CITATION: JB & M Walker Ltd. v. The TDL Group Corp., 2019 ONSC 1837
COURT FILE NOs: CV-17-577371 and CV-17-584058-00CP
DATE: 20190429

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: JB & M Walker Ltd., Plaintiff

– AND –

The TDL Group Corp., Defendant

BEFORE: EM Morgan J.

COUNSEL: *Tom Arndt, Richard Quance , and Emily Dubis*, for the Plaintiffs
Mark Gelowitz and Jennifer Dolman, for the Defendant

HEARD: April 26, 2019

SETTLEMENT APPROVAL

[1] The representative Plaintiff in these companion class actions is a Tim Hortons franchisee and the Defendant is the Tim Hortons franchisor. This is a two-part motion for settlement and fee approval brought in respect of the two related claims – a double double.

[2] The parties have entered a Settlement Agreement effective March 6, 2019, which will resolve the dispute in two companion actions: Court File No. CV-17-577371 (relating to a dispute over use of the Ad Fund for the franchise system) and Court File No. CV-17-584058 (relating to the formation of the Great White North Franchisee Association ("GWNFA") by franchise owners). They seek approval of the Settlement Agreement under section 29(2) of the *Class Proceedings Act, 1992*, SO 1992, C. 6 ("CPA"). Class counsel submits that the settlement is fair and reasonable and in the best interests of the class.

[3] Class counsel also move for approval of its fees and for certain amounts payable under a Litigation Funding Agreement dated November 15, 2018 (the "LFA") between class counsel and a NewYork-based funding company, Galactic TH Litigation Funders LLC ("Galactic"). The LFA was approved in my ruling of February 11, 2019: *JB & M Walker Ltd / 1523428 Ontario Inc. v TDL Group*, 2019 ONSC 999. To date, Galactic has incurred and paid $1,000,000 in charges pursuant to the LFA.

I. The settlement

[4] The Settlement Agreement was reached after substantial disclosure was made by the Defendant and came about as a result of mediation conducted by former Chief Justice Warren

Winkler Q.C. Both sides view it as favorable and they each consent to its approval. Class counsel advise that the board of the GWNFA board voted unanimously in favour of the settlement.

[5] There were no opt-outs from the settlement and there appears to be only one objector to the settlement who has sent a letter to the court and appeared in person at the hearing. The sole objection is primarily addressed to the status and role of the franchisee association going forward and the mistrust that has developed between the franchisees and the Defendant. The objector, Eric Sanderson, has filed a thoughtful and well-articulated letter setting out his concerns. He worries that the GWNFA has not actually been recognized by the Defendant, and that the present board members may never be replaced because none of the other franchisees will want to play a role that is adversarial to the Defendant.

[6] Counsel for the class respond to Mr. Sanderson by pointing out that the GWNFA is being re-energized by the funding infused by the settlement, and that the very purpose of the settlement process is to re-instill some of the lost trust between the franchisees and the Defendant. He also observes that the court cannot simply order the Defendant to recognize or speak with the GWNFA, but that the Settlement Agreement prohibits the Defendant from interfering with the GWNFA's operations. It has also been pointed out by counsel for the Defendant that Mr. Sanderson himself is a board member of GWNFA and apparently voted in favour of the Settlement Approval (since the board's vote was unanimous), and that as a class member he has not opted out of the settlement (since there are no opt outs).

[7] In my view, Mr. Sanderson's objections raise legitimate concerns, but are not of a type that undermine the Settlement Agreement. Indeed, I take it from Mr. Sanderson's position in writing about his concerns but not voting against or opting out of the Settlement Agreement, that his aim is not to undermine the settlement but to improve it. The Court of Appeal has been clear, however, that the court's role in a motion like this is to either approve a proposed settlement or reject it; the Settlement Agreement is, first and foremost, an agreement which the representative Plaintiff and the Defendant must freely enter. I do not have the authority to amend it either at an objector's request or *sua sponte*: *Welsh v Ontario*, 2019 ONCA 41, at para 11.

[8] In any case, what Mr. Sanderson raises are matters of business relations within the Tim Hortons franchise system which the parties will hopefully be working on following implementation of the settlement. As class counsel say, the Settlement Agreement is itself part of a trust building process which is envisioned as starting a new era of positive business relations between Tim Hortons' franchisees and franchisor.

[9] The key terms of the Settlement Agreement include:

a) The Defendant will pay $10,000,000 over two years toward enhancing local marketing initiatives, with the exact regional and brand building expenditures to be determined by the regional marketing process in place (the "Ad Supplement");

b) The Defendant will pay $2,000,000 to class counsel to cover reasonable costs of legal, administrative, operational, organizational, logistical, expert, consultant, disbursements, travel, and other expenses of the litigation;

c) The Defendant will not discourage franchisees from joining or participating in an association regardless of whether their province or territory has such statutory rights and obligations;

d) The Defendant and the Tim Hortons Franchisee Advisory Board have amended the Franchisee Advisory Board Governance Handbook to increase the visibility of Ad Fund expenditures to franchisees, including audit rights and accountability obligations to report and respond to franchisee inquiries;

e) The Defendant has revoked clauses in franchisee agreements that formerly prohibited franchisees from negotiating their own insurance contracts and dairy supply contracts;

f) Amounts payable under the LFA are payable from the Ad Supplement;

g) The costs of the Rule 21 motion contained in my endorsement of November 21, 2018 have been paid or waived;

h) The Defendant will provide 10-year renewal rights to the current members of the GWNFA board members; and

i) The Defendant will withdraw and rescind the brand protection notices served on September 4, 2018 and the breach of media policy notices dated October 25, 2018 to the current Association board members.

[10] Since section 29(3) of the CPA makes an approved settlement binding on all class members, in considering approval of the Settlement Agreement it is incumbent on me to evaluate its fairness and reasonableness. I am to do so with a view to determining whether or not it is in the best interests of the class having regard to the claims, potential defences, and any objections: *Romeo v Ford Motor Co.*, 2019 ONSC 1831, at para 15; *Baxter v Canada (Attorney General)* (2006), 83 OR (3d) 481, at para 10 (SCJ). In engaging in this analysis, I am to take into account:

> (a) the likelihood of recovery or likelihood of success; (b) the 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, the 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 (i) information conveying to the court the dynamics of and the positions taken by the parties during the negotiation [citations omitted].
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> *Lavier v MyTravel Canada Holidays Inc.*, 2011 ONSC 1222, at para 21.

[11] Needless to say, a settlement does not have to measure up to a level of perfection. Courts have often pointed out that, "All settlements are the product of compromise and a process of give and take": *Dabbs v Sun Life Assurance Company of Canada,* [1998] OJ No 2811 (Gen Div), at

para 30. In the ordinary course, however, the court is "entitled to assume, in the absence of evidence to the contrary, that it is being presented with the best reasonably achievable settlement": *Wein v Rogers Cable Communications*, [2011] OJ No 5572, at para 20 (SCJ).

[12] The settlement here was negotiated by experienced counsel on both sides working at arm's length. It was achieved through the services of one of the country's most prominent judges as mediator. Although the cash portion of the proposed settlement amount is relatively modest, class counsel were working with a substantially pared-down claim following my ruling in a Rule 21 motion dismissing a number of causes of actions and claims against several parties other than the present Defendant: *JB&M Walker Ltd / 1523428 Ontario Inc. v TDL Group*, 2018 ONSC 5886.

[13] Class counsel have made it clear that even after the Rule 21 motion, the claim involved a number of pitfalls and obstacles for the Plaintiff along the way and that this is the best they could extract from the Defendant under the circumstances. They have, in effect, staked their reputation on it: *Wein v Rogers Cable Communications Inc.*, 2011 ONSC 7290, at para 20.

[14] Class counsel also explain that the payments made by the Defendant will ensure that the GWNFA remains financially viable. This, in turn, will allow the franchisees to ensure that the behavior modification achieved under the Settlement Agreement will continue in to the future. Further, it is class counsel's view that while the financial component of the settlement is less than the amount initially claimed, the governance, transparency and control benefits are very significant under the circumstances. Indeed, they are in many respects more important to the Tim Hortons franchise system than monetary compensation. Class counsel calculate that even a $100 million award at trial (a relatively unlikely result) would have netted in the range of $27,000 per Tim Hortons store.

[15] Furthermore, in assessing the value of the settlement, there is a dollar value to be placed on the fact that the class members are now at liberty to negotiate their own insurance policies and dairy contracts, as well as on the guaranteed renewal rights of the GWNFA board members. Class counsel retained a professional valuator, Krofchik Valuations, to determine the money's worth of these features of the settlement. According to the Krofchik report, the value-in-kind elements of the Settlement Agreement is $25,396,000. When added to the $12,000,000 cash payment, this makes for an overall settlement value of $37,396,000.

[16] With all of this, the Settlement Agreement appears to me to achieve access to justice, judicial economy and behaviour modification. These are the policy goals of the CPA; having achieved these goals the Settlement Agreement is fair, reasonable, and in the best interests of the class. The class members would not have been able to achieve these kinds of results suing TDL on their own: *Gagne v. Silcorp Ltd.*, 1998 CanLII 1584 (Ont CA).

II. Litigation funder and class counsel fees

[17] Turning to the issue of fees, Galactic has incurred over $1 million in charges since signing the LFA. It undertook substantial risk in assuming liability for any adverse costs awards against the Plaintiff, and its commitment of funds to the action was instrumental in the class achieving the settlement.

[18] In approving the LFA, I indicated that the amounts payable thereunder are "within the range of 'presumptive validity'": *Supra,* 2019 ONSC 999, at para 4. In general, courts "now accept presumptively that counsel can ask for 33 per cent of the plaintiffs' recovery in return for undertaking the risk of funding the case": *Houle v St Jude Medical Inc.*, 2018 ONSC 6352, at para 33 (Div Ct). In calculating this percentage, the combined monetary and non-monetary recovery for the class members is relevant: *Patel v Goupon Inc.*, 2013 ONSC 6679, at paras 20-21. In *Groupon*, my colleague Belobaba J. used 25% as a benchmark figure for calculating the value of fees charged under a so-called coupon settlement.

[19] As indicated, the overall value of the recovery for the class, including both the cash and the non-monetary value, is $37,396,000. Under the LFA, Galactic's return could be as high as 24%, or $9,000,000, while class counsel's return could be as high as 2.5%, or $900,000. Instead, both have been content to seek a return at a substantial discount from what they were formally entitled to seek.

[20] They seek approval for a payment in the amount of $3,622,641.51, or 24% of the $12,000,000 cash payment, for Galactic, and a payment in the amount of $377,358.49, or 2.5% of the $12,000,000 cash payment, for class counsel, plus a marginal 2.9% and 0.3%, respectively, on the $25,396,000 non-monetary settlement. This works out to a combined return of 33% of the $12,000,000 cash component alone. When the value of the non-monetary aspects of the settlement is factored into the overall settlement amount, the fees come to a combined return of just over 10%.

[21] Having regard to the various factors, the combined fee request of $3,622,641.51 for Galactic and $377,358.49 for class counsel "fall[s] within a zone of reasonableness": *Smith v National Money Mart*, 2010 ONSC 1334, at para 19.

III. Disposition

[22] The Settlement Agreement is hereby approved.

[23] The fee requests of Galactic and class counsel are likewise approved.

Morgan J.

Date: April 29, 2019