

**CITATION:** *Sa'd v. The Remington Group*, 2013 ONSC 1404  
**COURT FILE NO.:** 11-CV-434778  
**DATE:** March 6, 2013

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

<b>BETWEEN:</b>	)	
	)	
<b>SAMIR SA'D</b>	)	<i>Sean M. Grayson</i> for the Plaintiff
	)	
	)	Plaintiff
	)	
- and -	)	
	)	
<b>THE REMINGTON GROUP INC.,</b>	)	<i>Michael F. Cooper</i> for the Defendants
<b>ROUGE RESIDENCES I INC., AND</b>	)	
<b>ROUGE RESIDENCES II INC.</b>	)	
	)	Defendants
	)	
	)	
Proceeding under the <i>Class Proceedings Act, 1992</i>	)	<b>HEARD:</b> March 6, 2013

**PERELL, J.**

**REASONS FOR DECISION**

**I. INTRODUCTION**

[1] The Plaintiff, Samir Sa'd brings a motion: (a) to have his action certified as a class action under the *Class Proceedings Act, 1992*, S.O. 1992 for settlement purposes; (b) for approval of the Settlement Agreement signed on January 23, 2013; and (c) for approval of Class Counsel's fee. Class Counsel is the law firm of Roy Elliott O'Connor LLP. There are also requests for ancillary relief.

[2] The Defendants, The Remington Group Inc., Rouge Residences I Inc. ("Rouge I"), and Rouge Residences II Inc. ("Rouge II") consent to Mr. Sa'd motions for certification and for approve of the Settlement Agreement.

**II. FACTUAL BACKGROUND**

[3] Mr. Sa'd and other members of the proposed class purchased condominium units from Rouge I and Rouge II in a development in Markham, Ontario that included the

Rouge Bijou Condominium Residences. Mr. Sa'd alleges that they were overcharged for development charges. There are approximately 400 class members.

[4] The Defendants Remington Group, Rouge I, and Rouge II were the developers of the residential project in Markham.

[5] On September 12, 2011, Mr. Sa'd commenced this proposed class action, and on September 29, 2011, the Defendants delivered a Notice of Intent to Defend.

[6] In his Statement of Claim, Mr. Sa'd advances claims for general damages in breach of contract, unjust enrichment, and/or negligent misrepresentation.

[7] No steps were taken in the litigation, but the parties attempted to settle the action.

[8] A serious risk in pursuing the litigation is that Rouge I and Rouge II were likely judgment proof and the claim against Remington Group would depend upon piercing the corporate veil.

[9] After months of negotiations, the parties signed a Settlement Agreement dated January 23, 2013.

[10] From the negotiations, Mr. Sa'd determined that purchasers had different responses to the development charges; that is: (a) Some purchasers paid the full amount of the disputed charges; (b) Some purchasers paid \$3,000 of the disputed charges; (c) Some purchasers signed an Amendment to the Agreement of Purchase and Sale that capped the adjustments due on closing; (d) Some purchasers paid the disputed charges at closing, but upon complaint were given additional consideration and signed a Full and Final Mutual Release (the "Levy Adjustment Release"); (e) Some purchasers disputed the development charge increase and paid the charge in escrow which funds have or are being returned to them; and (f) Some purchasers were successful in the Small Claims Court and have been reimbursed.

[11] The Settlement Agreement will provide compensation to those purchasers in categories (a) to (d) above. There are 257 individuals in categories (a), (b) and (c). There are 145 individuals in category (d).

[12] The key terms of the Settlement Agreement are as follows:

- The Defendants have agreed to pay \$578,000.00 to a settlement fund, to be divided among two groups of Class Members; non-releasing and releasing Class Members.
- Non-Releasing Class Members (Class Members who did not sign a release in favour of any of the Defendants) will receive their *pro rata* share of approximately \$400,875.00.
- The share of Non-Releasing members will depend upon the number of opt-outs. If no opt-outs are received, Class Members who paid \$3,000.00 will recover approximately \$1,978.27 less legal fees.

Thus, for example, if the Court approves a contingency fee of 25%, Class Members who paid \$3,000 would receive a net recovery of \$1,483.70. By way of further example, for class members that paid \$7,680.59, they would receive a gross amount of approximately \$5,064.75 less legal fees for a net amount of \$3,798.56.

- Class Members who previously signed a Levy Adjustment Release on closing will receive \$300 less legal fees for a net amount of approximately \$225 each.
- The Settlement Agreement provides that this settlement is dependent on the number of class members participating in this settlement. If more than 10 Non-Releasing Class Members who are to be paid their *pro rata* share of the settlement fund opt out, or more than 15 Releasing Class Members opt-out, the Settlement Agreement will be void and of no effect for all Class Members.
- The Defendants may, at their sole discretion, agree to a higher participation threshold.

[13] Counsel is requesting legal fees of \$144,500.00 plus disbursements to be deducted from the settlement fund. This is 25% of the total settlement fund under the retainer agreement between Mr. Sa'd and Class Counsel

### III. CERTIFICATION

[14] Pursuant to s. 5(1) of the *Class Proceedings Act, 1992*, the court shall certify a proceeding as a class proceeding if: (a) the pleadings disclose a cause of action; (b) there is an identifiable class; (c) the claims or defenses of the class members raise common issues of fact or law; (d) a class proceeding would be the preferable procedure; and (e) there is a representative plaintiff or defendant who would adequately represent the interests of the class without conflict of interest and there is a workable litigation plan.

[15] Where certification is sought for the purposes of settlement, all the criteria for certification must still be met: *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (S.C.J.) at para. 22. However, compliance with the certification criteria is not as strictly required because of the different circumstances associated with settlements: *Bellaire v. Daya*, [2007] O.J. No. 4819 (S.C.J.) at para. 16; *National Trust Co. v. Snallhorn*, [2007] O.J. No. 3825 (S.C.J.) at para. 8; *Nutech Brands Inc. v. Air Canada*, [2008] O.J. No. 1065 (S.C.J.) at para. 9.

[16] The proposed class is defined as follows:

All individuals, corporations or partnerships who or which purchased condominium units from the Defendants or any of one of them, in the properties known as Rouge Residences I and II and who were charged by

and paid to the Defendants, or any one of them, an increased development and/or other charge above what the Defendants were themselves charged, but not including the Individuals Who Paid Into Escrow and the Small Claims Court Claimants.

[17] The proposed common issue is as follows:

Did the Defendants, or any of them, charge the class excess development fees?

[18] Having reviewed the motion record, I am satisfied that all of the criteria for certification set out in s. 5 of the *Class Proceedings Act, 1992* have been satisfied.

#### IV. SETTLEMENT APPROVAL

[19] Under s. 29 (2) of the *Class Proceedings Act, 1992*, a settlement of a class proceeding must be approved by the court to be binding on the parties.

[20] To approve a settlement of a class proceeding, the court must find that in all the circumstances the settlement is fair, reasonable, and in the best interests of those affected by it: *Dabbs v. Sun Life Assurance*, [1998] O.J. No. 1598 (Gen. Div.) at para. 9; *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) at paras. 68-73.

[21] In determining whether to approve a settlement, the court, without making findings of facts on the merits of the litigation, examines the fairness and reasonableness of the proposed settlement and whether it is in the best interests of the class as a whole having regard to the claims and defences in the litigation and any objections raised to the settlement: *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (S.C.J.) at para. 10.

[22] When considering the approval of negotiated settlements, the court may consider, among other things: (a) likelihood of recovery or likelihood of success; (b) amount and nature of discovery, evidence or investigation; (c) settlement terms and conditions; (d) recommendation and experience of counsel; (e) future expenses and likely duration of litigation and risk; (f) recommendation of neutral parties, (g) if any; number of objectors and nature of objections; (h) the presence of good faith, arms-length bargaining and the absence of collusion; (i) the degree and nature of communications by counsel and the representative parties with class members during the litigation; and (j) information conveying to the court, the dynamics of and the positions taken by the parties during the negotiation: *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.) at pp. 440-44, aff'd (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C., [1998] S.C.C.A. No. 372; *Parsons v. The Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) at paras. 71-72; *Frohlinger v. Nortel Networks Corp.*, [2007] O.J. No. 148 (S.C.J.) at para. 8; *Kelman v. Goodyear Tire and Rubber Co.*, [2005] O.J. No. 175 (S.C.J.) at paras. 12-13; *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.* (2005), 74 O.R. (3d) 758 (S.C.J.) at para. 117; *Sutherland v. Boots Pharmaceutical plc*, [2002] O.J. No. 1361 (S.C.J.) at para. 10.

[23] A reasonable and fair settlement is inherently a compromise and a reasonable and fair settlement will not be and need not be perfect from the perspective of the aspirations of the parties. That some class members are disappointed or unsatisfied will not disqualify a settlement because the measure of a reasonable and fair settlement is not unanimity or perfection. See: *Baxter v. Canada (Attorney General)*, [2006] O.J. No. 4968 (S.C.J.) at para. 21; *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.) at p. 440, aff'd (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C., [1998] S.C.C.A. No. 372.

[24] In the case at bar, the Settlement Agreement was the product of arms-length good faith negotiations between counsel for the parties. Under the agreement, the Defendants have agreed to settle this action by establishing a settlement fund of \$578,000.00 to be distributed among members of the Class in accordance with the terms of the Settlement Agreement. If this settlement is approved Class members will receive a refund of between 52% to 73% of the disputed development charges.

[25] It is the opinion of Class Counsel that in the circumstances the Settlement Agreement is fair and reasonable and in the best interests of the Class Members. Mr. Sa'd also supports the settlement.

[26] There was one objector to the settlement. The objection was as follows:

[I]f the builder is willing to settle, they should pay each class action member back the full amount that is owed...AND the builder should pay for your firm's legal expenses. The final amount paid to the class action members should not be less than what we over-paid to the builder. It does not seem fair that we still do not get full restitution from the builder. This is not enough of a punitive measure against the builder. Class action members paid the builder in good faith at closing and they essentially ripped us off for a few thousand dollars each.

[27] The objector is disappointed in the amount of the settlement, but that disappointment does not show that the settlement is unfair or unreasonable or that it is not in the best interests of the class members, which is my own conclusion. The objector also has the alternative of opting out of the class and suing in Small Claims Court for a full recovery with the attendant risks and transaction costs.

[28] In my opinion, the settlement is a fair and reasonable one. The case at bar is an example of the *Class Proceedings Act, 1992* working for its intended purposes of providing access to justice, behaviour modification, and judicial economy. It is unlikely that but for a class action that the 400 class members would have obtained access to justice.

[29] I approve the settlement in accordance with the *Class Proceedings Act, 1992*.

## V. FEE APPROVAL

[30] On July 6, 2001, Mr. Sa'd and Class Counsel entered into a retainer agreement that provides for a 25% contingency fee calculated after all expenses including disbursements have been deducted.

[31] The services performed by Class Counsel before this hearing have a value of approximately \$150,000.00 pre-tax, totaling approximately \$170,000.00 in fees inclusive of HST.

[32] Class Counsel is requesting to be paid its contingency fee of 25% of the Settlement Fund as agreed to in the Retainer Agreement inclusive of taxes and disbursements. Its fee request is \$144,500.00 inclusive of tax and disbursements. Thus, the fees requested are less than the value of the services rendered.

[33] Class Counsel will expend additional time and incur additional disbursements in finalizing this proceeding.

[34] Class Counsel is also seeking to have approval of a referral fee of 15% paid out of its fee paid to Carlson & Kociper PC by Class Counsel. This payment will not result in any additional payments from the class.

[35] Mr. Sa'd consents and supports the payment of the fees being requested by Class Counsel. He also consents and supports referral payment from Class Counsel to Carlson & Kociper PC.

[36] The fairness and reasonableness of the fee awarded in respect of class proceedings is to be determined in light of the risk undertaken by the lawyers in conducting the litigation and the degree of success or results achieved: *Maxwell v. MLG Ventures Ltd.* (1996), 30 O.R. (3d) 304 (Gen. Div.); *Windisman v. Toronto College Park Ltd.*, [1996] O.J. No. 2897 (Gen. Div.); *Serwaczek v. Medical Engineering Corp.*, [1996] O.J. No. 3038 (Gen. Div.); *Parsons v. Canadian Red Cross Society* (2000), 49 O.R. (3d) 281 (S.C.J.).

[37] Where the fee arrangements are a part of the settlement, the court must decide whether the fee arrangements are fair and reasonable, and this means that counsel are entitled to a fair fee, which may include a premium for the risk undertaken and the result achieved, but the fees must not bring about a settlement that is in the interests of the lawyers, but not in the best interests of the Class Members as a whole: *Sparvier v. Canada (Attorney General)*, [2006] S.J. No. 752 (Q.B.) at para. 43, aff'd [2007] S.J. No. 145 (C.A.).

[38] Fair and reasonable compensation must be sufficient to provide a real economic incentive to lawyers to take on a class proceeding and to do it well: *Gagne v. Silcorp Ltd.* (1998), 41 O.R. (3d) 417 (C.A.); *Parsons v. Canadian Red Cross Society* (2000), 49 O.R. (3d) 281 (S.C.J.); *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117 (S.C.J.) at paras. 59-61.

[39] Factors relevant in assessing the reasonableness of the fees of Class Counsel include: (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 the fees; (j) the opportunity cost to Class Counsel in the expenditure of time in pursuit of the litigation and settlement: *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117 (S.C.J.) at para. 67; *Endean v. Canadian Red Cross Society*, [2000] B.C.J. No. 1254 (S.C.); *Wamboldt v. Northstar Aerospace (Canada)* [2009] O.J. No. 2583 (S.C.J.) at para. 33.

[40] In my opinion, considering the facts described above and the factors relevant to assessing the reasonableness of Class Counsel's fee request, I am satisfied that Class Counsel's fee request should be approved, and I do so in accordance with the *Class Proceedings Act, 1992*.

#### VI. CONCLUSION

[41] For the above reasons, I certify this action for settlement purposes, approve the settlement, and approve Class Counsel's fee as requested.

[42] Order accordingly



Perell, J.

Released: March 6, 2013

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**SAMIR SA'D**

Plaintiff

- and -

**THE REMINGTON GROUP INC., ROUGE  
RESIDENCES I INC., AND ROUGE  
RESIDENCES II INC.**

Defendants

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**REASONS FOR DECISION**

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Perell, J.

Released: March 6, 2013