CITATION: Axiom Plastics Inc. v. E.I. DuPont Canada Company, 2013 ONSC 2675
COURT FILE NO.: 05-CV-302358CP
DATE: 20130508

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
AXIOM PLASTICS INC.	)	Sarah W. Corman for the Plaintiff
	)	
Plaintiff	)	
	)	
– and –	)	
	)	Brent Ledger and Christopher P. Naudie
E.I. DUPONT CANADA COMPANY	)	
	)	
Defendant	)	
Proceeding under the *Class Proceedings Act, 1992*	)	**HEARD:** May 8, 2013
	)	

PERELL, J.

REASONS FOR DECISION

I. INTRODUCTION

[1] The Representative Plaintiff, Axiom Plastics Inc., and the Defendant, E.I. Du Pont Canada Company have reached a Settlement Agreement dated April 12, 2013 in this certified class action under the *Class Proceedings Act, 1992*, S.O. 1992, c. C.6. This is a motion for approval of the settlement and for approval of Class Counsel's fees. For the reasons that follow, I grant the motion.

II. FACTUAL AND PROCEDURAL BACKGROUND

[2] In December 2005, Axiom Plastics commenced this action alleging that DuPont Canada conspired to fix and maintain the prices of engineering resins used in the manufacture of automotive parts. Axiom Plastics sought damages pursuant to s. 36 of the *Competition Act*, R.S.C. 1985, c. C-34, and it alleged breaches of ss.45(1)(b), (c) and (d) and 61 of the *Act*. It also asserted a civil conspiracy claim and a claim for unjust enrichment. Its claim asserted two separate conspiracies by DuPont Canada in relation to the pricing of engineering resins used in the manufacture of automotive parts.

[3] The first conspiracy, referred to as the "CUPS Conspiracy," alleges that DuPont Canada, conspired with its authorized Canadian distributors to fix, raise and maintain the prices of engineering resins sold to auto parts' manufacturers, also known as "Tier 2 manufacturers", in Canada. The second conspiracy, known as the "Tier 1 Conspiracy"

alleges that DuPont Canada conspired with certain of the class members' customers, "Tier 1 manufacturers", to enhance and maintain the prices of engineering resins sold to the Tier 2 manufacturers.

[4] The action was brought on behalf of approximately 252 Canadian automotive parts' manufacturers that were required by their customers to purchase DuPont engineering resins and which purchased resins between January 2000 and August 27, 2007 from DuPont Canada or its authorized Canadian distributors.

[5] DuPont Canada delivered a Statement of Defence on June 12, 2006, and Axiom Plastics delivered a Reply on August 25, 2006.

[6] The action was very vigorously prosecuted and defended.

[7] On December 4, 2007, Justice Hoy certified the action as a class proceeding. Sotos LLP and McCarthy Tétrault LLP were appointed Class Counsel.

[8] However, only the CUPS Conspiracy claim was certified. The prosecution of this claim was made considerably more difficult by the failure to certify the Tier 1 Conspiracy claim, which is intertwined with the CUPS Conspiracy claim.

[9] This action was the first *Competition Act* claim to be certified on a contested basis in Canada. Under the Certification Order, the class was limited to Canadian purchasers who were required by a customer to use a DuPont engineering resin, (the "Requirement to Use" criterion). Class members who were not required to use a DuPont engineering resin were excluded from the class.

[10] Both Axiom Plastics and DuPont Canada sought leave to appeal from the certification decision to the Divisional Court. Axiom Plastics sought to have the court certify the Tier 1 Conspiracy, and DuPont Canada sought leave to appeal the entire Certification Order. Justice Kiteley dismissed both motions, and the action proceeded to the discovery stage.

[11] After negotiating a detailed confidentiality order and a detailed document exchange protocol, DuPont Canada produced over 40,000 hard-copy and electronic documents covering over 120,000 pages. Each document was reviewed by or under the supervision of a lawyer. Document review and annotation took place over more than a two-year period.

[12] DuPont Canada's representative was examined for a total of six days of discovery over a two-year period. Over 4,800 questions were asked on discovery. Extensive answers to undertakings were also received in phases together with supplementary productions.

[13] On July 14 and 15, 2011, a refusals motion was argued. The result of this important motion was that, while a number of the questions were ordered to be answered, most questions and documents relating to the Tier 1 Conspiracy were found to be irrelevant to the action as certified. As well, DuPont Canada was not required to produce information in its affiliates' possession, power or control relating to the issue of

but-for pricing of engineering resins. DuPont Canada was ordered to answer questions about alleged efforts to cut off grey market supply of resins into Canada.

[14] Throughout the action, Class Counsel retained and consulted with experts, including: (a) Margaret Sanderson, Vice President and Practice Leader of Antitrust & Competition Economics of CRA International, who provided expert testimony at the certification motion; (b) Richard Schwindt, Retired Professor of Economics at Simon Fraser University, who was retained as an expert consultant and who prepared a draft expert report in respect of the alleged *Competition Act* breaches; and (c) Martin K. Perry, professor of economics at Rutgers University and former chief economist for the U.S. Federal Communications Commission with considerable experience in resale price maintenance economics. Prof. Perry was retained to provide an econometric analysis of the likely range of damages if the plaintiff were successful at trial and was consulted during the settlement negotiations.

[15] The action is ready to be set down for trial, and it is in the queue for a common issues trial likely commencing in 2016. Given how the action has been litigated, whatever the outcome, an appeal would be likely.

[16] If this matter were to proceed to trial, there would be a need for individual inquiries following the common issues trial because purchase records and proof necessary to satisfy the "requirement to use criterion" would have to come from individual class members' records. Class attrition and the difficulties surrounding the records which class members may or may not have retained will increase the longer the case proceeds through the courts.

III. SETTLEMENT NEGOTIATIONS

[17] The parties engaged in settlement negotiations four separate times; *i.e.* (a) before certification; (b) after the certification decision was released; (c) during the examinations for discovery; and (d) after the final round of discoveries and the refusals' motion. The first three negotiations did not result in any serious progress.

[18] The negotiations were hard-fought and intense. After an agreement in principle was reached, there were two more stages of written agreement, making three stages of intense negotiations; namely: (a) an agreement in principle; (b) a formal term sheet signed by counsel; and (c) a formal 41-page, plus seven schedules, settlement agreement signed by the parties.

[19] Each form of agreement took months of negotiation, involved the exchanges of many drafts, raised new points of contention, and resulted in delays. The initial meeting which led to the settlement took place on November 24, 2011. The settlement agreement was not finalized and signed until April 12, 2013.

[20] On April 19, 2013, the Court approved the Notice of Settlement Approval Hearing.

[21] On April 23, 2013, Sotos LLP caused the Notice of Settlement Approval Hearing to be mailed to all class members, and on April 26 it posted the Notice on its webpage.

[22] There were no objectors to the settlement.

IV. DETAILS OF PROPOSED SETTLEMENT

[23] The Settlement Agreement provides compensation equal to 6% of the price paid by a Class Member for resin purchases from DuPont Canada's authorized Canadian distributors during the class period and 3% for resin purchases from DuPont Canada during the class period. For example, if a class member had $2 million in eligible resin purchases from DuPont Canada's authorized distributors over the class period, it would be entitled to recover $120,000 from the claims fund. The total amounts available to the class are capped at USD $11.38 million.

[24] Counsel fees will be paid in addition to the capped compensation.

[25] At the Class Member's option, it may choose payment in kind (*i.e.* engineering resins) at a rate of 1.1 times the settlement payment based on prices no higher than DuPont Canada's truckload prices.

[26] It is anticipated that the settlement fund will be adequate to pay the surviving Class Members' Claims. I say "surviving" because during the course of the litigation some of the Class Members have gone out of business because of the well-known economic misfortunes of the North American automotive industry that saw government intervention and a restructuring of the automobile industry.

[27] In order to submit a valid claim, a Class Member will be required to provide documentary proof of the following:

- (a) Proof of Purchase - It bought DuPont engineering resins during the period between January 1, 2000 and August 27, 2007 from DuPont Canada or one of its authorized Canadian distributors;
- (b) Proof of Requirement to Use – It was required to use the resins in an automotive application (*e.g.* cars, vans or light trucks) and the Class Member's direct customer was a Tier 1 manufacturer (or lower tier manufacturer) but was not an original equipment manufacturer (*e.g.* General Motors or Toyota). In most cases, it is anticipated that this criterion will be satisfied by the engineering drawings for each particular automotive part manufactured; and,
- (c) Proof of Sale on to Customer – It used the resins in parts which it then sold to its customer. This requirement can be satisfied through electronic invoicing records that Class Members ought to have retained.

[28] DuPont Canada is required to provide reasonable cooperation to Class Counsel in the claims process and to use reasonable efforts to give effect to the terms of the Settlement Agreement.

[29] Class Counsel consulted with Axiom Plastic and another Class Member and were satisfied that they do have the records necessary to satisfy the conditions. Nevertheless, it is possible that other Class Members, particularly smaller ones which may have had less formal recordkeeping or those which have reorganized or gone out of business since the end of the class period, will simply not be able to locate the evidence necessary to comply with the settlement terms.

[30] Despite Class Counsel's efforts to keep the proof requirements to a minimum, in light of the passage of time, some and perhaps even many Class Members may no longer have the documentation needed to satisfy the settlement conditions. In anticipation of Class Members no longer having the proof necessary to submit a claim, the Settlement Agreement provides the following:

- (a) If a Class Member no longer has the proof of purchase of the resins, it can approach one of the authorized Canadian distributors for such records. DuPont Canada will provide confirmation of the Settlement Agreement to its existing authorized Canadian distributors and DuPont Canada will advise its existing authorized Canadian distributors that it does not oppose their providing information to Class Members necessary to satisfy the Requirement to Use criteria;

- (b) If a Class Member no longer has records showing proof of sale of parts on to its customer or no longer has the engineering drawings needed to satisfy the "required to use" criterion, it can approach its customer for such proof. If the customer is not willing to cooperate, the plaintiff may return to this Court to request an Order that the customer provide such assistance so as to give full effect to the settlement.

[31] The Settlement Agreement provides DuPont Canada and its affiliates a Full and Final Release.

[32] Class Members are also required to execute individual releases at the time they submit their claims. The Release excludes disputes between the Class Members and DuPont Canada unrelated to the matters involved in this action, such as any claims arising from any alleged product defect, breach of contract, breach of warranty, negligence, bailment or similar claims relating to DuPont engineering resins. Although the time period covered by the Release is longer than the class period, such release language is similar to that approved in other *Competition Act* class action settlements.

[33] The Settlement Agreement contemplates a standard Bar Order in light of the allegations that DuPont Canada had participated in unlawful agreements with other parties. The terms reflect the standard form of Bar Order that has been approved by the Court of Appeal and other Courts in other settlements. If the Court refuses to approve the Release and the Bar Order in the terms proposed, DuPont Canada may withdraw from the settlement.

[34] Class Counsel agree not to participate or assist in any similar action against DuPont Canada.

[35] Class Members must undertake not to disclose the quantum paid to them under the settlement and must not disparage DuPont Canada in respect of any matter relating to this action or its settlement.

[36] Class Counsel agree not to publicize the settlement beyond the extent necessary to bring it to the attention of the Class Members through the court approved notice provisions. The Settlement Agreement contains agreed-upon language in response to any media inquiries concerning the settlement and for publication on Sotos LLP's website.

[37] Notice of the settlement approval will be posted on Sotos LLP's website, mailed individually to each Class Member at the addresses provided by DuPont Canada following certification, and advertised in the major trade publication for the plastics industry in Canada, *Canadian Plastics*, in the next email bulletin issue following settlement approval.

[38] The Settlement Agreement requires Class Members to submit their claim within four months of the entry of the Settlement Approval Order, failing which their claim will lapse.

[39] The administration of the settlement will be carried out by Class Counsel. Any dispute as to whether or not a class member has submitted a valid claim is to be resolved by a third-party claim adjudicator.

[40] Class Counsel will report to the court on the results of the claims process.

[41] In evaluating the substantive merits of the settlement, it is worth noting that DuPont Canada had asserted that if the plaintiff were successful in proving unlawful conduct at trial, damages would be *de minimis* or below 1 to 2% of purchases from DuPont Canada's authorized Canadian distributors, and even less in respect of qualifying resin purchases from DuPont Canada. Prof. Perry, on the other hand, opined that the range of damages could be as high as 20% or perhaps slightly more.

[42] It is also worth noting that the law in this area is largely unsettled. The certified claims relate to a vertical conspiracy and not the more common horizontal conspiracy. Unlike most *Competition Act* class actions, this action is being prosecuted in the absence of any guilty plea or investigation by a competition authority. While this action was pending, Parliament repealed the price maintenance provision in s. 61 of the *Competition Act*, which underlies part of the CUPS Conspiracy claim.

[43] Added to the uncertainty in the law and the attendant litigation risk in this class action is the fact that in October of last year the Supreme Court of Canada heard three competition law appeals arising from two cases decided last year in British Columbia and one in Quebec. (See: *Sun-Rype Products Ltd v. Archer Daniels Midland Co*, Court File No. 34283, *Pro-Sys Consultants Ltd. v. Microsoft Corp*, Court File No. 34282, and *Option Consommateurs v. Infineon Technologies AG*, Court File No. 34617.) In these cases, the Supreme Court will consider whether and how the "pass-through defence" applies in the competition law context. That defence asserts that the plaintiff in a competition claim suffered no damage if it "passed through" the overcharge it paid to its

customers. DuPont Canada asserts such a defence. The outcome of those appeals could therefore be an adverse factor for this case if it were to proceed further to a common issues trial.

[44] Both Class Counsel firms have extensive class actions' experience including competition class actions. The Class Counsel team includes senior members of the Bar. Class Counsel believes that the settlement reflects a fair and appropriate balancing of the litigation risk and damages risk versus the potential for a larger victory at trial and therefore recommend the settlement.

V. DETAILS OF CLAIM FOR LEGAL FEES

[45] To the end of March 2013, Sotos LLP has docketed time of $1,136,671 and McCarthy Tétrault LLP has docketed time of $2,253,706 for a total of $3,390,377.

[46] A costs award of $290,000 including disbursements and taxes was received following certification. A portion of this amount was applied to disbursements incurred up to that time, including substantial experts' fees.

[47] The Class Proceedings Fund agreed to fund this case. Accordingly, the Fund is entitled to a return of all disbursements paid to date and its statutory levy of 10% of the net proceeds of the claims process. To date, the Fund has provided disbursements in the amount of $95,469. The balance of disbursements was funded through the costs award following certification.

[48] Subject to court approval, Class Counsel may seek an award in respect of Class Counsel fees and administration expenses up to $2.7 million.

[49] DuPont Canada will also make a prepayment of an additional sum of $150,000 as a pre-payment in respect of an approximation of HST/GST on Class Counsel fees. Because Class Members are corporations, they will be entitled to claim an input tax credit on their proportionate share of HST/GST on Class Counsel fees as an offset on their tax filings.

[50] Subject to court approval, Class Counsel may seek an additional amount in respect of fees and administration expenses following the completion of the claims process. Any such fees would be paid from the claims fund.

VI. SETTLEMENT APPROVAL

[51] Section 29(2) 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: *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 (S.C.J.) at para 57; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 (S.C.J.), at para. 43.

[52] 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 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. See: *Fantl v. Transamerica Life Canada*, *supra* at para 59; *Corless v. KPMG LLP*, [2008] O.J. No. 3092 (S.C.J.), at para. 38; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, *supra,* at para. 45.

[53] In my opinion, having regard to the various criteria set out above, the outcome of this class action is fair, reasonable, and in the best interests of the Class Members.

[54] Indeed, in my opinion, having regard to very substantial risk factors, the settlement achieved is a very good result for the Class Members.

VII. FEE APPROVAL

[55] Turning to the matter of Class Counsel's fee request, 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: *Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374 (S.C.J.), at para 13; *Smith v. National Money Mart*, [2010] O.J. No. 873 (S.C.J.), at paras 19-20; *Fischer v. I.G. Investment Management Ltd.*, [2010] O.J. No. 5649 (S.C.J.), at para 25.

[56] 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; (j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement: *Smith v. National Money Mart, supra*, at paras. 19-20; *Fischer v. I.G. Investment Management Ltd.*, *supra,* at para 28.

[57] In my opinion, Class Counsel's fee request is more than reasonable and fair, and it should be approved as asked.

VIII. CONCLUSION

[58] For the above reasons, I approve the settlement and Class Counsel's claim for legal fees.

[59] Orders accordingly.

Perell, J.

Perell, J.

Released: May 8, 2013

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