CITATION: JB & M Walker Ltd / 1523428 Ontario Inc. v. TDL Group, 2019 ONSC 999
COURT FILE NOs: CV-17-584058 and CV-17-577371-00CP
DATE: 20190211

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: JB & M Walker Ltd., Plaintiff

– AND –

The TDL Group Corp., Defendant

AND RE: 1523428 Ontario Inc., Plaintiff

– AND –

The TDL Group Corp., Defendant

BEFORE: EM Morgan J.

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

HEARD: February 6, 2019

LITIGATION FUNDING APPROVAL

I. The funding approval motion

[1] The Plaintiffs in both of these actions are Tim Hortons franchisees and the Defendant is the Tim Hortons franchisor. Each of the actions has been brought as a potential class action, although neither of them has reached the certification stage. The Plaintiffs bring this motion for approval of a third-party litigation funding arrangement.

[2] One of the original Plaintiffs in Court File No. CV-17-584058, 1128419 Alberta Ltd., has been removed as Plaintiff from that action by consent Order dated February 6, 2019, leaving JB & M Walker Ltd. ("Walker") as the sole Plaintiff in that action. The Plaintiff in Court File No. CV-17-577371, 1523428 Ontario Inc., has indicated that it also wishes to be removed as Plaintiff in that action. Walker, the remaining Plaintiff in CV-17-584058, has indicated that it will agree to step in as Plaintiff in CV-17-577371, conditional on the litigation funding being approved herein. At that point, Walker will be Plaintiff in both actions and each will be titled *JB & M Walker Ltd. v The TDL Group Corp*. Since this last change has not yet taken place, I will for now continue to refer to the Plaintiffs in the plural. That said, the actions are closely related to each

other and the Agreement and Budget pertain to both, and so I will refer to the litigation itself in the singular.

[3] Plaintiffs' counsel and the Plaintiffs themselves have entered into a Litigation Funding Agreement dated November 15, 2018 (the "Agreement") and an accompanying Funding Agreement Budget (the "Budget") with a New York-based litigation funding company, Galactic TH Litigation Funders LC ("Galactic"). They have submitted a copy of the Agreement and a redacted copy of the Budget in their motion record and have provided me with an unredacted copy of the Budget which they seek to file under seal.

[4] The Agreement provides that Galactic will pay class counsel's fees and disbursements on a pay-as-you-go, non-recourse basis in accordance with the terms set out in the Budget. In addition, Galactic will post security for costs if required and will indemnify the Plaintiffs for any adverse costs awards. Galactic has also agreed to attorn to the court's jurisdiction, protect the confidentiality and privilege of any communications related to the litigation, and abide by the deemed undertaking rule. Importantly, the Agreement provides that the funding arrangement thereunder may only be terminated with court approval. The Plaintiffs have received independent legal advice regarding the Agreement and Budget from experienced class action lawyers.

[5] Under the *Class Proceedings Act, 1992*, SO 1992, c. 6 ("CPA"), it is necessary for the Plaintiffs to obtain court approval for the Agreement and Budget in order for them to be legally in force: *Bayens v Kinross Gold Corporation*, 2013 ONSC 4974, at para 41. Previous cases have held that, "The general test for determining whether to approve a third-funding agreement is that the agreement should not be champertous or illegal and it must be a fair and reasonable agreement that facilitates access to justice while protecting the interests of the defendants": *Houle v St. Jude Medical Inc*., 2017 ONSC 5129, at para 71, aff'd 2018 ONSC 6352 (Div Ct).

[6] This overall test was elaborated further by Perell J. in *Houle*, at para 63, and approved by the Divisional Court, at para 27, as a multi-part analysis. The court is to assess a request for third party litigation funding in accordance with the following criteria:

> (a) the agreement must be necessary in order to provide access to justice; (b) the access to justice facilitated by the third-party funding agreement must be substantively meaningful; (c) the agreement must be a fair and reasonable agreement that facilitates access to justice while protecting the interests of the defendants; and (d) the third-party funder must not be overcompensated for assuming the risks of an adverse costs award because this would make the agreement unfair, overreaching, and champertous.

[7] For the reasons that follow, I find that the Agreement and Budget meet this test and are approved.

II. Access to justice

[8] As indicated at the outset, these claims and proposed class action pit Tim Hortons coffee and donut shop franchisees against the franchisor. The background to the action is set out in my

judgement in a motion under Rule 21 of the *Rules of Civil Procedure* which defined and limited the parameters of the claims: see *1523428 Ontario Inc. / JB&M Walker Ltd. v The TDL Group*, 2018 ONSC 5886. There is no need to repeat that background detail here.

[9] Until mid-2018, the Great White North Franchisee Association (the "Association"), an alliance of Tim Hortons franchisees, provided financial support to the Plaintiffs in pursuing their claims. The Association's ability to continue this support is now at an end, and the Plaintiffs do not have the resources to support the litigation on their own.

[10] Plaintiffs' counsel is likewise not in a position to finance the claim. While this case does not exactly parallel *Dugal v Manulife Financial Corp.*, 2011 ONSC 1785, where the representative plaintiff's claimed losses were so modest as to be nearly trivial, the size of the putative class here is small relative to the potential expense of the litigation and the exposure to a potential adverse costs award. Plaintiffs' counsel explain that the legal fees to date are larger than any potential return to the representative Plaintiffs.

[11] The inability of counsel to carry its fees without billing them has also eliminated the possibility that the Law Society's class proceedings fund is a viable solution for the Plaintiffs. That fund supports claimants by covering disbursements and costs for Plaintiffs, but not counsel fees. Under the circumstances, that limited support does not meet the Plaintiffs' resource needs.

[12] In all, third party funding appears necessary in order to ensure that the Plaintiffs and the putative class of franchisees are able to achieve access to justice. Likewise, without access to justice there is no possibility of deterring future conduct by the Defendant, another important goal of the CPA. Accordingly, the Agreement fulfills two important features of class action litigation.

III. The Agreement provides a meaningful contribution

[13] Plaintiffs' counsel submit that the Agreement carries with it benefits that are similar to those approved by the court in *Houle*. That is, it protects the financial and human capital of class counsel while seeing to it that the Plaintiffs and class have adequately resourced legal representation.

[14] In *Houle*, class counsel was to receive 50% of its docketed time on a pay-as-you-go basis and the balance on a contingency basis. In the present case, Plaintiffs' counsel is to receive its billed hours on a current basis and a small top-up of 2% to 3%, to be determined at the end of the action (either at settlement approval or after a trial). Perell J. observed in *Houle*, at para 79, that "class counsel firms are few and those firms take on only a fraction of the cases that would gratify the goals and policies of the class action regime." The current Agreement goes a great distance in filling the representation gap identified by Justice Perell.

[15] I have been given no reason to doubt that Galactic is anything other than a reliable funding body. It is certainly experienced, having provided litigation funding in numerous legal actions, including a number of franchise class actions. I have had an opportunity to review an unredacted copy of the Budget. It provides what in my view is a reasonable estimate of fees and

disbursements that Galactic will cover over the course of the litigation, and specifically states that the amounts set out therein are estimates and may have to be adjusted as the matter unfolds.

[16] The motion record contains an affidavit of Frederick Schulman, the Chairman and CEO of Galactic, who deposes that Galactic has assets in the range of $33,000,000 (US) and a net equity of some $29,000,000 (US). It appears to me that Galactic is in a financial position to meet the obligations of this case as it goes forward.

[17] Given that the Agreement places appropriate obligations on Galactic to support all aspects of the case, maintains the Plaintiffs' right to instruct counsel and direct the litigation, is accompanied by a Budget that appears realistic and at the same time acknowledges that it must be flexible to meet the exigencies of the litigation, I find that the funding arrangement makes a meaningful contribution to the goal of access to justice and other objectives of the CPA.

IV. Defendant's interests are protected

[18] The Defendant raises no objection to the terms of the Agreement although, of course, it has not seen the unredacted version of the Budget and relies on the court to ensure that the Budget is suitable to the needs of the case. This is appropriate in order to protect privilege and to ensure that the Defendant does not acquire a strategic advantage by virtue of being privy to the complete financial parameters of the funding body's commitment to the litigation: see *Marriott v General Motors of Canada Company*, 2018 ONSC 2535, n. 1.

[19] As indicated, Galactic has covenanted to post security if required to do so and to cover any costs awarded against the Plaintiff. It has also committed to respect the deemed undertakings rule, which is an important step in protecting the Defendant's interests. Further, Galactic has by consent attorned to Ontario court jurisdiction and so will be subject to any orders issued by this court during the course of the litigation.

[20] As already stated, the Budget commits Galactic to what appears to be an appropriate level of support. Accordingly, the concerns of any defendant are for the most part satisfied by the Agreement and Budget.

[21] Counsel for the Defendant has pointed out that the parties are on the verge of settling the entire dispute. They have allowed me to see a Term Sheet signed by all parties which sets out the outlines of a potential settlement. Although this Term Sheet is non-binding, both sets of counsel have advised that they are optimistic about the prospects of crystallizing the proposed settlement in the near future. This development has no doubt provided some comfort to the Defendant in the Agreement, as it portends well for the matter being brought to an expeditious conclusion.

[22] In any case, I see no reason not to conclude that the Agreement is a fair and reasonable one that also provides protection for the Defendant's interests.

V. The funder is not overcompensated

[23] In *Kinross*, at para 41, it was noted that for approval of a litigation funding agreement, it must be shown that "the representative plaintiff has not agreed to over-compensate the third party funder for assuming the risks of an adverse costs award." In the same paragraph, the court went on to observe that, "This will be a difficult determination for the court to make, but the comparable benchmark of the Class Proceedings Fund's percentage uncapped levy may assist the court in determining whether the third party funding agreement is fair and reasonable."

[24] Given the different structure of this Agreement, it is difficult to make a direct comparison with the Class Proceedings Fund arrangement. Under Ont. Reg. 771/92, there is a levy payable to the Class Proceedings Fund that is calculated to repay all disbursements paid by the fund plus 10% of the final settlement amount or court ordered award. Under the Agreement, Galactic is to receive between 22% and 26% of the settlement or award, depending on when these are reached. The pay-as-you-go legal fees and disbursements that Galactic has been funding for class counsel do not get reimbursed. Likewise, the Agreement does not require Galactic to recover from the class any adverse cost awards that have been ordered against the Plaintiffs in the interim.

[25] The amounts to which Galactic is entitled, combined with the range of legal fees to which Plaintiffs' counsel would be entitled, come to a maximum of 29% of any final settlement or award. Although every case has its variable factors, and fees are typically evaluated at the end of a case rather than at the more initial stages as here, it is noteworthy that this amount is within the range previously described by the court to be within the range of "presumptive validity": *Cannon v Funds for Canada Foundation,* 2013 ONSC 7686, at para 10.

[26] Plaintiffs' counsel states that in any case the arrangements under the Agreement will result in a greater recovery to the class than if class counsel had entered into a typical 33%-plus contingency fee arrangement. Furthermore, Plaintiffs' counsel points out that the fairness of Galactic's ultimate recovery can wait for approval until a settlement or final award has been reached. This approach was approved by the Divisional Court in *Houle*, at paras 7, 44.

[27] Under the circumstances, it does not appear to me that the Plaintiffs have agreed to allow Galactic to be over-compensated for funding the litigation. The Agreement is not champertous or otherwise illegal and is a fair and reasonable arrangement that facilitates access to justice at the same time as it protects the interests of the Defendant.

VI. Disposition

[28] The Agreement and Budget are hereby approved.

[29] The Plaintiffs may serve and file the redacted Agreement and Budget and may file an unredacted copy of the Agreement and Budget under seal with the court.

Morgan J.

Date: February 11, 2019