

CITATION: Wiggins v. Mattel, 2011 ONSC 2964
COURT FILE NO.: CV-07-00003100-CP
DATE: 20110512

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: LISA WIGGINS and GILLES ROBINEAU
Plaintiffs
– and –
MATTEL CANADA INC., MATTEL, INC. and FISHER-PRICE INC.
Defendants

BEFORE: K. van Rensburg J.

COUNSEL: Nicholas P. Robinson, Counsel for the Plaintiffs

D. Michael Brown and Nicholas Saint-Martin,
Counsel for the Defendants

HEARD: April 29, 2011

ENDORSEMENT

Introduction

[1] The plaintiffs move for certification and approval of a settlement in a proposed class proceeding, and for approval of the fees and disbursements of class counsel and incentive payments to the representative plaintiffs. The motions were heard on April 29, 2011, and I indicated that day that the orders proposed by the parties would be granted, with reasons to follow. These are the reasons for the decision in respect of each motion.

The Class Action Proceedings in Canada and the U.S.

[2] The Ontario action was commenced as a proposed class proceeding by the plaintiff Lisa Wiggins on September 28, 2007. (Ms Wiggins has since moved to Alberta, and an order was granted on consent on January 10, 2011, adding Ontario resident Gilles

Robineau as a plaintiff). The action relates to recalls in 2006 and 2007 by Mattel Inc. and its subsidiaries Mattel Canada Inc. and Fisher-Price Inc. (together, “Mattel” or the “Defendants”), of certain toys containing excessive amounts of lead or small magnets that might become loose (the “Recalled Toys”). The statement of claim seeks damages for negligence, breach of contract, breach of express or implied warranty and failure to warn, damages for payments for lead testing of children exposed to the Recalled Toys, restitution of the cost of replacement of the Recalled Toys and the disgorgement by Mattel of all benefits accruing from the sale of the Recalled Toys.

[3] Class action proceedings were also commenced by the Merchant Law Group (“MLG” or the “Plaintiffs’ Counsel”) against Mattel in relation to the Recalled Toys by statements of claim issued in British Columbia, Alberta, Saskatchewan, Manitoba, Québec and New Brunswick. The proceedings in the Canadian courts essentially seek relief on behalf of Canadian resident consumers.

[4] Following the product recalls and prior to the commencement of proceedings in Canada, a number of class actions were commenced in the U.S. Those actions were eventually consolidated via the U.S. multi-district litigation process in the United States District Court for the Central District of California (the “U.S. Action”). The U.S. Action was actively litigated during 2008, and in early 2009 the plaintiffs and Mattel Inc. entered into settlement discussions.

The Settlement Agreements

[5] A settlement agreement dated October 12, 2009 was signed, addressing the claims of U.S. consumers. The U.S. settlement received preliminary court approval on October 23, 2009, and final approval on March 24, 2010.

[6] The settlement of the Canadian proceedings was negotiated commencing in the spring of 2010. By August 2010 the parties reached an agreement in principle to settle the Canadian class actions on essentially the same terms as the U.S. settlement with certain modifications (the material differences are as noted below).

[7] The settlement agreement dated February 9, 2011 (the “Settlement Agreement”) provides for the resolution of all seven proceedings commenced in the Canadian courts, either through certification and settlement approval (by the courts of Ontario, British Columbia and Québec) or by way of consent dismissal (in Alberta, Saskatchewan, Manitoba and New Brunswick). Approval hearings are scheduled in Victoria, B.C. on May 16th and in Montréal, Québec on May 31st.

[8] The Settlement Agreement provides for the following payments:

- (a) Settlement class members who returned Recalled Toys pursuant to the 2006 or 2007 recalls are entitled to receive a cheque for: (i) 50% of the total amount of the recall vouchers sent to the settlement class member in connection with the recalls; or (ii) \$10, whichever is greater;
- (b) Settlement class members who are still in possession of certain Recalled Toys may return those Recalled Toys in exchange for a cheque or voucher (at their election) in the amount of the recall price of such returned Recalled Toys;
- (c) Settlement class members who no longer have possession of Recalled Toys but who have receipts or other documentation demonstrating their purchase of such Recalled Toys are entitled to receive a cheque or voucher in the amount of the price actually paid for the Recalled Toys;

- (d) Settlement class members who are no longer in possession of Recalled Toys and who have no proof of purchase are entitled to receive a voucher in the amount of the recall price for not more than three Recalled Toys per person and/or address, upon submitting a declaration that the settlement class member had purchased or acquired such Recalled Toy(s). Claims in this category are capped at a total of \$1,000,000. In the event that claims in this category exceed the cap, vouchers sent to settlement class members under this category will be reduced *pro rata* to a total of \$1,000,000;
- (e) Settlement class members who purchased certain Recalled Toys for which Mattel offered a replacement remedy under the recalls are entitled to receive a cheque in the amount of \$4.00 per Recalled Toy with a limit of three Recalled Toys per person and/or address as well as a replacement part to the extent such replacement part is still available in Mattel's inventory;
- (f) Settlement class members who had a minor child tested for lead as a result of such child's exposure to a Recalled Toy(s) within six weeks of the announcement of the recall of such Recalled Toy(s) are entitled to receive reimbursement for the actual out-of-pocket and costs of such lead testing. Claims in this category are capped at a total of \$60,000. In the event that claims in this category exceed the cap, reimbursements paid to settlement class members under this category will be reduced *pro rata* to a total of \$60,000;
- (g) Mattel agrees to make a *cy près* contribution to charity on behalf of designated Canadian children's hospitals in the amount of \$25,000;

- (h) Mattel agrees to pay all claims administration expenses and all notice expenses;
- (i) Mattel agrees to pay class counsel fees (including disbursements) up to a total of \$350,000 in respect of all of the Canadian proceedings, subject to court approval; and
- (j) Mattel agrees to pay up to \$500 as an incentive payment to each of the plaintiffs in the Canadian actions, subject to court approval.

[9] The Settlement Agreement provides for a release by class members for claims in relation to the Recalled Toys, but excludes from released claims any individual claim for personal injury.

[10] The Settlement Agreement provides for the settlement to be administered by Gilardi & Co., an arm's length company. According to the information contained in affidavits provided to this court, Gilardi & Co. has extensive experience administering class action settlements, including the settlement in the U.S. action. The court was advised that the final cheques in completion of the U.S. settlement went out during the week of April 18th. The proposed opt-out deadline in Canada is 90 days after notice is given, with the claims deadline 120 after notice.

[11] The Canadian settlement is identical to the U.S. settlement except that the amounts are payable in Canadian funds and not U.S. funds, the total caps with respect to particular categories of claims for the Canadian settlement are 10% of the corresponding U.S. caps (to reflect the smaller Canadian population and correspondingly low Mattel sales of Recalled Toys), and the total *cy prè*s contribution is lower. The amount agreed to as an upper limit on counsel fees is less, due to the fact that the U.S. proceedings were more advanced than the Canadian proceedings before settlement occurred, and the fact

that the total value of the settlement in the U.S. was expected to be substantially greater than the total value of the Canadian settlement.

[12] Another important difference is the absence of injunctive relief in the Canadian settlement. The U.S. settlement specifically required Mattel to implement and maintain a Quality Assurance System with respect to the testing of “children’s products” (as that term is defined in section 3(a) of the *Consumer Product Safety Act*, 15 U.S.C., section 2052(a)(16) and as amended by section 235 of the *Consumer Product Safety Improvement Act*). No injunctive relief was sought in the Canadian proceedings. This court was advised that the Quality Assurance System Mattel put in place following the recalls and as mandated by the U.S. settlement, applies to Mattel’s sales in Canada of children’s products manufactured by Mattel or for Mattel by a third party manufacturer. In these circumstances, Plaintiffs’ counsel were satisfied that it was unnecessary to provide for injunctive relief as part of the Canadian settlement.

[13] The court was informed that the rationale for settlement in the U.S. as well as the settlement of the Canadian proceedings is to provide class members full financial compensation for their economic losses arising out of the purchase of defective toys. The categories of claimants includes persons who participated in the product recalls, and received vouchers, as well as those who did not participate whether or not they retained the toys or proof of purchase of the toys. The threshold for making claims is very low, reflecting the realities of consumer conduct, for example, in not retaining receipts or having destroyed toys that were considered hazardous.

[14] Anticipated payments to settlement class members who made claims under the original product recalls (10,873 Canadian consumers in all) have been calculated by Mattel at \$311,000. The Defendants have contact information for such purchasers. All such consumers will be settlement class members and will be sent cheques, unless they

opt out of the proceedings. Cheques that are undeliverable will be added to the *cy près* distribution. The overall value of the settlement, including amounts expected to be paid to class counsel and the representative plaintiffs is estimated at \$1 to \$1.5 million. Based on the U.S. experience (where payments to the first category of claimants represented about one half of all payments under the settlement), amounts paid to class members is expected to be in the range of \$600-700,000.

Class Action Certification

[15] The plaintiffs propose that the Ontario Settlement Class be defined for the purpose of certification as follows:

All persons in Canada, except Excluded Persons and Persons who are members of the Québec Settlement Class or the B.C. Settlement Class, who:

- (i) purchased or acquired (including by gift) a new Recalled Toy for or on behalf of themselves or a minor child over whom they have custody and control as a parent or guardian, or to be given as a gift to another Person; or
- (ii) are the parent or guardian of a minor child who purchased or acquired (including by gift) a new Recalled Toy;

“Excluded Persons” for the purpose of the Ontario Settlement Class means:

- (a) all persons who purchased or acquired recalled toys for resale; and
- (b) all defendants and their affiliated entities, legal representatives, successors and assigns.

[16] The proposed class for certification in Ontario includes Ontario consumers, as well as consumers from all other provinces and territories of Canada, except for Québec and B.C.

[17] The requirements for certification need not be applied as rigorously in the settlement context as they are in the litigation context: *Hurst v. Berkshire Securities Inc.*, [2006] O.J. No. 3647 (S.C.J.); *Gariepy v. Shell Oil Co.* [2002] O.J. No. 4022 (S.C.J.). The settlement context will affect the question whether the requirements for certification are satisfied: *Bona Foods Ltd. v. Ajinomoto U.S.A., Inc.* [2004] O.J. No. 908(S.C.J.).

[18] I am satisfied that the Plaintiffs' Counsel have established the necessary requirements for certification under section 5(1) of the *Class Proceedings Act, 1992* (the "CPA"). Ontario courts have routinely certified product liability class actions both for the purposes of settlement and on a contested basis: *Whiting v. Menu Foods Operating Limited Partnership*, [2007] O.J. No. 3996 (S.C.J.); *Heward v. Eli Lilly & Co.*, [2007] O.J. No. 404 ; aff'd [2008] O.J. No. 2610 (Div. Ct.); *Serhan v. Johnson and Johnson*, [2004] 72 O.R. (3d) 296 (S.C.J.); aff'd (2006), 85 O.R. (3d) 665 (Div. Ct.).

[19] The statement of claim discloses a cause of action. This is a claim in negligence and breach of warranty against a manufacturer for an alleged product defect. There is an identifiable class in which all settlement class members have an interest in the resolution of a proposed common issue. The proposed class definition is set out in objective terms, such that membership in the class proceeding is readily ascertainable. The issue "Were the Defendants, or any of them, negligent in the manufacture, distribution, sale and/or recall of the Recalled Toys?" is appropriate as a common issue. A class proceeding, together with the proposed settlement, is the preferable procedure as it provides an efficient and expeditious plan to resolve the claims of the class members, the prosecution of which would otherwise be time-consuming and uneconomical for individual litigants.

Finally, there is an adequate representative plaintiff, with no apparent conflict of interest, and the settlement provides a workable plan.

[20] Accordingly, the Ontario action is certified as a class proceeding for the purpose of implementing the settlement.

Settlement Approval

[21] Following hearings in this court and before the courts in British Columbia and Québec approving the Hearing Notice and the Dissemination Plan for the Hearing Notice, notice of the hearings for court approval of the Canadian settlement was published in six newspapers across Canada on April 8, 2011. Since the hearing notice was published Plaintiffs' Counsel has received no objections from members of the settlement class and no information from such persons that they intend to object to the settlement.

[22] Plaintiffs' Counsel adverted to a number of risks that existed in the action, including the risk that the court would not certify the proceedings as class proceedings (in part because of the breadth of claims in the original statement of claim), the risk that certification of the action on a national basis might be refused, the risk that the plaintiffs could not prove liability in respect of all of the Recalled Toys, the risk that the plaintiffs could not prove their damages at trial or that damages would be assessed at a nominal level, and the length of time that would be required to bring the proceedings to their conclusion, including the likelihood of appeals in one or more jurisdictions.

[23] I am satisfied that the proposed settlement is fair, reasonable and in the best interests of the settlement class. An important feature of the settlement is that it effectively provides full compensation to settlement class members for the purchase price of Recalled Toys, as well as reimbursement of the cost of lead testing. Further, the Defendants are obliged to cover all costs associated with the claims administration

process as well as the costs of all notices to the class. The amount sought for class counsel fees is on the basis that such fees will be payable without any reduction of the amount payable to class members. Further, the Settlement Agreement does not provide for the release of any personal injury claims, which can be pursued through individual actions.

[24] The settlement is accordingly approved under s. 29 of the CPA.

Approval of Counsel Fees and Plaintiff Payments

[25] By amended notice of motion the Plaintiffs' Counsel seek court approval of the Plaintiffs' counsel fee of \$350,000 and payment of an incentive payment of \$500 to six representative plaintiffs in the Alberta, Saskatchewan, Manitoba, Ontario and New Brunswick actions. Consistent with the terms of the Settlement Agreement, the motion was not opposed by the Defendants.

[26] The Affidavit of Jason Zushman, a lawyer with MLG in Winnipeg, deposes to the work performed by that firm in commencing and pursuing the Canadian actions and in negotiating the settlement. By the time the Settlement Agreement was signed, the Canadian proceedings were the furthest advanced in the province of Saskatchewan, where motion materials and a litigation plan had been filed and the certification hearing had been scheduled.

[27] MLG has extensive experience handling class action lawsuits, including consumer products class actions. As of April 18, 2011, the firm had billed time of 421.21 hours on the Mattel class action file, at an average hourly rate of \$318.10. An additional 100 to 150 hours is estimated to complete MLG's involvement in the file. Disbursements are estimated at \$10,000. Overall billable time to completion of the matter is estimated to be in the range of \$200,000.

[28] The counsel fee sought is inclusive of disbursements and all future attendances that will be required to complete this matter, including any involvement of the firm during the claims administration process. The fee covers the proceedings in all of the Canadian jurisdictions.

[29] The lump sum fee that has been negotiated as a maximum fee under the Settlement Agreement and in respect of which court approval sought is approximately 1.75 times the actual value of the work performed.

[30] I am satisfied that the fee is fair and reasonable and it is hereby approved by the court. The fee was negotiated arm's length and is over and above the amounts that are being paid to class members, who are receiving full compensation for their actual losses. As such, there is no question of any direct or indirect erosion of the benefit of the settlement by the amount of fees payable to class counsel.

[31] The incentive awards to the representative plaintiffs are also reasonable taking into account the information provided in their individual affidavits as to the assistance they have provided in advancing the litigation and reviewing and approving the settlement. The incentive payments "represent a modest award...in recognition of the effort expended on behalf of the class members [that] is consistent with restitutionary principles and recognition of the principle of *quantum meruit*": *Parsons v. Coast Capital Savings Credit Union*, [2010] B.C.J. No. 1184 (B.C.S.C.).

[32] The fees and disbursements of Plaintiff's Counsel and the incentive payments to the representative plaintiffs are hereby approved as per the draft order which I have signed.

K. van Rensburg J.

DATE: May 12, 2011

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