CITATION: Lipson v. Cassels Brock & Blackwell LLP. 2023 ONSC 1098
COURT FILE NO.: CV-09-376511-00CP
DATE: 20230214

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	
JEFFREY LIPSON Plaintiff	*David O'Connor* and *J. Adam Dewar* for the Plaintiff
- and –	
CASSELS BROCK & BLACKWELL LLP Defendant	*Rebecca Jones*, and *Jessica Kras* for the Defendant
- and –	
MINTZ & PARTNERS, DELOITTE & TOUCHE LLP, GLENN F. PLOUGHMAN, SHELLEY SHIFMAN, PRENICK LANGER LLP, GARDINER ROBERTS LLP, THE ESTATE OF RONALD J. FARANO, DECEASED, JOHN DOE 1-100, JOHN DOE INC. 1-100, JOHN DOE PARTNERSHIP 1-100 and JOHN DOE LLP 1-100 Third Parties	*Sean Dewart* and *Adrieene Lei* for the Third Parties, Gardiner Roberts LLP and the Estate of Ronald Farano, deceased *Deepshikha Dutt* for the Third Party, Mintz & Partners LLP *Ethan Schiff* for the Third Party, Prenick Langer LLP
Proceeding under the *Class Proceedings Act, 1992*	**HEARD**: January 20, 2023

PERELL, J.

REASONS FOR DECISION

A. Introduction

[1] Pursuant to the *Class Proceedings Act, 1992*,[1] the Representative Plaintiff, Jeffrey Lipson, and Class Counsel, Roy O'Connor LLP, move for settlement and fee approval. The settlement

[1] S.O. 1992, c. 6.

fund is $8.25 million. Class Counsel seeks approval of its contingency fee agreement, which provides for a 25% contingency fee. Class Counsel seeks a Counsel Fee of $2,176,984.46, inclusive of HST and reimbursement of disbursements of $543,860.34. which is inclusive of taxes.

[2] For the reasons that follow, the motions are granted.

B. Facts

1. The Class Members' Claim against Cassels Brock & Blackwell LLP

[3] In 2000, Stephen Elliott and Steven Mintz approached the accounting firm, Mintz & Partners with the idea of a Timeshare Program that would provide tax benefits to participants. Steven Mintz's brother Harley was a partner of the accounting firm. Messrs. Elliot and Mintz's idea was that participants in a Timeshare Program would donate timeshares in a Caribbean Resort to the Athletic Trust of Canada, a Canadian amateur athletic association, along with sufficient cash to discharge the encumbrances against the timeshares. In return for the donations, the Athletic Trust would provide the participants with tax receipts for the charitable donations.

[4] The Timeshare Program was established, and Mintz & Partners established an entity known as Tuscany Marketing Services to oversee the marketing of the program. Many accountants and investment advisers participated in the marketing of the Timeshare Program, including Venturedge Corporation, which was a corporation owned by Gerald Prenick and Morris Langer, the principals of Prenick Langer LLP, another accounting firm and a Third Party to these proceedings.

[5] Messrs. Elliot and Mintz retained Cassels Brock to provide an independent legal opinion about the tax consequences under the *Income Tax Act* of participating in the Timeshare Program. Cassels Brock is a full service law firm carrying on business in Toronto as a limited liability partnership. Lorne Saltman, a tax lawyer and a partner of the firm, prepared the opinion for Canadian Athletic Advisors.

[6] In the following years, Cassels Brock prepared more legal opinions about the Timeshare Program. There are six opinions. The opinions are substantially the same. Using the October 8, 2003 opinion as an example, it is a 26-page, single-spaced, legal opinion divided into nine parts after an introduction. The parts are: (1) Facts; (2) Relevant Provisions of the Tax Act; (3) Meaning of "Gift"; (4) Transfer of Timeshare Weeks to Class A Beneficiaries; (5) Capital Gains; (6) Valuation; (7) General Anti-Avoidance Rule ("GAAR"); (8) Tax Shelter Identification Number; and (9) General Comments.

[7] Cassels Brock's opinion contained numerous qualifications, disclaimers, reservations, caveats, and cautions.

[8] In Mr. Lipson's action, a core allegation against Cassels Brock is that it failed to consider whether Canada Revenue Agency would consider the conveyance of timeshares a gift in accordance with the *Income Tax Act* case law. Mr. Lipson alleges that Cassels Brock breached the standard of care of reasonably competent solicitors when it prepared legal tax opinions for the years 2000 to 2003. The opinions were part of a package available to the Class Members, i.e., the investors in the Timeshare Program.

[9] In December 2002, the law firm Aikins, McCauley & Thorvaldson provided a tax opinion to Canadian Athletic Advisors about whether the opinions set out in the Cassels Brock opinion for the Canada *Income Tax Act* were applicable to the *Manitoba Tax Act*. The firm provided the legal opinion that: "Although we have not independently verified the strength of the arguments raised or the conclusions reached in the Cassels Brock Opinion, given the similarities between the *Federal Tax Act* and the *Manitoba Tax Act*, we know of no reason why similar arguments could not be raised and similar conclusions could not be reached, with the necessary contextual changes, with respect to the *Manitoba Tax Act*."

[10] On behalf of Venturedge, Mr. Prenick retained the late Ronald J. Farano, Q.C., a tax partner at the law firm Gardiner Roberts LLP to provide a second opinion about the Timeshare Program. The opinion written by Mr. Farano stated: "Based upon my understanding of the law as it exists as of this date the [Cassels Brock] Opinion properly reflects the legal situation in an income tax context."

[11] In the fall of 2000, Morris Langer of Prenick Langer LLP, who was Mr. Lipson's accountant, told Mr. Lipson about the Timeshare Program. Mr. Lipson is a wealthy retired businessman living in Toronto, Ontario. Before his retirement, he oversaw his family's retail business, and he was a real estate investor.

[12] Mr. Lipson says that he did not understand the intricacies of the Timeshare Program, and he asked Mr. Langer whether there was a legal opinion to support the tax benefits. Mr. Langer advised him that Cassels Brock had issued a supporting legal opinion. This satisfied Mr. Lipson, who says that he had a high aversion to financial risk, and he decided to participate in the program. Mr. Lipson says that he would not have participated in the Timeshare Program if there had not been a favourable tax opinion from a reputable law firm. Mr. Lipson, however, did not read the Cassels Brock opinion.

[13] In 2000 and in the following years, Mr. Lipson went ahead and participated in the program. After his 2000 donation, he did not put his mind to the Cassels Brock opinion before making more donations. For 2000, he claimed tax credits of $634,352. For 2001, he claimed credits of $1,261,988. For 2002, he claimed credits of $2,085,835. For 2003, he claimed credits of $1,148,879.60.

[14] Approximately 1,000 other persons, the Class Members, invested in the Timeshare Program and received receipts for their purported charitable donations.

[15] In October and November 2004, in terse letters to the participants in the Timeshare Program, Canada Revenue Agency disallowed the charitable donation receipts as a basis for tax credits.

[16] As an explanation for denying the charitable donations Canada Revenue Agency: (a) denied that the Athletic Trust was a validly constituted trust and, therefore, there had not been a valid transfer of timeshares; (b) denied that the donors had acquired legal title to timeshares; (c) denied that the donors had transferred timeshares to the athletic associations; (d) denied that the Athletic Trust was a charitable trust; (e) denied that the donation of the timeshares was a true gift

because it was not given willingly without conditions or without restrictions on the charity; and (f) contended that the reported fair market value of the timeshares was significantly overstated.

[17] With the receipt of the correspondence from Canada Revenue, Mr. Lipson immediately realized that there was a problem, and he sought legal and accounting advice at some expense. In April 2004, Mr. Lipson and many other participants in the Timeshare Program retained Thornsteinssons LLP to represent them in dealing with Canada Revenue with respect to the Timeshare Program.

[18] In January 2006, several of Thornsteinssons' clients brought test cases to challenge the disallowances of the tax receipts.

[19] Also in 2006, Mr. Lipson a filed notice of objection to his reassessments. He claimed that he was entitled to the full amount of the tax credits. These notices were held in abeyance pending the determination of the test cases.

[20] In 2008, Canada Revenue Agency settled the test cases, and it offered to settle with all of the donors. Mr. Lipson settled with Canada Revenue Agency at that time.

[21] In the settlement, Canada Revenue Agency agreed that the cash paid by the donors to discharge the encumbrances against the timeshares constituted a charitable donation entitled to a tax credit.

[22] However, in the settlement, Canada Revenue Agency denied any charitable donation for the alleged fair market value of the donated timeshare.

[23] The majority of the investors in the Timeshare Program accepted the Canada Revenue Agency's offer.

[24] The settlement with Canada Revenue Agency salvaged approximately 47.9% of the investment losses leaving a deficiency of approximately 52.1%.

[25] It is the opinion of the experts retained by Mr. Lipson that the Class Members invested approximately $43.5 million over the years 2000 to 2003. It is the experts' opinion that based on the settlement with the Canada Revenue Agency, the Class Members were able to claim tax credits totaling approximately $21 million on the approximately $44.3 million total donated funds, resulting in the Class Members being net out of pocket approximately $23.3 million.

2. The Experts' Opinions

[26] During the course of the proceedings, numerous expert's reports were exchanged. There were reports from experts opining on whether Cassels Brock met the standard of care of a reasonably competent tax lawyer. There were reports from experts opining on whether Cassels Brock had a conflict of interest when it provided it professed to be independent tax opinion. There were reports from experts opining on the damages, if any, suffered by the investors consequent upon Cassel Brock's alleged professional negligence.

[27] Professor Vern Krishna, a legal scholar in taxation law, provided three reports for Mr.

Lipson. It was his opinion that Cassels Brock failed to analyze central and essential components of the Timeshare Program and that it failed to fully inform participants of the risk of a Canada Revenue assessment and potential denial of the tax credits. He opined that Cassels Brock did not give adequate weight to the risk that the Class Members' donations would not amount to gifts that qualify for a tax credit.

[28] Edward Heakes, a tax specialist, provided two expert's reports for Cassels Brock. Mr. Heakes opined that (a) Cassel Brock's opinions properly set out the risks faced by investors in the Timeshare Program, (b) Cassels Brock met the standard of care of a competent tax lawyer at the time, and (c) Cassels Brock remained appropriately independent in providing its opinions.

[29] Brian Nichols, a tax specialist, provided an expert's report for the Third Party Gardiner Roberts. Mr. Nichols opined that both Cassels Brock's opinions and Mr. Farano's concurring opinion met the standard of care, that the law of charitable gifting changed over the life of the Timeshare Program, and that until 2007, it was possible for a taxpayer to make a gift with a profit element and still claim a tax credit. Disagreeing with Professor Krishna, Mr. Heakes opined that at the time the Timeshare Program was offered to the public, it was possible to make a gift that would qualify for a tax credit. Mr. Heakes disagreed with Professor Krishna's interpretation of the caselaw and Mr. Heakes opined that Professor Krishna's opinion did not reflect the law at the time the Cassels Brock's opinions were provided, but rather was influenced by the benefit of hindsight.

[30] Gavin MacKenzie delivered a report for Mr. Lipson. Mr. MacKenzie, a former Treasurer of the Law Society of Ontario and an author of a leading text on a lawyer's professional responsibilities, opined that Cassels Brock did owe duties to the Class Members and breached those duties by purporting to offer an independent opinion, while simultaneously offering advice about the structure and operation of the Timeshare Program.

[31] Peter Jewett, who had practiced corporate law for 45 years at Torys LLP until retiring at the end of 2017 delivered a report countering Mr. MacKenzie's opinion. Mr. Jewett opined that Cassels Brock acted appropriately in rendering the opinions and did not breach any duties of independence. He also opined that Cassels Brock was not in a conflict of interest and that it owed no duty of care to the Class Members, who were not clients of Cassels Brock.

[32] For the purposes of the mediation, Mr. Lipson obtained an expert report from Errol Soriano a forensic accountant, at KSV Advisory. Mr. Soriano's report was based on the premise that, had the Class Members not made their donations to the Timeshare Program expecting a 30%-plus immediate profit, they would have otherwise invested those funds in some other relatively profitable investment (which was set at 5%). Mr. Soriano calculated the aggregate amount of the Class Members' capital out of pocket losses plus a 5% return on those cash losses. Mr. Soriano calculated the Class Members' out of pocket or cash losses at approximately $23.3 million. On top of that out-of-pocket loss, Mr. Soriano calculated a 5% compound return on the cash losses, which generated approximately $38 million in additional interest/return, given the length of time since the payments were made in the early 2000s.

[33] In response to Mr. Soriano's damages report, Cassels Brock produced a damages report from the financial expert Robert Low. Mr. Low disagreed with Mr. Soriano's theory of the Class Members' damages. Mr. Low opined that as the Program was structured around a charitable gift, Class Members had no expectation of a profit and that their damages totaled $0.00. Mr. Low also

opined that there was no basis to apply a 5% compounding interest rate, or to otherwise deviate from the 1.3% prejudgment interest provided for under the *Courts of Justice Act*. If that rate was applied to what Mr. Soriano calculated as the cash losses, Mr. Low noted that the Class Members' total theoretical damages would amount to a maximum of approximately $27.5 million.

C. Procedural Background

[34] Following the settlement with Canada Revenue Agency, Mr. Lipson brought a proposed class against Cassels Brock in **April 2009**. This action was issued by Mr. Lipson's then counsel Davies, Ward, Phillips & Vineberg LLP.

[35] Mr. Lipson's claim advanced two causes of action: (a) negligence *simpliciter*, based on the allegation that Cassels Brock's opinions were a pre-requisite to the establishment of the Timeshare Program and that the firm did not meet the relevant standard of care; and (b) negligent misrepresentation, based on the allegation that the firm's opinions contained misleading statements as to whether the Timeshare Program would withstand Canada Revenue Agency's challenge.

[36] The class definition is as follows:

> All individuals who applied and were accepted to be beneficiaries of the Athletic Trust in 2000, 2001, 2002 and/or 2003 and received Timeshare Weeks from the Athletic Trust and donated them, together with a cash donation, to one or more of the RCAAAs (the "**Class Members**" or the "**Class**").

[37] In November 2011, there was a two-day certification motion. On **November 14, 2011**, I dismissed Mr. Lipson's claim on the basis that his claim was statute barred. I dismissed the certification motion.[2]

[38] Mr. Lipson appealed. In reasons for decision released on **March 19, 2013**, the Court of Appeal set aside the dismissal of the action and certified the action as a class action.[3] The Court of Appeal found that Cassels Brock's limitation defenses would be addressed at the individual issues phase of the action.

[39] The certified common issues did not include any questions relating to the quantification of Class Members' damages. If the Class Members were successful at the common issues trials, individual issues trials to determine liability and to quantify damages would be necessary.

[40] Cassels Brock issued a Third Party Claim against a number of individuals and entities, alleging that they provided tax, financial or legal advice to Class Members with respect to the Program and claiming contribution and indemnity for any amounts awarded against Cassels Brock in the main action. The Third Parties that remain in the action are: (a) Mintz & Partners LLP; (b) Prenick Langer LLP (now TCH Partners LLP); and (c) Gardiner Roberts LLP and the Estate of Ronald J. Farano.

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[2] *Lipson v. Cassels Brock & Blackwell LLP*, 2011 ONSC 6724.
[3] *Lipson v. Cassels Brock & Blackwell LLP*, 2013 ONCA 165.

[41] The action proceeded to documentary discovery and examinations for discovery.

[42] In 2014, there was a dispute about whether Mr. Lipson should produce the documents and opinions prepared by Thorsteinssons. In reasons for decision released on **October 21, 2014**, I among other things, directed that the Thorsteinssons opinions and related documents be produced.[4]

[43] Mr. Saltman's examinations for discovery commenced on **August 18, 2015**. On the first day of Mr. Saltman's examination, it came to Class Counsel's attention that Cassels Brock was in possession of additional documents regarding its role in the development or design of the Timeshare Program. This information supported an argument that Cassel Brock's opinion may not have been an independent opinion. Mr. Saltman's examination was adjourned to allow the parties to consider and further address that issue.

[44] Following a case management conference, on **February 11, 2016**, Mr. Lipson delivered an Amended Statement of Claim. Cassels Brock and the Third Parties delivered amended pleadings and amended affidavits of documents and productions later that year.

[45] Mr. Saltman's examination for discovery resumed. He was examined over the course of six days between **August of 2015 and October 2016**.

[46] Jeffrey Lipson was examined for discovery on **August 17, 2015**. Answers to undertakings and supplemental answers to undertakings were delivered on October 3, 2017 and May 16, 2018, respectively.

[47] The Third Party Prenick Langer was examined for discovery on **November 15, 2015**. Prenick Langer delivered answers to undertakings in April 2018.

[48] The Third Party Mintz and Partners was examined for discovery on **December 1, 2015** and delivered answers to undertakings in July of 2017.

[49] On **January 8, 2019**, Mr. Saltman delivered answers to Mr. Lipson's follow-up questions.

[50] Given that Mr. Farano is deceased, the examination for discovery of Gardiner Roberts and the Estate of Ronald Farano was conducted in writing. Various answers to the Plaintiff's and Cassels Brock's written interrogations were eventually provided by Gardiner Roberts and the Estate of Ronald Farano between **July 2019** and **November of 2020**.

[51] On **September 6, 2019**, there was a continuation of Mr. Saltman's examination for discovery.

[52] The Parties argued refusals motions on **September 9, 2019**.[5]

[53] On **November 15, 2019**, Mr. Lipson delivered answers to the refused questions.

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[4] *Lipson v. Cassels Brock & Blackwell, LLP*, 2014 ONSC 6106.
[5] *Lipson v. Cassels Brock & Blackwell, LLP*, 2019 ONSC 5483 and *Lipson v. Cassels Brock & Blackwell LLP*, 2019 ONSC 5524

[54] On **May 6, 2020**, there was a continuation of Mr. Lipson's examination for discovery.

[55] On **January 7, 2021**, the action was set down for trial.

[56] On **December 3, 2021**, Justice Darla Wilson scheduled a pre-trial conference for November 2022. She also directed the parties to attend a mediation before June 30, 2011.

[57] The common issues trial was scheduled to proceed as a 30-day trial commencing in late January 2023.

[58] In the summer and fall of 2022, there were mediations and intense settlement negotiations, which are discussed below.

[59] A settlement was reached, and on **November 15, 2022**, I ordered that notice be given to the Class Members of this motion for approval of the settlement and Class Counsel's fee.

D. The Settlement

[60] On **June 21, 2022** and **October 4, 2022**, there were mediation sessions presided by the Honourable Frank Marrocco, retired Associate Chief Justice.

[61] Before the mediation sessions, Thorsteinssons provided Class Counsel with the information and the work product that it used in its dealing with the Canada Revenue Agency on behalf of the participants in the Timeshare Program. The damage estimates in the settlement are based on information collected by Thorsteinssons during that tax court proceeding.

[62] Errol Soriano, Mr. Lipson's damages expert, used the information received from Thorsteinssons to prepare his report. Where no information was available for a Class Member's donation, Mr. Soriano applied an average donation.

[63] After very hard fought negotiations, the parties reached a settlement. The principal terms of the settlement are as follows:

- Cassels Brock pays $8.25 million for the Settlement Fund.
- Cassels Brock receives a release of all claims and potential claims that Class Members may have against it.
- The Settlement Fund will be disbursed for: (a) all legal fees and related disbursements (including taxes); (b) any costs of Davies, Ward, Phillips & Vineberg LLP; (c) the costs of administration and distribution of the Settlement Fund (d) the 10% statutory levy of the Class Proceedings Fund; and (e) compensation to Class Members.
- The compensation paid to Class Members will be paid from the amount of money remaining after deducting the Court-approved legal fees and disbursements (including taxes) as well as the costs of administering and distributing the money to Class Members, from the Settlement Fund.
- The Settlement will be paid out to Class Members in two stages.

- Under the first stage, of Class Members will receive their *pro rata* share of the Net Settlement Fund based on their relative cash contribution to the Program.
- If and to the extent that funds remain one year after the first stage (e.g., if certain cheques from the first stage are not cashed by some Class Members), the remaining funds will be used in phase two to make further payments to those Class Members who actually cashed their cheques under the first phase of the distribution. Any funds remaining after that second distribution will be donated to a charity.

- Calculations of the Class Members' share of the Net Settlement Fund will be based on the information already provided to the Parties by Thorsteinssons.
- Where the parties do not have information regarding a Class Member's participation in the Timeshare Program (approximately 290 Class Members), those Class Members will be asked to provide information confirming the value of their donations.

[64] After reviewing a number of proposals, Class Counsel retained RicePoint Administration Inc. to act as the Administrator of the settlement. RicePoint estimates that administration expenses should range between $90,000 and $100,000.

[65] Class Counsel's opinion is that the benefits of the settlement outweigh the risks of proceeding to a contested common issues trial. Class Counsel believes that the settlement is fair and reasonable, and indeed it believes that it achieved an excellent result given the extraordinarily high litigation risks.

[66] Mr. Lipson, who is not seeking an honourarium, fully supports the settlement.

[67] No objections were received in response to the notice of the settlement and fee approval hearing. Two Class Members wrote in support of the settlement.

[68] Whether the Third Parties (Mintz & Partners LLP, Prenick Langer LLP (now TCH Partners LLP), and Gardiner Roberts LLP and the Estate of Ronald J. Farano) contributed to the settlement was not disclosed to the court.

E. Facts: Class Counsel Fee

[69] This action was issued by Mr. Lipson's former counsel Davies, Ward, Phillips & Vineberg LLP ("Davies"). Davies performed various tasks, including investigating and researching the issues, seeking input from tax experts. It attempted to negotiate with Cassels Brock. Davies issued the claim against Cassels Brock.

[70] Davies had been retained on a fee-for-service retainer and it would not act on a contingency basis. Mr. Lipson and nine other Class Members, referred to as "Funders" in the Retainer Agreement, paid Davies approximately $320,000, inclusive of fees, disbursements, and taxes.

[71] By the summer of 2009, Mr. Lipson and other Funders were not prepared to continue to pay out of their pockets for Davies to prosecute the case and Davies was not prepared to act on a contingency basis. Mr. Lipson made the decision to retain current Class Action counsel, who were prepared to act on a contingency fee basis.

[72] Mr. Lipson contacted Roy O'Connor LLP in the summer of 2009, and it agreed to take carriage of this action on a contingency fee basis. Class Counsel agreed to a 25% contingency fee. The Retainer Agreement was negotiated with Mr. Lipson, who was then taking advice from Davies.

[73] As set out in the Retainer Agreement, Class Counsel agreed, subject to certain conditions, to seek recovery of the fees, disbursements and taxes paid to Davies by the Funders. Class Counsel recognized that Davies had performed valuable work for the Plaintiff and the putative Class, work that Class Counsel would have been required to complete had they been retained from the outset.

[74] Class Counsel incurred disbursements, inclusive of taxes, totaling $543,236.01 in this action. Class Counsel will incur several thousand dollars of additional disbursements throughout the settlement approval process.

[75] In this case, Class Counsel have to date expended in excess of 4,200 hours in time with work in process valued without taxes in excess of $2.4 million.

[76] Class Counsel will have additional work to do to implement the settlement. Class Counsel estimate that that the work will have a value of $150,000.

[77] If this estimated future value of work in process is added to the actual work in progress value to $2.4 million, the value of the work will be in excess $2.55 million and if the requested Counsel Fee is approved, the multiplier value of the settlement is 0.76.

[78] Mr. Lipson was approved for litigation funding by the Class Proceedings Fund. As this action resulted in settlement in favour of the Class, the Fund is, pursuant to s. 10(1) of O. Reg. 771/92, entitled to the repayment of its funded disbursements of $479,290.06 and 10% of the amount of the award or settlement funds payable to the Class Members.

[79] Class Counsel respectfully request that the $130,500 fee component (excluding tax) of the certification costs award and the $43,500 fee component (excluding tax) of the $50,000 certification appeal costs award not be deducted from its approved fee.

F. Settlement Approval

1. Settlement Approval: General Principles

[80] Section 27.1 (1) of the *Class Proceedings Act*, *1992*, provides that a settlement of a class proceeding is not binding unless approved by the court. 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 the class.[6] For present purposes, the relevant provisions of s. 27 are as follows:

[6] *Kidd v. Canada Life Assurance Company*, 2013 ONSC 1868; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 at para. 43 (S.C.J.); *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 at para. 57 (S.C.J.).

Settlement

27.1 (1) A proceeding under this Act may be settled only with the approval of the court.

[…]

(3) A settlement under this section is not binding unless approved by the court.

Effect of settlement

(4) If a proceeding is certified as a class proceeding, a settlement under this section that is approved by the court binds every member of the class or subclass, as the case may be, who has not opted out of the class proceeding, unless the court orders otherwise.

Settlement must be fair and reasonable

(5) The court shall not approve a settlement unless it determines that the settlement is fair, reasonable and in the best interests of the class or subclass members, as the case may be.

Differences not a bar

(6) The court may approve a settlement even if individual class or subclass members, including a representative party, are subject to different settlement terms.

Evidentiary requirements

(7) On a motion for approval of a settlement, the moving party shall make full and frank disclosure of all materials facts, including, in one or more affidavits filed for use on the motion, the party's best information respecting the following matters, which the court shall consider in determining whether to approve the settlement:

1. Evidence as to how the settlement meets the requirements of subsection (5).

2. Any risks associated with continued litigation.

3. The range of possible recoveries in the litigation.

4. The method used for valuation of the settlement.

5. The total number of class or subclass members, as the case may be.

6. A plan for allocating and distributing the settlement funds, including any proposal respecting the appointment of an administrator under subsection (14), and the anticipated costs associated with the distribution.

7. The number of class or subclass members expected to make a claim under the settlement and, of them, the numbers of class or subclass members who are and who are not expected to receive settlement funds.

8. The number of class or subclass members who have objected or are expected to object to the settlement, and the nature or anticipated nature of the objections.

> 9. A plan for giving notice of the settlement to class or subclass members in the event of an order under section 19, and the number of class or subclass members who are expected to obtain the notice.
>
> 10. Any other prescribed information.
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> […]
>
> *Supervisory role of the court*
>
> (13) The court shall supervise the administration and implementation of the settlement.
>
> *Court-appointed administrator*
>
> (14) The court may appoint a person or entity to act as an administrator to administer the distribution of settlement funds.
>
> *Duty of administrator, other person or entity*
>
> (15) An administrator appointed by the court or, if no administrator is appointed, the person or entity who administers the distribution of the settlement funds, shall administer the distribution in a competent and diligent manner.

[81] In determining whether a settlement is reasonable and in the best interests of the class, the following factors may be considered: (a) the likelihood of recovery or likelihood of success; (b) the amount and nature of discovery, evidence or investigation; (c) the proposed settlement terms and conditions; (d) the recommendation and experience of counsel; (e) the future expense and likely duration of the litigation; (f) the number of objectors and nature of objections; (g) the presence of good faith, arm's-length bargaining and the absence of collusion; (h) the information conveying to the court the dynamics of, and the positions taken by, the parties during the negotiations; and (i) the nature of communications by counsel and the representative plaintiff with class members during the litigation.[7]

[82] In determining whether to approve a settlement, the court, without making findings of fact 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.[8] An objective and rational assessment of the pros and cons of the settlement is required.[9]

[83] The case law establishes that a settlement must fall within a zone of reasonableness. Reasonableness allows for a range of possible resolutions and is an objective standard that allows for variation depending upon the subject-matter of the litigation and the nature of the damages for which the settlement is to provide compensation.[10] A settlement does not have to be perfect, nor

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[7] *Kidd v. Canada Life Assurance Company*, 2013 ONSC 1868; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 at para. 45 (S.C.J.); *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 at para. 59 (S.C.J.); *Corless v. KPMG LLP*, [2008] O.J. No. 3092 at para. 38 (S.C.J.).

[8] *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 at para. 10 (S.C.J.).

[9] *Al-Harazi v. Quizno's Canada Restaurant Corp.* (2007), 49 C.P.C. (6th) 191 at para. 23 (Ont. S.C.J.).

[10] *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.); *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 at para. 70 (S.C.J.).

is it necessary for a settlement to treat everybody equally.[11]

[84] Generally speaking, the exercise of determining the fairness and reasonableness of a proposed settlement involves two analytical exercises. The first exercise is to use the factors and compare and contrast the settlement with what would likely be achieved at trial. The court obviously cannot make findings about the actual merits of the Class Members' claims. Rather, the court makes an analysis of the desirability of the certainty and immediate availability of a settlement over the probabilities of failure or of a whole or partial success later at a trial. The court undertakes a risk analysis of the advantages and disadvantages of the settlement over a determination of the merits. The second exercise, which depends on the structure of the settlement, is to use the various factors to examine the fairness and reasonableness of the scheme of distribution under the proposed settlement.

2. Settlement Approval: Analysis and Discussion

[85] In the immediate case, as the above recitation of the facts reveals, all of the criteria used to determine whether a settlement is fair, reasonable and in the best interests of the Class Member, very strongly favour the approval of the settlement.

[86] I approve the settlement as requested.

G. Fee Approval

1. Fee Approval: General Principles

[87] Section 32 (2) of the *Class Proceedings Act, 1992* stipulates that an agreement respecting fees and disbursements between class counsel and a representative plaintiff is not enforceable unless approved by the court. For present purposes, the pertinent provisions of the *Act* are sections 32 and 33 as set out below:

> *Fees and disbursements*
>
> 32 (1) An agreement respecting fees and disbursements between a solicitor and a representative party shall be in writing and shall,
>
> (a) state the terms under which fees and disbursements shall be paid;
>
> (b) give an estimate of the expected fee, whether contingent on success in the class proceeding or not; and
>
> (c) state the method by which payment is to be made, whether by lump sum, salary or otherwise.

[11] *McCarthy v. Canadian Red Cross Society* (2007), 158 ACWS (3d) 12 at para. 17 (Ont. S.C.J.); *Fraser v. Falconbridge Ltd.*, [2002] O.J. No. 2383 at para. 13 (S.C.J.).

Court to approve agreements

(2) An agreement respecting fees and disbursements between a solicitor and a representative party is not enforceable unless approved by the court, on the motion of the solicitor.

Fees must be fair and reasonable

(2.1) The court shall not approve an agreement unless it determines that the fees and disbursements required to be paid under the agreement are fair and reasonable, taking into account,

(a) the results achieved for the class members, including the number of class or subclass members expected to make a claim for monetary relief or settlement funds and, of them, the number of class or subclass members who are and who are not expected to receive monetary relief or settlement funds;

(b) the degree of risk assumed by the solicitor in providing representation;

(c) the proportionality of the fees and disbursements in relation to the amount of any monetary award or settlement funds;

(d) any prescribed matter; and

(e) any other matter the court considers relevant.

Same

(2.2) In considering the degree of risk assumed by the solicitor, the court shall consider,

(a) the likelihood that the court would refuse to certify the proceeding as a class proceeding;

(b) the likelihood that the class proceeding would not be successful;

(c) the existence of any other factor, including any report, investigation, litigation, initiative or funding arrangement, that affected the degree of risk assumed by the solicitor in providing representation; and

(d) any other prescribed matter.

Same

(2.3) In determining whether the fees and disbursements are fair and reasonable, the court may, by way of comparison, consider different methods by which the fees and disbursements could have been structured or determined.

Priority of amounts owed under approved agreement

(3) Amounts owing under an enforceable agreement are a first charge on any settlement funds or monetary award.

[…]

> *Holdback*
>
> (6) The court may determine and specify an amount or portion of the fees and disbursements owing to the solicitor under this section that shall be held back from payment until,
>
> > (a) the report required under subsection 26 (12) or 27.1 (16), as the case may be, has been filed with the court and the court is satisfied that it meets the requirements of that subsection; and
> >
> > (b) the court is satisfied with the distribution of the monetary award or settlement funds in the circumstances, including the number of class or subclass members who made a claim for monetary relief or settlement funds and, of them, the number of class or subclass members who did and who did not receive monetary relief or settlement funds.
>
> *Agreements for payment only in the event of success*
>
> 33 (1) A solicitor and a representative party may enter into a written agreement providing for payment of fees and disbursements only in the event of success in a class proceeding.

[88] 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 lawyer in conducting the litigation and the degree of success or result achieved.[12] The actual take-up rate as a measure of the success of the settlement is a relevant factor in determining an appropriate counsel fee.[13]

[89] 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; and (j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.[14]

[90] The risks of a class proceeding include all of liability risk, recovery risk, and the risk that the action will not be certified as a class proceeding.[15]

[91] Fair and reasonable compensation must be sufficient to provide a real economic incentive

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[12] *Smith v. National Money Mart*, 2010 ONSC 1334 at paras. 19-20, var'd 2011 ONCA 233; *Fischer v. I.G. Investment Management Ltd.*, [2010] O.J. No. 5649 at para. 25 (S.C.J.); *Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374 at para. 13 (S.C.J.).
[13] *Lavier v. MyTravel Canada Holidays Inc*., 2013 ONCA 92.
[14] *Smith v. National Money Mart*, 2010 ONSC 1334, var'd 2011 ONCA 233; *Fischer v. I.G. Investment Management Ltd.*, [2010] O.J. No. 5649 at para. 28 (S.C.J.).
[15] *Endean v. Canadian Red Cross Society*, 2000 BCSC 971 at paras. 28 and 35; *Gagne v. Silcorp Ltd.*, [1998] O.J. No. 4182 t para. 17 (C.A.).

to lawyers to take on a class proceeding and to do it well.[16]

[92] Accepting that Class Counsel should be rewarded for taking on the risk of achieving access to justice for the Class Members, they are not to be rewarded simply for taking on risk divorced of what they actually achieved.[17] Placing importance on providing fair and reasonable compensation to Class Counsel and providing incentives to lawyers to undertake class actions does not mean that the court should ignore the other factors that are relevant to the determination of a reasonable fee.[18] The court must consider all the factors and then ask, as a matter of judgment, whether the fee fixed by the agreement is reasonable and maintains the integrity of the profession.[19]

2. Fee Approval: Analysis and Discussion

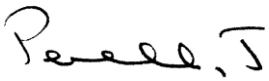
[93] In the immediate case, as the above recitation of the facts reveals, all of the criteria used to determine whether a Counsel Fee should be approved very strongly favour the approval of the contingency fee agreement and Class Counsel's fee.

[94] Although there was a contingency fee agreement, practically speaking, Class Counsel has recovered on a fee for service rendered basis. Class Counsel more than earned their fee and should be commended for their hard work and diligence. Although the Class Proceedings Fund mitigated the risk of an adverse costs award, from Class Counsel's perspective, this action was very high risk litigation. The defences raised by Cassels Brock to a finding of liability and to any meaningful quantum of damages were formidable. Both on a class wide basis at the common issues trial and at any individual issues, which are necessary to perfect the causes of action for negligent misrepresentation and to address the limitation period defences, the prospects of success were indeterminate for both sides. The settlement in the immediate case was a fair and reasonable one for both sides. The lawyers for both sides should be commended for their fine work and I approve Class Counsel's fee request.

[95] I also approve the requests with respect to Davies's costs and with respect to the costs awards not being deducted from the Class Counsel's fee.

H. Conclusion

[96] Orders to go accordingly.



Perell, J.

Released: Febuary 14, 2023

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[16] *Sayers v. Shaw Cablesystems Ltd.*, 2011 ONSC 962 at para. 37; *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117 at paras. 59-61(S.C.J.); *Parsons v. Canadian Red Cross Society* (2000), 49 O.R. (3d) 281 (S.C.J.); *Gagne v. Silcorp Ltd*. (1998), 41 O.R. (3d) 417 (C.A.).

[17] *Welsh v. Ontario*, 2018 ONSC 3217 at para. 103.

[18] *Smith Estate v. National Money Mart Co*., 2011 ONCA 233 at para. 92.

[19] *Commonwealth Investors Syndicate Ltd. v. Laxton*, [1994] B.C.J. No. 1690 at para. 47 (C.A.).

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DATE: 20230214

ONTARIO
SUPERIOR COURT OF JUSTICE
BETWEEN:

JEFFREY LIPSON

Plaintiff

- and –

CASSELS BROCK & BLACKWELL LLP

Defendant

- and –

MINTZ & PARTNERS, DELOITTE & TOUCHE LLP, GLENN F. PLOUGHMAN, SHELLEY SHIFMAN, PRENICK LANGER LLP, GARDINER ROBERTS LLP, THE ESTATE OF RONALD J. FARANO, DECEASED, JOHN DOE 1-100, JOHN DOE INC. 1-100, JOHN DOE PARTNERSHIP 1-100 and JOHN DOE LLP 1-100

Third Parties

REASONS FOR DECISION

PERELL J.

Released: February 14, 2023