CITATION: 405341 Ontario Limited v. Midas Canada Inc., 2013 ONSC 5714
COURT FILE NO.: 07-CV-333934CP [Toronto]
DATE: 20130912

2013 ONSC 5714 (CanLII)

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

405341 ONTARIO LIMITED

Plaintiff

- and -

MIDAS CANADA INC.

Defendant

Proceeding under the *Class Proceedings Act, 1992*

COUNSEL:

Allan D.J. Dick and Andy Seretis, for the Plaintiff
Linda Fuerst, for the Defendant

HEARING DATE: September 12, 2013

ENDORSEMENT

LAX J.

[1] This is a motion for approval of a proposed class action settlement reached by the parties and for approval of class counsel fees. The class consists of approximately 70 class members that owned approximately 148 "Midas" branded shops and carried on business as franchisees from July 11, 2003 to May 31, 2007 under franchise agreements with the defendant, Midas Canada ("Midas"). The claim arose out of certain changes that were made by Midas to the Midas franchise system in 2003 that were alleged to be in

breach of Midas' contractual and statutory obligations to class members, causing them serious losses.

[2] The action was commenced in May 2007 and certified by Justice M.C. Cullity on March 26, 2009, although on a considerably narrower basis than pleaded. Justice Cullity rejected the plaintiffs' allegations based on breach of express contractual provisions and found no valid cause of action against Midas' parent company. He permitted the action to proceed as a class action for a determination of whether Midas had acted in breach of its duties of good faith and fair dealing. Neither party sought leave to appeal from certification.

[3] Following certification, the action proceeded to documentary discovery, which was intensive and extensive, involving production of about 60,000 hard-copy and electronic documents covering an approximate 30-year time period. In August and September 2011, representatives of the parties were each examined for 3 days. By agreement, the plaintiff delivered written questions and the parties exchanged lengthy answers to undertakings. Oral examinations on those answers to undertakings took place in November 2012. The plaintiffs retained two experts who were consulted on valuation of damages and liability. The action is ready to be set down for trial, but due to significant delays in Toronto region in securing a date for a trial estimated to be four weeks or more, the common issues trial is not likely to commence until 2015, or later.

[4] The parties have engaged in two separate mediation sessions with highly experienced mediators: before certification in November 2008, and after discoveries were complete in April 2013. The first mediation did not result in resolution and was terminated on the third day. The second mediation took place on April 3, 2013. It is of some significance that in order to ensure representation from a cross-section of class members, class counsel invited two other Midas dealers, in addition to the representative plaintiff, to the second mediation. After a full day of negotiation, the mediation resulted in the proposed settlement that is now before the court.

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Settlement

[5] The settlement agreement, (Schedule "A" to the draft Order) is refreshingly brief and straightforward. It provides that Midas will pay CAD$8,500,000, inclusive of interest, legal fees, disbursements, administration expenses and taxes.

[6] Under the proposed plan of distribution, the amount each class member will receive will be based largely on its gross sales in 2004. I agree with the plaintiff that basing the distribution on sales is appropriate since the amount of sales is directly correlated to the amount of fees paid to Midas. At its heart, this action is about whether Midas should have adjusted the dealers' royalties when it exited parts distribution and outsourced this to a third party, yet continued to charge a royalty/advertising fee of 10%. The year 2004 was chosen because it is the first full year following Midas' withdrawal from distribution in 2003.

[7] The distribution formula has a progressive adjustment reduction to recognize that larger dealer groups or individual stores with high sales volumes were better able to negotiate lower prices and more favourable terms from their suppliers than average single store operators and were therefore not as adversely affected as dealers with little or no purchaser power. None of the settlement amount will revert to Midas. Undistributed amounts will be re-distributed to remaining class members in the same proportion as under the proposed plan of distribution. The claim process is straightforward requiring only a statutory declaration from a claimant verifying entitlement.

[8] To approve the settlement, the court must be satisfied that, in all the circumstances, the settlement is fair, reasonable, and in the best interests of the class members.[1] The factors to be considered are now well-established and are applied to this action with clarity in the plaintiff's Factum at paragraphs 74 through 90.

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[1] *Lavier v. MyTravel Canada Holidays Inc*., 2011 ONSC 1222 at paras. 19-20; *Dabbs v. Sun Life Assurance*, [1998] O.J. No. 1598 (Gen. Div.) at para. 9, aff'd 1998 CanLII 7165 (ONCA), (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. refused Oct. 22, 1998, [1998] S.C.C.A. No. 372; *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) at paras. 68-73.

[9] In a nutshell, this is a fully mature action that has had the benefit of discovery and arms-length negotiations before two separate and highly experienced mediators (The Hon. George Adams, Q.C. and Mr. Allan Stitt, President of ADR Chambers). The prosecution and defence of this action to date have taken over six years. During this time, the jurisprudence in franchisee class actions has developed. See, for example, *Fairview Donut Inc. v. The TDL Group Corp.*, 2012 ONSC 1252 (aff'd 2012 ONCA 867)["TDL"].

[10] Midas relies heavily on the *TDL* case, where the court dismissed an action brought by franchisees in the Tim Hortons franchise system who alleged bad faith conduct. The *TDL* case certainly highlights the risk of loss at trial. In his reasons, Justice Cullity acknowledged that proving bad faith and lack of fair dealing would involve the "difficult exercise of weighing the detriment suffered by the Franchisees, as a result of the change in the products supply system, in light of the undoubted right of Midas to give consideration and weight to its own interests" (para. 39). Even if the plaintiff is successful at trial, the anticipated range of damages for breaches of the duties of good faith and fair dealing is uncertain. Moreover, appeals are inevitable.

[11] Notice of Settlement Approval Hearing was approved by the court on July 8, 2013 and distributed to class members on July 18, 2013 by ordinary mail, email and web publication on the website of class counsel. Class counsel also took steps to individually contact each class member and to locate class members whose notices were returned in the mail. At today's hearing, I was informed that only a handful of class members have not been located, but efforts will continue during the claims process.

[12] As of September 6, 2013, no objections had been received by class counsel. However, Mr. Mark Spergel attended today's hearing and addressed the court. For 16 years, Mr. Spergel was a Midas franchisee in Ottawa. He explained that he did not go bankrupt, but other Ottawa franchisees did. He described Midas as a "bully, deserving of punishment" and took issue with the settlement amount asserting that it is "one third of what we were expecting". He drew to the court's attention that his own company and others have ceased to carry on business and their corporations are dissolved. In response, class counsel gave an undertaking to assist in facilitating the administrative revival of any

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dissolved company so that these class members may participate in the settlement. Class counsel also assured the court that any amounts paid to them by class members or their Association in order to fund the litigation will be accounted for.

[13] The court appreciates that Mr. Spergel took the time to put his concerns forward. As I explained to him today in court, class proceedings are not intended to punish; rather, they aim to modify behaviour, provide access to justice and achieve judicial economy. In my opinion, each of these objectives has been met. When compared to the risk, cost, uncertainty and likely duration of contested litigation, a settlement is the preferred route. This settlement delivers real benefits to class members with expected net proceeds producing payments ranging from $14,075.30 at the lowest to $391,543.40 at the highest: the average payable is $80,816.10. Every eligible class member will derive some benefit from the proposed settlement based on a fair and rational distribution plan that will be supervised by the court. I have no hesitation in concluding that the proposed settlement represents a fair and reasonable settlement for class members and it is approved.

Fees

[14] Class counsel request a fee of $2,125,000 plus HST and disbursements. This amount is 25% of the settlement amount, plus HST, and accords with the retainer agreement entered into between the representative plaintiff and class counsel. It represents a small premium (approximately 1.3 multiplier) of class counsel's base fee for actual hours docketed to this matter. Class counsel also seek leave to return upon completion of the claims process to request a further fee in respect of its administration of the settlement fund from surplus funds, if any.

[15] The representative plaintiff was unable to raise money for disbursements from class members. After certification, it instructed class counsel to apply to the Class Proceedings Fund and the Fund agreed to fund the action. The Fund is entitled to a return of disbursements paid to date ($73,513.85) and to be paid ($37,598.30) and its statutory levy of 10% of the net proceeds of the claims process.

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[16] Because the class consists entirely of businesses, class members are entitled to claim a refund of HST applicable on legal fees. Class counsel undertake to send a certificate to each class member that will set out the total amount of HST payable on the legal fees in connection with this action and the proportion attributable to that class member's share of the proceeds of the settlement.

[17] The fairness and reasonableness of the fee sought is assessed in light of the risk class counsel undertook in conducting the litigation and the result achieved.[2] This is a case where class counsel assumed significant risk in pursuing this action, particularly following certification when the case was re-framed and scaled back. As the court did not certify the action against the U.S. parent, the potential of a Midas Canada insolvency or restructuring, and an uncollectible judgment, was significant. Considerable time and resources were devoted to the litigation process as well as to settlement negotiations without any assurance that either would be fruitful.

[18] The counsel fee sought is fair and reasonable as are the disbursements to be recovered by the Fund. They are each approved.

LAX J.

Released: September 12, 2013

[2] *Lavier*, *supra*, at para. 31; *Parsons*, *supra*, at para. 94; *Smith v. National Money Mart*, [2010] O.J. No. 873 (S.C.J) at paras. 19-20.

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