ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)
	)
DANIEL BENNETT	) *Sabrina Callaway* for the Plaintiff
	)
Plaintiff	)
	)
– and –	)
	)
LENOVO (CANADA) INC. and SUPERFISH INC.	) *Vlad Calina* for the Defendant Superfish Inc.
	)
	) *Kiran Patel* for the Defendant Lenovo
Defendants	) (Canada) Inc.
	)
	)
	)
	) **HEARD**: November 2, 2017

PERELL, J.

REASONS FOR DECISION

[1]   On March 11, 2015, the Plaintiff Daniel Bennett commenced a proposed national class action under the *Class Proceedings Act*,[1] against Lenovo (Canada) Inc., a computer manufacturer, and against Superfish Inc., a software developer in Palo Alto, California, that developed a computer program known as Visual Discovery. On September 26, 2017, the certification motion was argued as against Lenovo (Canada) - but not against Superfish. Mr. Bennett now moves for certification of the action for settlement purposes as against Superfish.

[2]   The background facts to the motion are that Lenovo (Canada) is a subsidiary of Lenovo Group Limited, a corporation based in Beijing, China. Seventeen (17) models of Lenovo (Canada)'s laptop computers were sold with Visual Discovery software preloaded. Visual Discovery operates to find consumer products based on an image-to-image search technology that enables users to search for items based on the appearance of the item, rather than a text-based description. Visual Discovery operates to intercept the user's internet connections and scans the user's web traffic to inject advertisements into the user's web browser.

[3]   Mr. Bennett is a lawyer who lives in St. John's, Newfoundland and Labrador. In September 2014, he purchased a Flex 2 laptop computer from Lenovo (Canada) on-line for personal and for business use. His computer was preloaded with Visual Discovery.

---

[1] 1992, S.O. 1992, c. 6.

[4]   In versions of the software intalled on Lenovo (Canada)'s computers from September 1, 2014 until December 1, 2014, when an updated version of the software was installed, there was a security defect in the software (a self-signed root certificate with a non-unique password). The presence of the security defect meant that in certain circumstances, when the user was using his or her laptop on an unsecure computer network, a third-party could gain access to the computer owner's confidential and private information. The defect did not affect users on a secure network such as typically provided by a home internet service, but the user's computer was exposed if used on an unsecure network such as in an airport or coffee shop where a hacker who knew the non-unique password and how to redirect the user's traffic to a malicious website, could obtain data from the user's computer.

[5]   In all versions of Visual Discovery installed on Lenovo (Canada)'s computers between September 1, 2014 and January 16, 2015, when Lenovo (Canada) stopped loading the software, it was part of the operation of the software to send information from the user's computer to Superfish's servers in order to perform the search for items. The information included the URL of the website being visited, the main or first product image on the page, text associated with that product image, the name of the merchant's website, the user's IP address and country, a unique identifier created by the software, and session information.

[6]   All information sent to Superfish's servers was received on an anonymous basis. The information did not contain the name, username, password, physical address, email address, telephone number or other personally identifiable information of the user or computer owner. Visual Discovery did not log users' keystrokes and the information that Visual Discovery sent to Superfish could not be tracked back to any particular person. The information was not retained and each search was treated as a discrete search.

[7]   After January 16, 2015, Visual Discovery was not preloaded on Lenovo computers.

[8]   On February 19, 2015, from media reports, Lenovo (Canada) learned that the original version of Visual Discovery had a security defect. On that day, the Superfish servers were shut down, and Visual Discovery became inoperable on all Lenovo computer units on which it had been installed.

[9]   There have been no reports or evidence in Canada or elsewhere that the security defect was exploited to access the private information of any user of the computers sold by Lenovo (Canada).

[10]   On March 11, 2015, Mr. Bennett commenced his then proposed class action.

[11]   There is a parallel action in the United States.

[12]   Mr. Bennett's Statement of Claim was amended twice on January 6, 2016 and again on May 9, 2016 when Superfish Inc. was added as a defendant.

[13]   After the action was commenced, Lenovo (Canada) brought a Rule 21 motion to challenge the various causes of action pleaded, and Justice Belobaba concluded that it was not plain and obvious that the claims for: (1) the implied condition of merchantability; (2) the tort of intrusion upon seclusion; and (3) breach of provincial privacy laws, would fail.[2]

---

[2] *Bennett v. Lenovo*, 2017 ONSC 1082.

[14]   On March 10, 2017, Lenovo (Canada) delivered a Statement of Defence and a Crossclaim against Superfish. Superfish did not defend the action and instead there were settlement discussions. A settlement was reached in which Superfish would pay $151,547 and provide co-operation in the Canadian litigation.

[15]   Superfish initially would not agree that a settlement had been reached, and Mr. Bennett brought a motion under Rule 49 of the *Rules of Civil Procedure* to enforce the settlement. If the Rule 49 motion was granted, his plan was to seek approval of the settlement in accordance with the *Class Proceedings Act, 1992*.

[16]   On September 26, 2017, before the Rule 49 motion had been heard, the certification motion as against Lenovo (Canada) came on for a hearing. I reserved judgment.

[17]   On September 28, 2017, the Rule 49 motion came on for a hearing, but counsel for Superfish, without appearing on the record, attended and requested an adjournment, which was opposed by Mr. Bennett. I, however, granted the adjournment and made the following endorsement:

> This is a class action with two defendants, Lenovo (Canada) Inc. and Superfish Inc. Both defendants were served and Lenovo (Canada) defended and has resisted certification of the action and made a crossclaim against Superfish.
>
> There is a parallel action in the United States.
>
> Superfish did not defend the Canadian action and instead there has been settlement discussions between the plaintiff Mr. Bennett's counsel and lawyers acting for Superfish's insurer. Mr. Bennett moves under Rule 49 to enforce an alleged settlement arising from those discussions. If the Rule 49 motion is granted, he intends to seek approval of the settlement in accordance with the *Class Proceedings Act, 1992*, S.O. 1992, c. 6.
>
> Counsel for Superfish, which is not formally on the record, requests an adjournment to obtain instructions from Superfish. The adjournment request is opposed by Mr. Bennett.
>
> I am granting the adjournment request and rescheduling this motion for November 2, 2017.
>
> As presently constituted the motion is ill-conceived. In my opinion, in the context of a proposed class action, a Rule 49 motion cannot proceed pre-certification of the action. Once the action is certified, the court would be in a position to both approve and enforce the settlement.
>
> I am, therefore, adjourning the motion to allow Mr. Bennett to properly constitute his motion. To do this, I direct that he serve on Superfish the following materials, service to be effected pursuant to Justice Belobaba's Order of May 9, 2016:
>
>> (1) a new notice of motion and supporting affidavits for an order certifying the action as against Superfish and for approval and enforcement of the alleged settlement;
>>
>> (2) the motion records and factums delivered for the certification motion as against Lenovo (Canada) heard on September 26, 2017;
>>
>> (3) the motion record for the motion now being adjourned.
>
> The costs of this adjournment are reserved to the return of the motion.
>
> ...

[18]   On October 3, 2017, I certified the action as against Lenovo (Canada).[3] I also issued a direction that notice to the class of the settlement approval hearing with respect to Superfish would not be required before the return of the Rule 49 motion and the certification and

---

[3] *Bennett v. Lenovo (Canada)*, 2017 ONSC 5853.

settlement approval hearing.

[19]   Superfish has now recognized the settlement, and the Rule 49 motion is no longer necessary and is being withdrawn. Thus, the matters before the court are a consent certification motion for settlement purposes and approval of the settlement.

[20]   In the certification motion as against Superfish, Mr. Bennett proposes the following class definition, which is the definition I certified as against Lenovo (Canada):

> All persons in Canada who purchased directly from Lenovo (Canada) one or more of the following Lenovo laptops containing Visual Discovery software:
>
> - G Series: G510, G40-70, G50-70, G50-45
> - U Series: U430P, U530Touch
> - Y Series: Y40-70, Y50-70
> - Z Series: Z40-70, Z50-70
> - Flex Series: Flex2 14, Flex2 15,
> - MIIX Series: MIIX2-10
> - YOGA Series: YOGA2Pro-13, YOGA2-13, YOGA2-11BTM, YOGA2-11HSW

[21]   Mr. Bennett proposes that the following common issues be certified as against Superfish:

Intrusion Upon Seclusion

(i) Did Superfish Inc. invade, without lawful justification, the class members' private affairs or concerns by designing and developing Visual Discovery for installation on the Affected Models?

(ii) If the answer to question (i) is "yes", was Superfish Inc.'s conduct intentional or reckless?

(iii) If the answer to questions (i) and (ii) are "yes", would a reasonable person regard the invasion as highly offensive causing distress, humiliation or anguish?

Breach of Provincial Privacy Acts

(iv) For class members resident in British Columbia, did Superfish Inc. contravene the *Privacy Act*, R.S.B.C. 1996, c. 373, s. 1?

(v) For class members resident in Saskatchewan, did Superfish Inc. contravene the *Privacy Act*, R.S.S. 1978, c. P-24, s. 2?

(vi) For class members resident in Manitoba, did Superfish Inc. contravene *The Privacy Act*, C.C.S.M., c. P 125, s. 2?

(vii) For class members resident in Newfoundland and Labrador, did Superfish Inc. contravene the *Privacy Act*, R.S.N.L. 1990, c. P-22, s. 3?

[22]   Pursuant to s. 5(1) of the *Class Proceedings Act, 1992*, the court shall certify a proceeding as a class proceeding if: (1) the pleadings disclose a cause of action; (2) there is an identifiable class; (3) the claims or defences of the class members raise common issues of fact or law; (4) a class proceeding would be the preferable procedure; and (5) 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.

[23]   In the present case, I am satisfied that all of the criteria for certification have been satisfied and that the incidental relief should be granted.

[24]   Turning to the matter of settlement approval, as noted above, there is similar litigation in the U.S. involving the same defendants and alleged misconduct. The plaintiffs in the U.S. litigation reached a settlement with Superfish on February 1, 2016 based on the following terms:

- In full, complete and final settlement of the Litigation... Superfish shall pay... $1,000,000 in United States currency... (paragraph 4.1).

- In addition to the monetary consideration set forth in paragraph 4.1 above, Superfish agrees to cooperate with Plaintiffs by (a) producing additional documents and discovery relevant to the Litigation as reasonably requested by Class Counsel, (b) providing assistance reasonably necessary to establish the authenticity and admissibility of documents, (c) making knowledgeable persons then-employed by Superfish available for interviews in the city where those employees work or reside, as reasonably requested by Class Counsel, (d) responding to requests for assistance in understanding the facts at issue in the Litigation, and (e) producing at trial in person, by deposition or affidavit, whichever is legally necessary and reasonably possible, representatives to testify as reasonably requested by Class Counsel (paragraph 4.3).

[25]   As noted above, the Plaintiff and Superfish entered into a Settlement Agreement in respect of all claims made against Superfish in the within action. Under the terms of the Settlement Agreement, the Plaintiff agreed to dismiss his claims as against Superfish, and Superfish agreed:
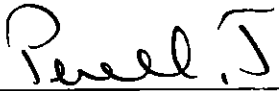
- to pay US$115,000 (through its insurer AIG Israel) to settle the Canadian class action. The parties agreed to use the Bank of Canada exchange rate for July 22, 2016 to convert the U.S. funds into Canadian dollars. Payment will therefore be C$151,547; and

- that the offer to settle includes all non-monetary terms including cooperation contained in the settlement in the U.S. class action.

[26]   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; *Kidd v. Canada Life Assurance Company*, 2013 ONSC 1868.

[27]   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 the 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; *Kidd v. Canada Life Assurance Company, supra.*

[28]   In determining whether to approve a settlement, the court, without making findings of fact on the merits of the litigation, examines 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. An objective and rational assessment of the pros and cons of the settlement is required: *Al-Harazi v. Quizno's Canada Restaurant Corp.* (2007), 49 C.P.C. (6th) 191 (Ont. S.C.J.) at para. 23.

[29]   In the immediate case, having regard to the various factors that the court must consider in approving or rejecting a settlement, I conclude that the settlement is fair, reasonable, and in the best interests of the Class Members. I approve the settlement.

_____
Perell, J.

Released: November 2, 2017

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

DANIEL BENNETT

Plaintiff

– and –

LENOVO (CANADA) INC. and SUPERFISH INC.

Defendants

REASONS FOR DECISION

PERELL J.

Released: November 2, 2017