

**SUPERIOR COURT OF JUSTICE**

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Date: October 29, 2013

RE: HITENDRA PATEL v. Groupon Inc.
DOCKET: CV-11-428749-00CP

Please contact Gladys Gabbidon at (416) 327-5052 if you do not receive all pages. Thank you.

CITATION: Patel v. Groupon Inc., 2013 ONSC 6679
COURT FILE NO.: CV-11-428749-00CP
DATE: 20131029

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Hitendra Patel / Plaintiff

AND:

Groupon Inc. / Defendant

Proceeding under the *Class Proceedings Act, 1992*

BEFORE: Justice Edward Belobaba

COUNSEL: Louis Sokolov, Christine Davies and Nadine Blum for the Plaintiff

Laura K. Fric and Robert Carson for the Defendant

HEARD: July 2 and September 10, 2013

CERTIFICATION AND SETTLEMENT APPROVAL

[1] The parties have settled this proposed class action. The plaintiff now brings this motion for certification of the action as a class proceeding (on consent), approval of the settlement agreement and approval of class counsel fees.

[2] For the reasons set out below, I am satisfied that this settlement is fair and reasonable and in the best interests of the class. I am also satisfied that the proposed legal fees should be approved although not for the reasons advanced by class counsel. As I explain below, the legal fees are approved but only because they are less than what would have been awarded on a contingent fee basis.

Background

[3] Groupon is a web-based “deal-of-the-day” company, which sells vouchers (also known as “groupons”) that can be used towards the purchase of goods or services at participating local or national merchants. Consumers pay the listed purchase price (“purchase value”) in exchange for a voucher with a higher face value, which can be redeemed for goods and services from the merchant, thereby achieving a deal. The difference between the face value and the purchase value is known as the “promotional value.”

[4] The plaintiff alleges that Groupon engaged in “unfair practices” contrary to provincial consumer protection legislation by selling Groupon vouchers with illegal expiration dates. The plaintiff further alleges that Groupon illegally required consumers to use the entire “groupon” in a single transaction, or lose any remaining balance. The proposed class action is framed in breach of contract, negligent misrepresentation, breach of consumer protection legislation and unjust enrichment. There are about one million potential class members in Canada.

[5] Shortly after the commencement of this action, Groupon changed its terms of service to clarify that the purchase value of the Groupon vouchers would not expire. However, despite these changes, Groupon did not take any steps to refund the purchase price of class members’ expired groupons and continued to publish deal pages that, on their face, included an expiry date and, in the plaintiff’s view, did not make clear that the expiry date only referred to the promotional value and not to the purchase value. The lawsuit, therefore, continued.

[6] The action was settled in February, 2013. The settlement provides that class members can continue to redeem their vouchers at the purchase price or, if redemption is not possible, they can recover their money back from a settlement fund. Both sides agree that the number of persons who will have to resort to the settlement fund will be small. Based on a parallel Groupon U.S. settlement, the parties anticipate that less than \$500,000 will actually be needed for the Canadian settlement fund.

[7] The specifics of the settlement agreement are these: Groupon will deposit \$535,000 into the settlement fund for eligible claimants; counsel fees of \$235,000 and administration fees of \$100,000 will be deducted from the fund, leaving about \$200,000 for class member claimants. Any unclaimed balance will be returned to the defendant.

Certification

[8] Under s. 5(1) of the *Class Proceedings Act, 1992*,¹ (“CPA”) the court shall certify a proceeding as a class proceeding if: (a) the pleadings disclose a cause of action; (b) there is an identifiable class; (c) the claims or defenses of the class members raise common issues of fact or law; (d) a class proceeding would be the preferable procedure; and (e) there is a representative plaintiff or defendant who would adequately represent the interests of the class without conflict of interest and there is a workable litigation plan.

[9] Where certification is sought for the purposes of settlement, all the criteria for certification must still be met: *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d)

¹ S.O. 1992, c. 6.

481 (S.C.J.) at para. 22. However, compliance with the certification criteria is not as strictly required because of the different circumstances associated with settlements: *Bellaire v. Daya*, [2007] O.J. No. 4819 (S.C.J.) at para. 16.

[10] The proposed class is defined as “all consumers in Canada who purchased or acquired a daily deals voucher from Groupon, also known as a “groupon,” for services and products, prior to March 8, 2013, the date that the Court approved notice of the certification and settlement approval hearing in the proposed class proceeding.” The claim asserts viable causes of action for breach of contract, breach of provincial consumer protection legislation, unjust enrichment and negligent misrepresentation. There is an identifiable class of two or more persons. The proposed common issues about the legality of the defendant’s business practices will significantly advance (and indeed decide) the class members’ claims. The class proceeding is the preferable procedure and there is no doubt but that the plaintiff has fairly and adequately represented the interests of the class to date and will continue to do so until the matter is completed.

[11] In sum, I find that all of the criteria for certification as set out in s. 5 of the CPA have been satisfied.

Settlement approval

[12] Under s. 29(2) of the CPA, a settlement of a class proceeding must be approved by the court to be binding on the parties. To approve the settlement, the court must find that in all the circumstances the settlement is fair, reasonable, and in the best interests of those affected by it: *Dabbs v. Sun Life Assurance*, [1998] O.J. No. 1598 (Gen. Div.) at para. 9.

[13] In deciding whether to approve a settlement, the court, without making findings of facts on the merits of the litigation, must examine the fairness and reasonableness of the proposed settlement and whether it is in the best interests of the class as a whole having regard to the claims and defences in the litigation and any objections raised to the settlement: *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (S.C.J.) at para. 10.

[14] A reasonable and fair settlement is inherently a compromise and will not be and need not be perfect from the perspective of the parties. That some class members are disappointed or unsatisfied will not disqualify a settlement because the measure of a reasonable and fair settlement is not unanimity or perfection: *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.) at p. 440, aff'd (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C., [1998] S.C.C.A. No. 372.

[15] The settlement agreement that is before me for approval was the product of arms-length and good faith negotiations. The defendant has agreed to settle this action by establishing a settlement fund of \$535,000 to be distributed among members of the class in accordance with the terms of the settlement agreement. If this settlement is approved,

class members who are otherwise unable to redeem their groupon for its purchase value, will be able to recover all or most of this amount from the settlement fund.

[16] Any further litigation to show that the promotional value of the groupon (as opposed to its purchase value) should also be free of an expiration date would likely not succeed, given the many counter-arguments identified by counsel for the defendant. It is the opinion of class counsel that the settlement agreement is fair and reasonable and in the best interests of the class members.

[17] I agree. The settlement agreement is approved.

Legal fees approval

[18] As I advised counsel when they were last before me, I have difficulty with the legal fees portion of the settlement agreement. As part of the settlement, the defendant has agreed to pay legal fees of \$235,000 directly to class counsel. The risk of collusion, significant in any settlement agreement, is especially high in a case where counsel have agreed to pre-allocate monies that would otherwise have gone to the class, to the class counsel as fees.² The concerns about collusion and conflict of interest in "pre-cutting the cake" have been widely discussed in the class action literature.³ Put simply, where the legal fees have been pre-allocated to be paid directly out of the settlement agreement to class counsel, the legal fee provisions must be subjected to strict scrutiny.

[19] Normally, I would not have approved the \$235,000 payment in legal fees. I am willing to do so only because class counsel has persuaded me in supplementary written submissions that the value of the overall settlement, including the non-monetary value provided to class members, is actually in the millions of dollars.

[20] Based on Groupon's corporate filings with the American S.E.C. and statistical information available in the business literature, class counsel submit that a significant benefit achieved herein was the freeing up at least \$7 million worth of unredeemed vouchers that consumers believed had expired and that now can be redeemed. I accept this submission. But let me assume that \$7 million may be an overestimate. Let me reduce this "benefit" by half to \$3.5 million and then by half again to \$1.75 million. The value of the overall settlement, on the most conservative measure, would thus be \$2.285 million (\$535,000 plus \$1.75 million in "non-monetary value.")

² I am not suggesting that counsel in this case acted in anything other than good faith and in the best interests of their clients. I am simply noting the much-documented risk of collusion and the obvious conflict of interest, even when neither of these is consciously intended by counsel who honestly believe they are acting in good faith.

³ By leading class action commentators such as Garry Watson, Richard Posner and John Chaffee to name just three; see the excerpts from their articles in Watson, *Class Actions: Cases and Materials* (Toronto: Osgoode Hall Law School, 2010) found under the sub-topic, "The Settlement Problem."

[21] If class counsel had based their legal fees request on a 20 percent contingency, they would have arguably been entitled to \$457,000 in legal fees. I therefore have no difficulty approving the lower amount being requested herein, namely \$235,000. I am approving this amount, not because of the hours docketed (a generally unsatisfactory metric) but because the quantum is fair and reasonable given the fact that the overall recovery for class members (monetary and non-monetary) is demonstrably in the millions of dollars.

Disposition

[22] The proposed class action is certified. Both the settlement agreement and the legal fees are approved.

[23] Order to go accordingly.



Belobaba J.

Date: October 29, 2013