CITATION: Haddad v. The Kaitlin Group Ltd., 2017 ONSC 7321
COURT FILE NO.: 07-CV-345642 CP
DATE: 20171208

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
JEAN-MARC HADDAD and ROBERT PHIPPARD Plaintiffs	*Stephen Birman*, for the Plaintiff
– and –	
THE KAITLIN GROUP LTD. and 1138337 ONTARIO INC. Defendants	*Michael Cohen*, for the Defendants
HEARD: November 30, 2017	

E.M. MORGAN, J.

[1] This motion is brought jointly by the Plaintiffs and the Defendants for approval of a proposed settlement of the action, which was certified as a class proceeding by order of this court dated December 15, 2008. Along with approval of the settlement, class counsel also seeks approval of its fees.

[2] The class action was commenced on December 17, 2007 on behalf of all purchasers of homes on land developed and marketed by the Defendants in a residential subdivision known as the Port of Newcastle (the "Subdivision") on or before October 5, 2007 ("Class Members"). The claim relates to alleged misrepresentations by the Defendants that Class Members would have access to a golf course being developed within the Subdivision and to membership in a clubhouse facility. The golf course was never built; the clubhouse, which includes a spa, fitness room, indoor pool, lounge and party room, was built but Class Members were not provided with free memberships.

[3] Following certification, the parties completed discoveries and a number of procedural motions. The action was then set down for trial. At a pre-trial on July 17, 2015, the Defendants advised the Plaintiffs and Archibald J. that they were impecunious except for six properties owned

by the Defendant, 1138337 Ontario Inc. Following an investigation, which included an Examination in Aid of Execution of a representative of the Defendants, class counsel concluded that the Defendants did not have sufficient assets or insurance to continue responding to the claims contained in the action. It was also determined to class counsel's satisfaction that the Defendants had no active income and had no realistic prospects of earning any income in the future.

[4] Class counsel further concluded in its investigation that the only assets of significant value owned by the Defendants are two parcels of land with an approximate value of $200,000 - $300,000. This is an estimate of value ascertained on the basis of a comparison with other comparable properties; but, as both counsel point out, it does not account for inherent real estate risk, the lack of road access and services for the properties, or the transaction costs involved in the marketing, sale and transfer of the properties.

[5] In view of the Defendants' dearth of assets, the parties have agreed to a settlement of the action, subject to approval of this court. They have set out the essential terms of the settlement as follows:

(a) Defendants will pay $150,000, all-inclusive, to resolve the claims contained in the class action (the "Settlement Amount");

(b) Class Members will be entitled to a free lifetime membership to the Admiral's Walk (the "Clubhouse") with one free transfer of that lifetime membership to any purchaser of their home ("Free Membership");

(c) The Settlement Amount, less class counsel's approved legal fees, HST, and disbursements ("Net Settlement Amount") will be distributed *pro rata* to each Class Member who submits a claim following court approval. Class Members who purchased a home jointly with another share the *pro rata* distribution with all who purchased with them;

(d) The Net Settlement Amount will be distributed *pro rata* to Class Members based on the number of Class Members who submit a claim form to class counsel by the deadline of March 31, 2018;

(e) The Plaintiffs agree that the Settlement Amount, payable on behalf of the Defendants, and the Free Membership to be received will be in full and final satisfaction of the matters claimed in this litigation, subject to court approval.

[6] A retainer agreement dated February 27, 2009 was signed by the Plaintiffs which updated an initial retainer agreement in order to comply with the terms of the *Solicitor's Act* and recent jurisprudence thereunder (the "Retainer Agreement"). The Retainer Agreement contemplates a contingency fee of 33%, plus disbursements and taxes. The Plaintiffs were made aware that the proposed fees would be subject to court approval.

[7] Class counsel seeks a significantly reduced fee of $16,500, which amounts to 13.75% of the damages portion of the Settlement Amount, plus $2,145 in HST, plus $30,000 for reimbursement of disbursements, for a total recovery of $48,645. This represents a small fraction

of class counsel's docketed time incurred in pursuing the claim, which amounts to approximately $490,000 worth of time from the commencement of the action through certification, discoveries, procedural motions, settlement negotiations, review of Class Members' claim information, investigation of the Defendants' assets, the present motion for court approval, and administration of the settlement and disbursement of settlement funds.

[8] The Net Settlement Amount for the class members, after payment of class counsel's fees, taxes and disbursements, is $101,355.

[9] Section 29(2) of the *Class Proceedings Act, 1992*, provides that a settlement of a class proceeding is not binding unless approved by the court. In carrying out its approval mandate, the court must look at all of the circumstances and reach the conclusion that the proposed settlement is fair and reasonable and in the best interests of the class: *Fantl v Transamerica Life Canada*, [2009] OJ No 3366, at para 57 (SCJ); *Zwaniga v Johnvince Foods Distribution LP*, 2017 ONSC 888, at para 18.

[10] As Perell J. observed in *Kidd v Canada Life Assurance Co*, 2013 ONSC 1868, at para 118, "In scrutinizing a settlement, the court is called on to protect the interests of the class members who are to be bound by the outcome and who will be compelled to release their claims against the defendant in exchange for their participation in the class action settlement." It is well established that when considering settlement approval, the court may have a view to the likelihood of recovery or success, the amount of discovery, evidence and investigation, the settlement terms, counsel's recommendation, the risk, expense and likely duration of litigation, the recommendation of neutral parties if any, the objectors if any, the good faith and arms' length nature of the settlement bargaining process, the level of communication by counsel and the representative plaintiffs with class members, and other information conveying to the full circumstances and dynamics of the negotiations leading to settlement: *Dabbs v Sun Life Assurance Company of Canada* (1998), 40 OR (3d) 429, 440-444 (Gen Div), aff'd (1998), 41 OR (3d) 97 (Ont CA), leave to appeal to SCC denied, [1998] SCCA No 372.

[11] In *Baxter v Canada (Attorney General)* (2006), 83 OR (3d) 481, at para 10, Winkler RSJ (as he then was) indicated that, "On a settlement approval motion, the court's review is not directed toward the merits... Instead, the court must examine the settlement in the context of the record before it. That examination includes a review of the allegations underlying the claims, the defences advanced in response and any objections to the settlement, to determine whether the settlement is 'fair, reasonable and in the best interests of the class as a whole'." Other courts have previously noted that this requires an objective and rational assessment of the settlement's pros and cons: *Al-Harazi v Quizno's Canada Restaurant Corp* (2007), 49 CPC (6th) 191, at para 23 (SCJ); *Zwaniga, supra*, at para 20.

[12] Counsel submit that here the predominant issue in determining the rationality of the proposed settlement is the likelihood of recovery for Class Members. The crucial point, of course, is that class counsel have engaged in what appears to be an exhaustive investigation of the resources available to the Defendants, and have come up with very little. The Examination in Aid of Execution confirmed that the settlement will effectively transfer to the Class all of the Defendants' unencumbered assets, making it unlikely that the Defendants would be in a position either now or in the future to offer to settle for an increased sum.

[13] Furthermore, given the paucity of assets, it stands to reason that the Defendants would likely spend up everything they have if they were to defend this action at trial. This fact makes the question of whether the Class could have achieved a more favourable judgment at trial into a moot point. As counsel point out in their factum, para 26, "...trying this case would create considerable risk that the Class Members would be unable to collect *any* amount awarded to them in a Judgment of this action on the merits."

[14] In addition to the monetary settlement, the Class Members are also achieving their sought-for membership in the club house. This aspect of the settlement is akin to a remedy of specific performance, as it provides the Class Members the very thing that they contracted for and for which they sought compensation.

[15] Specific performance is, of course, a more perfect remedy for a claim of breach of contract than damages would be, and it is unavailable in most breach of contract cases: see *Cohen v Roche*, [1927] 1 KB 169. This aspect of the settlement has the effect of putting the Class Members in the very position they would have been in had the contract been performed by the Defendants as promised.

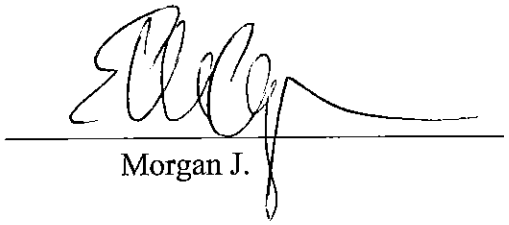
[16] Turning to the question of class counsel's fees, the Court of Appeal has explained that, "The court must first determine the number of hours worked and the hourly rate to be allowed in order to calculate a 'base fee'. Second, the court must determine the appropriate multiplier to be applied to the base fee in order to arrive at fair and reasonable compensation to class counsel for the risk they have assumed in representing the class on a contingency basis": *Smith Estate v National Money Mart*, 2011 ONCA 233, at para 45.

[17] As already indicated, the fees incurred on an hourly basis by class counsel would be some 20 times those sought to recover via the settlement. Moreover, the contingency fee of 13.75% sought here represents a substantial reduction than the 33% contingency fee contained in the retainer agreement. Contingency fees in the range of 33% have been approved in previous cases; in *Cannon v Funds for Canada Foundation*, 2013 ONSC 7686, at para 11, Belobaba J. stated that as long as the contingency fee arrangement was appropriately explained in the retainer agreement, a fee of 1/3 of the class' recovery is presumptively valid: *Cannon v Funds for Canada Foundation*, 2013 ONSC 7686, at para 11.

[18] Given the risks of the case, the amount of time and effort invested by class counsel, the maximizing of the recovery given the precarious financial state of the Defendants, and the significant discount in fees when calculated on either an hourly or a percentage basis, the fees sought by class counsel are eminently reasonable: *Smith Estate*, *supra*, at para 46. The settlement will leave just over $100,000 to be distributed among Class Members, which is a significant recovery given the state of the Defendants' assets. The result for Class Members appears to me to be as generous as one could expect considering all of the circumstances, while the fees sought by class counsel appear to me as modest as one can expect under the circumstances.

[19] The Settlement Agreement entered into by the parties and the draft Order submitted by counsel are hereby approved.

[20] Class counsel's fees, inclusive of disbursements and HST, in the amount of $48,645.00 are also hereby approved.



Morgan J.

Released: December 8, 2017

CITATION: Cams Atlas, LLC v. Stang, 2017 ONSC 6553
COURT FILE NO.: CV-16-561580
DATE: 20171208

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

CAMS ATLAS, LLC

Plaintiff

– and –

DARREL STANG, in his capacity as trustee of ALIGNED VENTURES INNOVATIVE FUND, GORDON D. PUTNAM, Q.C. in his capacity as trustee of ALIGNED ENTURES INNOVATIVE FUND, PETER PURDON, in his capacity as Trustee of ALIGNED VENTURES INNOVATIVE FUND, WATER EXCHANGE, INC., TECH SONIC INTERNATIONAL (f/k/a, TECH SONIC INTERNATIONAL LTD. and/or TECH SONIC, TECH SONIC SERVICES L.P.) TECH SONIC LIMITED PARTNERSHIP, SHAWN SMITH and ROBERT ORR

Defendants

AND BETWEEN:

WATER EXCHANGE, INC. and TECH SONIC INTERNATIONAL, INC.

Plaintiffs by Counterclaim

– and –

CAMS ATLAS, LLC

Defendant by Counterclaim

REASONS FOR JUDGMENT

E.M. Morgan, J.

Released: December 8, 2017