to 25 per cent), but that I needed further written submissions to persuade me that the approval of the full one-third was indeed fair and reasonable.

[3] I have now been provided with these supplementary submissions and I am persuaded that my Order of October 18, 2013 approving the 25 per cent amount should be varied to allow the full one-third. I have also been persuaded that a one-third contingency fee agreement, if fully understood and accepted, should be accorded presumptive validity.

Analysis

[4] I initially approved class counsel's legal fees at the 25 per cent level (rather than the full one-third that had been agreed to in the retainer agreement) because, frankly, that's what other judges were doing. I reviewed several of the decisions, expecting to find persuasive reasons for capping the legal fees at say, 20 to 25 per cent and not allowing the 30 per cent or one-third that had been agreed to in the retainer agreement. What I found, instead, were well-intentioned judicial efforts to rationalize legal fee approvals by discussing arguably irrelevant or immeasurable metrics such as docketed time (irrelevant) or risks incurred (immeasurable.) By using these metrics, judges felt comfortable building up a reasonable legal fees award that was capped at the 20 to 25 per cent level, sometimes 30 per cent but rarely, if ever, approved at the one-third level.

[5] I couldn't understand this reasoning. Why should it matter how much actual time was spent by class counsel? What if the settlement was achieved as a result of "one imaginative, brilliant hour" rather than "one thousand plodding hours"? If the settlement is in the best interests of the class and the retainer agreement provided for, say, a one-third contingency fee, and was fully understood and agreed to by the representative plaintiff, why should the court be concerned about the time that was actually docketed? This only encourages docket-padding and over-lawyering, both of which are already pervasive problems in class action litigation.

[6] If "risks incurred" was something judges could really measure on the material provided, then this metric might make sense. Everyone understands that class counsel accept and carry enormous risks when they undertake a class action. But I don't understand how a judge, post-hoc and in hindsight, confronted with untested, self-serving

assertions about the many risks incurred, can measure or assess those risks in any meaningful fashion and then purport to use this assessment as a principled measure in approving class counsel's legal fees. And why are we approaching legal fees approval as a building blocks exercise to begin with, working from the bottom up rather than from the top down? Why not start at the top with the retainer agreement that was agreed to by the clients and their solicitor when the class action began?

[7] In my view, it would make more sense to identify a percentage-based legal fee that would be judicially accepted as presumptively valid. This would provide a much-needed measure of predictability in the approval of class counsel's legal fees and would avoid all of the mind-numbing bluster about the time-value of work done or the risks incurred.

[8] What I suggest is this: contingency fee arrangements that are fully understood and accepted by the representative plaintiffs should be presumptively valid and enforceable, whatever the amounts involved. Judicial approval will, of course, be required but the presumption of validity should only be rebutted in clear cases based on principled reasons.

[9] Examples of clear cases where the presumption of validity could be rebutted include the following:

(i) *Where there is a lack of full understanding or true acceptance on the part of the representative plaintiff.* Did the representative plaintiff truly understand that one-third of the recovery would be claimed by class counsel as legal fees? Class counsel would be wise to set out the consequences of their contingency fee arrangement in some detail in the retainer agreement: e.g. "if we recover $30 million for the class, we will be entitled to legal fees of $10 million." Settlement agreement notices should bold-face or highlight the legal fees portion in order to focus class members' attention on the amount being requested. Affidavits from the representative plaintiffs or class members supporting the legal fees request would certainly be relevant.

(ii) *Where the agreed-to contingency amount is excessive*. I, for one, am prepared to accept that a one-third contingency is presumptively reasonable and acceptable in the class actions area because that amount that has been found to be reasonable and acceptable (and successful) in the personal injury area. If class counsel seek higher amounts, say 40 or 50 per cent, they should be prepared to provide a detailed justification because these higher amounts fall outside the penumbra of what, in my view, is currently acceptable.

(iii) *Where the application of the presumptively valid one-third contingency fee results in a legal fees award that is so large as to be unseemly or otherwise*

> *unreasonable.* I know that I would be quite comfortable approving legal fees of $10 or even $15 million based on overall cash recoveries of $30 or $45 million. But I frankly don't know what I would or should do as a class actions judge when the recovery is, say, $150 million and class counsel are asking for $50 million. Although the $50 million legal fees award would be enormous, to say the least, I really can't think of a principled reason for not approving these larger amounts. Fortunately, I don't have to decide this today.

[10] In my view, the judicial acceptance of the contingency fee agreement as presumptively valid would further the development of the class action in at least three ways:

- Class counsel's legal fees would be more easily understood, more principled and more "reasonable" than under the "multiplier" approach.
- The contingency fee approach would inject a much-needed measure of predictability into class counsel's compensation calculus, which in turn would encourage greater use of the class action vehicle, enhancing access to justice.
- According presumptive validity to a one-third contingency fee, and thus making class counsel's compensation more certain would take the pressure off certification-motion costs awards as a method for forward-financing the class action lawsuit.

[11] The approach that I have discussed works best when you have, as we do here, an all-cash settlement. An across the board one-third recovery will likely not be available when the settlement is in-kind, or involves vouchers or coupons, or where class counsel compensation is best determined by considering the take-up rate. But to the extent that the retainer agreement provides for a percentage-based fee approach rather than the multiplier approach, I will be one judge that will accept a fully understood one-third contingency fee agreement as presumptively valid.

[12] Returning, then, to the motion before me. I am satisfied that the one-third contingency fee should be approved. The contingency fee retainer agreement was fully understood and agreed to by Michael Cannon, the representative plaintiff. Indeed, Mr. Cannon filed an affidavit strongly supporting the one-third legal fee and no class members have voiced any objections. The one-third contingency is not excessive because it is in line with the percentages that are charged in the personal injury area. And there is no suggestion that the $9.4 million amount that class counsel will receive is unseemly or inherently unreasonable. In short, no reasons have been advanced to rebut the presumption of validity.

Disposition

[13] Class counsel's request for the full one-third contingency fee is granted. My Order of October 18, 2013 shall be amended to reflect this variation.

Belobaba J.

Date: December 19, 2013