

RAIKES J.

- [1] The plaintiff settled with the Okaya and Nitsuko defendants subject to approval of courts in Ontario, Quebec and British Columbia. I have approved the Ontario settlements conditional on approvals in the other two courts.
- [2] On the assumption that the courts would approve the settlements, Class Counsel bring a motion for an interim fee approval. Counsel seek approval of
 - a. A contingent legal fee of \$177,225 plus applicable taxes which represents approximately 25% of the aggregate monetary value of the settlements; and
 - b. Payment of \$43,932 plus applicable taxes for reimbursement of disbursements incurred by Class Counsel for the notice program for certification and the settlement approval hearing.
- [3] Pursuant to the Okaya and Nitsuko settlements, plaintiffs' Class Counsel will receive CDN \$460,000 and US \$190,000 to be deposited to a trust account for the benefit of the members of the class.
- [4] Plaintiff's counsel in the Ontario action is working cooperatively with two other firms in Quebec and British Columbia to advance the price fixing claim against the many named defendants in this litigation. Together, the three firms are sharing the work and expense of the litigation. The proposed amounts to be approved are on account of their collective time and expense.
- [5] The plaintiff entered into a retainer agreement with Ontario counsel pursuant to which counsel agreed to upfront payment of the reasonable disbursements incurred in the action. The parties also agreed that counsel would only be paid in the event of success on a lump sum percentage of the recovery, subject to court approval. The retainer agreement is a contingency agreement.
- [6] Contingency agreements are permitted by s. 33(1) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("CPA").
- [7] The retainer agreement between the plaintiff and Harrison Pensa firm satisfies the requirements of s. 32(1) CPA. It is in writing. It states the terms under which fees and disbursements are to be paid. It provides the basis on which fees will be calculated and provides an estimate of same. It clearly indicates that the payment of fees depends on success as defined and is payable as a percentage (maximum of 30%) of monies recovered.
- [8] "Success" includes a settlement with any of the defendants that provides benefits to some or all class members. There is no doubt that "success" has been achieved through the two settlements.

- [9] The *CPA* requires that any fees payable to class counsel must first be approved by the court: s. 32(4). The court has a discretion to approve an interim fee award on partial settlement before the matter has reached its ultimate conclusion as against all named defendants: *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2752 at paras. 13 and 16. It is quite common for partial fee approvals to be made in price fixing actions as settlements are reached with individual defendants: *Airia Brands Inc. v. Air Canada*, 2015 ONSC 6367; *Fanshawe College v. Panasonic et al.*, 2015 ONSC 8158; *Shah v. LG Chem, Ltd.*, 2018 ONSC 6101; *Fanshawe College v. Hitachi, Ltd. et al.*, 2016 ONSC 8212.
- [10] In exercising its discretion the court will consider any unusual circumstances present including,
- a. Whether counsel will receive a substantial premium on an interim basis: *Mancinelli v. Royal Bank of Canada*, 2016 ONSC 6953, 2017 ONSC 2324 and 2018 ONSC 4206;
 - b. Whether settlement recoveries are contingent and may be reduced in future by some event such as a “favoured nation” clause: *Eidoo v. Infineon Technologies AG*, 2013 ONSC 853 at paras. 21 and 23; and
 - c. Whether very substantial recoveries have been achieved before construction of a distribution plan for the settlement funds: *Eidoo*, paras. 57 and 68.
- [11] There are no unusual circumstances present here. There is no premium on counsel’s time. The settlement amounts payable by the settling defendants will not reduce because of some future event. There is no favoured nation clause. The amounts recovered are modest and a distribution plan is premature.
- [12] I find that it is appropriate and reasonable to approve an interim fee in this case at this stage as:
- a. The disbursements requested are those directly attributable to the settlement approval and are reasonable;
 - b. The fees are modest and will assist counsel in carrying the cost of the litigation against the many well-resourced defendants who remain;
 - c. Counsel achieved a benefit for class members through these settlements;
 - d. Payments of even modest amounts incentivize counsel to be efficient and effective in seeking resolution of the litigation;
 - e. Payment is consistent with the terms of the retainer agreement and the expectations of the parties; and
 - f. The plaintiff supports the request.

Quantum of Fees Approved

- [13] In determining the reasonableness of class counsel fees, courts have traditionally considered the following factors:
- a. the factual and legal complexities of the matters dealt with;
 - b. the risk undertaken, including the risk that the matter might not be certified;
 - c. the degree of responsibility assumed by class counsel;
 - d. the monetary value of the matters in issue;
 - e. the importance of the matter to the class;
 - f. the degree of skill and competence demonstrated by class counsel;
 - g. the results achieved;
 - h. the ability of the class to pay;
 - i. the expectations of the class as to the amount of fees; and
 - j. the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.

(See *Osmun*, para. 23; *Abdulrahim v. Air France*, 2011 ONSC 512 at para. 8.)

- [14] The assessment of reasonableness is substantially the same for interim fee requests as it is for fee requests on final settlements: *Airia Brands Inc. v. Air Canada*, 2015 ONSC 6367 at para. 10.

- [15] I find that:

- a. The principal benefit derived from these settlements lies in the cooperation and disclosure of these defendants which will assist in prosecution of the claims against the remaining defendants who had significantly greater market share. The value of that component cannot be ascertained at this point;
- b. The monetary benefits to the class are very modest ;
- c. Counsel have taken on significant responsibility in the litigation;
- d. These settlements are the product of many hours of work by counsel over a lengthy period;
- e. The litigation is complex;

- f. There is significant risk including that the action may not be certified;
- g. Counsel have accepted an additional risk by indemnifying the plaintiff against adverse costs awards;
- h. The defendants are large corporations who are represented by very experienced counsel. This litigation could be long and costly;
- i. At this point, it appears that the remaining defendants intend to vigorously contest the allegations and claim against them;
- j. The plaintiff agreed to payment of fees and disbursements upon success being achieved;
- k. The amounts requested are consistent with the retainer agreement;
- l. The percentage requested is consistent with similar interim awards in other cases; and
- m. There is an opportunity cost to counsel although its measure is difficult to assess at this point.

[16] Therefore, I find that the amounts requested as set out in para. 2 above are fair and reasonable. I hereby approve those amounts to be paid to Class Counsel from the Okaya and Nitsuko settlement monies, provided that the fee request is also approved by the Quebec and British Columbia courts.



Justice R. Raikes

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