QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2010 SKQB 437**

Date: **2010 11 19**
Docket: Q.B. No. 1917 of 2009
Judicial Centre: Regina

BETWEEN:

DONNA DRIEDIGER

PLAINTIFF

- and -

ASHLEY FURNITURE INDUSTRIES INC. AND ASHLEY HOMESTORES, LTD.

DEFENDANTS

Counsel:

E.F. Anthony Merchant, Q.C. and Nicholas P. Robinson — for the plaintiff, Donna Driediger

Robert W. Leurer, Q.C. — for Ashley Furniture Industries Inc. and Ashley HomeStores, Ltd.

JUDGMENT — LAING C.J.Q.B.
November 19, 2010

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[1] On November 8, 2010, I made a final judgment and order approving the settlement of this action on terms which implement the settlement agreement entered into between the parties effective June 24, 2010. The application for approval was brought jointly by both parties. I indicated at the time reasons would follow.

BACKGROUND

[2] The action was commenced as a proposed class action to recover damages from the defendants as a result of a failed marketing promotion. During the period from September 1, 2008 to October 30, 2008, consumers who purchased products from an

Ashley HomeStore in Canada in a qualifying amount were entitled to participate in a gas redemption program. At the time of purchase, the consumers were provided with a gas redemption voucher entitling them to up to $500 in gas or merchandise from any participating gas station brand of their choice. The voucher required the person to register their gas redemption voucher on line or by mail with a third party who administered the program. Once registered, the person could submit $100 in receipts for gas or merchandise from a participating gas station each month up to a maximum of 20 months, and would receive back a $25 gift card from that gas station brand which could be used at any such brand station.

[3] The third party administering the redemption program was located in the United States, and went into receivership before any of the Ashley customers in Canada received a benefit from the gas redemption program.

[4] A similar class action to this one was earlier commenced in the United States of America. The United States action was settled on identical monetary terms to this one, and was judicially approved in a final judgment and order by a judge of the circuit court of Cook County, Illinois, on February 11, 2010.

[5] The settlement approved in Illinois and by me on November 8, 2010, provided as follows:

> 5. **THIS COURT ORDERS** that the Settlement Agreement is incorporated by reference into this Order, except as otherwise amended by this Order, and the Settlement Benefits for each Settlement Class member shall include:
>
> a) an Ashley Preferred Customer Card good for twenty percent (20%) off on purchases of Ashley Furniture products from an Ashley HomeStore for a two hundred ten (210) day period beginning on the date provided thereon, which shall be

> approximately ten days after the card is mailed or otherwise transmitted to the Settlement Class Member. The total of such discounts shall not exceed Five Hundred Dollars ($500.00) (USD) and is subject to other restrictions as set forth in the Settlement Agreement;
>
> b) Class Members who submit to the Claims Administrator the Gas Voucher Form issued on behalf of Ashley HomeStores in connection with the Gas Redemption Program, or other evidence demonstrating a good faith attempt to secure a Gas Voucher Form, shall receive the sum of One Hundred Fifty Dollars ($150.00) (USD).

Other terms of the order will be touched on later herein.

[6] On September 3, 2010, I had conditionally approved the certification of the class on the basis the action met the criteria set out in s. 6 of *The Class Actions Act*, S.S. 2001, c. C-12.01 ("the Act"). In the same order I also conditionally approved the settlement arrived at between the parties, with the requirement that a notice be sent to class members advising class members of the terms of the settlement, their right to object to the settlement, their right to opt out of the class action prior to a specified date, and the date of a fairness hearing, which took place on November 8, 2010. At the hearing on November 8, 2010, the claims administrator filed an affidavit indicating that it had sent out 2,898 notice packets to class members identified through Ashley HomeStores' point of sale records. One hundred and fifty-three notice packages were returned as undeliverable. Additional research was conducted on these 153 and new addresses were obtained for 51 of the class members from those returned. Two written objections from class members were received.

[7] Both of the objections took issue with the fact that apart from the $150 cash payment for those who qualified, class members would have to spend an additional $1,750 at an Ashley HomeStore to get the benefit of the 20% discount for the remaining $350 owed. The objectors took the position that a 20% discount off full retail price was

not costing Ashley anything, and would in fact result in a hike in sales revenue. They also took the position that Ashley should honour the original promotion, which was the incentive which caused them to purchase the furniture in the first place.

THE LAW

[8] Section 38 of the Act states a class action may be settled, discontinued or abandoned only with the approval of the court, and on the terms the court considers appropriate. However, a class action is defined in s. 2 of the Act as one which has been certified. The settlement in this matter was arrived at prior to certification. Counsel out of abundant caution in this matter, and others, have been requesting court approval for pre-certification settlements and discontinuances. The court has addressed such pre-certification settlement or discontinuance applications pursuant to its inherent jurisdiction.

[9] The Ontario *Class Proceedings Act, 1992*, S.O. 1992, c. 6 in s. 29 requires court approval for discontinuances, abandonment, and settlement of class actions for any proceedings commenced under the Act, whether certified or not. The section states:

> **Discontinuance, abandonment and settlement**
> 29.(1) A proceeding commenced under this Act and a proceeding certified as a class proceeding under this Act may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate.
>
> **Settlement without court approval not binding**
> (2) A settlement of a class proceeding is not binding unless approved by the court.
>
> **Effect of settlement**
> (3) A settlement of a class proceeding that is approved by the court binds all class members.

[10] It would be preferable if the Act was amended to require court approval for settlements or discontinuances prior to certification as well. The considerations to be taken into account by a court when asked to approve a settlement or discontinuance subsequent to certification would appear to be equally applicable to a pre-certification settlement. Early settlement is always to be encouraged and there is no principled reason for requiring court approval based on the stage of proceedings reached. In most cases class members will be equally affected by a pre-certification settlement, as a post-certification one.

[11] The case law has established that to achieve court approval of a settlement, the settlement must be fair, reasonable, and in the best interests of those affected by it. The court is concerned with the interests of the class as a whole rather than the demands of a particular class member (*vide: Sawatzky v. Société Chirurgicale Instrumentarium Inc.* (1999), 71 B.C.L.R. (3d) 51, [1999] B.C.J. No. 1814 (S.C.) (QL)). As noted per Winkler J., as he then was, in *Parsons v. Canadian Red Cross Society* (1999), 40 C.P.C. (4th) 151, [1999] O.J. No. 3572 (S.C.J.) (QL) at para. 69:

> 69 In the context of a class proceeding, this requires the court to determine whether the settlement is fair, reasonable and in the best interests of the class as a whole, not whether it meets the demands of a particular member. As this court stated in *Ontario New Home Warranty Program v. Chevron Chemical Co.* (June 17, 1999), Doc. 22487/96 (Ont. S.C.J.) at para. 89:
>
> > The exercise of settlement approval does not lead the court to a dissection of the settlement with an eye to perfection in every aspect. Rather, the settlement must fall within a zone or range of reasonableness.

[12] Sharpe J., as he then was, in *Dabbs v. Sun Life Assurance Co. of Canada* (1998), 40 O.R. (3d) 429 (Ont. Gen. Div.), aff'd (1998), 41 O.R. (3d) 97 (Ont. C.A.), leave to appeal to S.C.C. dismissed October 22, 1998 [reported (1998), 235 N.R. 390

(note) (S.C.C.)] (*Dabbs No. 2*) noted at para. 30, a class action settlement will affect a large number of individuals who are not before the court, and the court is required to scrutinize the proposed settlement closely to ensure that it does not "sell short the potential rights of those unrepresented parties". He stated:

> 30 ... I agree with the thrust of Professor Watson's comments in "Is the Price Still Right? Class Proceedings in Ontario", a paper delivered at a CIAJ Conference in Toronto, October, 1997, that class action settlements "must be seriously scrutinized by judges" and that they should be "viewed with some suspicion". On the other hand, all settlements are the product of compromise and a process of give and take and settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and costs of litigation.

[13] In *Jeffery v. Nortel Networks Corp.*, 2007 BCSC 69, 68 B.C.L.R. (4th) 317, Groberman J. at para. 18 noted the factors to be considered in approving a class proceeding settlement are now well established. He went on to recite them as follows:

> 1. Likelihood of recovery or likelihood of success;
> 2. Amount and nature of discovery, evidence or investigation;
> 3. Settlement terms and conditions;
> 4. Recommendations and experience of counsel;
> 5. Future expense and likely duration of litigation;
> 6. Recommendations of neutral parties, if any;
> 7. Number of objectors and nature of objections; and
> 8. The presence of arms-length bargaining and the absence of collusion.

At paras. 19 and 20, Groberman J. went on to note:

> 19 In *Fakhri v. Alfalfa's Canada Inc*., 2005 BCSC 1123, 20 C.P.C. (6th) 70 (B.C. S.C.) at para. 8, Gerow J. added two additional factors to this list:
>
> > 9. degree and nature of communications by counsel and the representative plaintiffs with class members during litigation; [and]
> >
> > 10. information conveying to the court the dynamics of, and the positions taken by the parties during the negotiation.
>
> 20 In *Reid v. Ford Motor Co.*, 2006 BCSC 1454 (B.C. S.C.), at paragraph 11, Gerow J. produced a slightly different list, this time adding the following as a factor:
>
> > 11. if counsel fees were negotiated in the settlement, and if so, how big a factor are they; ...

At para. 28, Groberman J. summarized the foregoing factors as follows:

> 28 In summary, then, the court must consider four broad questions before approving the settlement of a class actions:
>
> > • Has counsel of sufficient experience and ability undertaken sufficient investigations to satisfy the court that the settlement is based on a proper analysis of the claim?
> >
> > • Is there any reason to believe that collusion or extraneous considerations have influenced negotiations such that an inappropriate settlement may have been reached?
> >
> > • On a cost/benefit analysis, are the plaintiffs well-served by accepting the settlement rather than proceeding with the litigation? and
> >
> > • Has sufficient information been provided to the members of the class represented by representative plaintiffs, and, if so, are they generally favourably disposed to the settlement

ANALYSIS

[14] In this matter, the parties entered into a settlement agreement that largely duplicated an earlier settlement agreement arrived at in a United States action brought as a class action against the same Ashley defendants on the same failed promotion. The

parties also relied on the judgment from the United States action to satisfy this court that the terms of the settlement in the United States met the criteria set out in the foregoing. The plaintiff's position is that as nothing has arisen from class members following their receipt of notice of the preliminary order to suggest the findings on the various settlement criteria made in the United States action were erroneous, this court should also accept the criteria there found to be satisfied based on the evidence led at the United States hearing.

[15] In the United States action Judge Epstein in his final judgment and order found as follows:

> **9. Likelihood of recovery at trial compared to the settlement agreement.** The parties have demonstrated that there would be substantial risks and uncertainties for all parties if the case were to go to trial. Ashley would vigorously defend the action, and the Class Members face a very real risk of not prevailing with regard to the merits. In contrast, under the settlement, the Class Members will receive benefits entitling them to the Settlement Benefits, which will compensate them for Ashley's alleged conduct with respect to the Gas Promotion Program. In addition, they will also benefit prospectively from Ashley's cessation of the Gas Redemption Program.
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> **10. Complexity, expense and duration of litigation.** The resolution of this case had the potential to be very complex given the individualized nature of the proof required to establish each Class Member's claims and damages. For all parties concerned, settlement is a desirable alternative.
>
> **11. Judgment of counsel.** The parties exchanged information during their negotiation process. The settlement was reached after months of arm's-length negotiation.
>
> **12. Class counsel is experienced in class action matters.** The settlement manifests no evidence of bias, collusion, or coercion in favor of any party or subgroup of Class Members. The judgment of experienced counsel for both parties is that the settlement should be approved. The opinions of counsel support the Court's finding that the settlement is fair and reasonable.
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> **13. Stage of the proceeding.** The proceedings to date provide an adequate basis for an informed settlement. By approving the settlement, the parties and the Court will be spared the massive amount

> of work yet to be done to resolve the litigation — including the litigation of class certification and the merits of the dispute.
>
> **14. Lack of opposition.** The Court preliminarily approved the settlement and no intervening events have occurred that would cause the Court to reconsider that preliminary approval. Eleven class members elected to opt out of the settlement. There were 117 objectors.
>
> **15. Other factors — arm's length negotiations.** The settlement is the result of lengthy, adversarial, arm's-length negotiations. The parties settled only after engaging in vigorous and comprehensive litigation and negotiations. The Court finds that the settlement was negotiated without collusion.

The foregoing findings address the four broad questions above summarized by Groberman J.

[16] In this action, counsel for both parties have sufficient experience and ability to have properly analysed the claim. There is no reason to believe collusion or extraneous considerations entered into counsels' settlement of the Canadian action on the same basis as the United States action. The cost benefit analysis conducted by Epstein J. appears equally applicable to this action. The notice following the preliminary order provided class members with sufficient information to analyse whether they wished to remain a member of the class, and also to object to the terms of settlement. In the end result, there were two objections only as set out above, and no member of the class opted out of the class.

[17] The settlement benefits to members of the class are real. It is reasonable that the $150 cash payment only be payable to those persons in the class who can demonstrate they attempted to secure a gas voucher from the third party administrator, because only those persons would have enjoyed the benefit of the promotion in the first instance. All class members, whether they ever attempted to secure a gas voucher or not, will receive the benefit of the $500 value preferred customer card, which admittedly will

require class members to expend money in order to realize this value. The fact that the card is transferable without restriction gives it a value which the class member may receive from a third party. As noted per Lax J. in *Mortillaro v. Cash Money Cheque Cashing Inc*. (2009), 73 C.P.C. (6th) 369 (Ont. S.C.J.) at para. 15 noted:

> 15 There is precedent in Ontario for the approval of voucher settlements: *Waddell v. Apple Computer Inc*. (2008), 67 C.P.C. (6th) 1 (Ont. S.C.J.); *Nantais v. Easyhome Ltd.*, [2005] O.J. No. 5805 (Ont. S.C.J.); *McCutcheon; Wong v. TJX Cos.*, [2008] O.J. No. 398 (Ont. S.C.J.). In appropriate circumstances, voucher settlements can serve both the class and the defendant and increase the overall value of settlement. Although it is not easy to assign a cash value to a voucher settlement, in circumstances where the vouchers are transferable, there is evidence of a secondary market in which the vouchers can be discounted and converted to cash and/or there is evidence of a class of repeat users, a voucher settlement can be fair and reasonable and in the best interests of the class.

[18] On the basis of the foregoing, I conclude the settlement is fair, reasonable, and in the best interests of the class as a whole.

COUNSEL FEE AND COSTS

[19] Section 41 of the Act states:

> 41(1) An agreement respecting fees and disbursements between a lawyer and a representative plaintiff must be in writing and must:
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> (a) state the terms under which fees and disbursements are to be paid;
>
> (b) give an estimate of the expected fee, whether or not that fee is contingent on success in the class action; and
>
> (c) state the method by which payment is to be made, whether by lump sum or otherwise.
>
> (2) An agreement respecting fees and disbursements between a lawyer

> and a representative plaintiff is not enforceable unless approved by the court, on the application of the lawyer.
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> (3) An application pursuant to subsection (2) may:
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> (a) unless the court orders otherwise, be brought without notice to the defendants; or
>
> (b) if notice to the defendants is required, be brought on the terms respecting disclosure of the whole or any part of the agreement respecting fees and disbursements that the court may order.
>
> (4) Amounts owing under an enforceable agreement are a first charge on any settlement funds or monetary award.
>
> (5) If an agreement is not approved by the court, the court may:
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> (a) determine the amount owing to the lawyer respecting the fees and disbursements;
>
> (b) direct an inquiry, assessment or accounting pursuant to *The Queen's Bench Rules* to determine the amount owing; or
>
> (c) direct that the amount owing be determined in any other manner.

[20] The settlement agreement between the parties also provided for recovery of plaintiff attorney fees calculated at counsel's usual hourly rates to a maximum of $81,000, plus $1,000 in disbursements, plus applicable federal goods and services tax and provincial sales tax on such fees and disbursements, as well as compensation to the representative plaintiff in an amount not to exceed $1,500. The defendants in the settlement agreement agreed not to object to the request, and to pay the amount the court awarded after the effective date of the settlement up to the maximum referred to in the foregoing.

[21] No agreement between the representative plaintiff, Ms. Driediger, and her counsel, was submitted in support of the above-requested fee. Ms. Driediger in her affidavit at para. 26 states in her view the proposed compensation to Merchant Law

Group is fair and reasonable for the risk and work that the lawyers performed. At para. 27 she indicates that the $1,500 proposed to be paid to her directly is also reasonable for the work that she personally devoted to the case. In the circumstances, the court is left to determine the appropriate amount of fees payable to the plaintiff's counsel pursuant to s. 41(5), *supra*.

[22] In this matter, Mr. Robinson on behalf of plaintiff's counsel, filed an affidavit indicating that as of August 12, 2010, billed time on the file was $79,531.75, which reflected 262.83 hours at an average hourly rate of $302.59. At this hearing he advised billable time now exceeds $81,000, and that the $1,000 in disbursements to be paid has already been exceeded. In each case, the firm is prepared to accept the maximum amount as set out in the settlement agreement. The number of hours expended do not appear out of line with what might be expected to bring the action to the conclusion realized. The average hourly rate reflects the skill requisite to perform the legal services involved, and is not out of line with the results obtained. The fact the fee portion will be paid directly by the plaintiff and not be a charge on the settlement funds is also a relevant factor. Counsel's fees are approved in the amount of $81,000, disbursements in the amount of $1,000 and applicable taxes to both.

[23] With respect to the representative plaintiff's request for the $1,500 for her time and effort in representing the class, Ms. Driediger has supplied the instructions to plaintiff's counsel, been involved in the settlement discussions, prepared a lengthy affidavit in support of the settlement, and requested orders for court approval. The sum of $1,500 is reasonable in light of her effort in the matter. A fee award to Ms. Driediger in the amount of $1,500 is approved.

[24] Judgment accordingly.

C.J.Q.B.
R.D. LAING