CITATION: Marriott v. General Motors of Canada Company, 2018 ONSC 2535
COURT FILE NO.: CV-17-576146CP
DATE: 20180420

2018 ONSC 2535 (CanLII)

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: KEVIN MARRIOTT, Plaintiff

AND:

GENERAL MOTORS OF CANADA COMPANY, GENERAL MOTORS COMPANY, GENERAL MOTORS LLC, ROBERT BOSCH GMBH, ROBERT BOSCH LLC and ROBERT BOSCH INC., Defendants

BEFORE: Justice Glustein

COUNSEL: *Mohsen Seddigh and Jean-Marc Leclerc*, for the Plaintiff

Nicole Henderson, for the Defendants Robert Bosch GmbH, Robert Bosch LLC, and Robert Bosch, Inc.

Cheryl Woodin, for the Defendants General Motors of Canada Company, General Motors Company, and General Motors LLC

HEARD: April 19, 2018

ENDORSEMENT

Nature of motion and overview

[1] The plaintiff brought a motion for an order approving a third party litigation funding agreement between the plaintiff and Claims Funding International, PLC ("CFI") dated April 17, 2018 (the "Funding Agreement"). The defendants did not oppose the relief sought.

[2] At the hearing, counsel provided the court with a draft order approving the Funding Agreement. I held that it was appropriate to approve the Funding Agreement and granted the motion. I signed the order and endorsed the motion record, with reasons to follow. I set out my reasons below.

Nature of the action

[3] This action arises out of the alleged violation of Canadian automobile emission standards by the defendants. The plaintiff alleges that the defendants researched, designed, manufactured, and installed a "defeat device" in certain diesel engine vehicles (the "Vehicles"), which rendered elements of the Vehicles' emission control systems inoperative

or less effective outside laboratory test conditions. The plaintiff also alleges that the Vehicles polluted far in excess of levels permitted under Canadian law.

[4] The plaintiff owns one of the Vehicles and sues the defendants for their roles in the alleged conduct.

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The Funding Agreement

[5] CFI is a litigation funding company who was the court-approved funder in both *Dugal v. Manulife Financial Corp.*, 2011 ONSC 1785 ("*Manulife*"), supplementary reasons at 2011 ONSC 3147 and in *Smith v. Sino-Forest Corp.*, 2012 ONSC 2937 ("*Sino-Forest*").

[6] Under the Funding Agreement, CFI has agreed to pay certain disbursements[1] and any adverse costs orders in relation to the action. In exchange, CFI will receive a commission of 7% of the gross settlement/judgment amount allocated to all class members, less any funding provided by CFI, plaintiff's lawyers' fees and disbursements including HST, and "Administration Expenses" as defined in the Funding Agreement.

[7] The commission is subject to a cap of $10 million if the action is resolved prior to the filing of the plaintiff's pre-trial conference brief, and $15 million if the action is resolved at any time thereafter.

Analysis

[8] It is settled law that funding agreements are an acceptable way to promote access to justice. I adopt the principles set out in *Manulife* and *Sino-Forest*, as summarized by Perell J. in *Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp.*, 2013 ONSC 4974 ("*Kinross*"), at para. 41.

[9] The Funding Agreement is very similar to the ones previously approved by the court in *Manulife*, *Kinross*, and *Sino-Forest*. Applying the *Kinross* factors and the analysis of the courts in these leading cases, I find:

(i) Given the magnitude of this litigation and the number of parties involved, it is reasonable to believe that an adverse costs award in the proceeding could be overwhelming to a representative plaintiff, given recent costs awards of $1 million or more in *Fehr v. Sun Life Assurance Co. of Canada*, 2017 ONSC 2218

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[1] The amount of the disbursements has been redacted from the Funding Agreement provided to the defendants and filed in the court record. I reviewed the unredacted Funding Agreement at the hearing. I accept that the redactions are appropriate to avoid any "tactical advantages [to the defendants] in how the litigation would be prosecuted or settled" (adopting the approach of Perell J. in *Berg v. Canadian Hockey League*, 2016 ONSC 4466, at para. 15).

(appeal pending); *Yip v. HSBC Holdings plc*, 2017 ONSC 6848 (appeal pending), and *Das v. George Weston Limited*, 2017 ONSC 5583;

(ii) "No rational person would risk an adverse costs award of several million dollars to recover several thousand dollars or even several tens of thousands of dollars" (*Manulife*, at para. 38);

(iii) It would be "negligent or unethical" if plaintiff's counsel "allowed their client, the representative plaintiff, to assume a potentially catastrophic financial risk" (*Kinross*, at para. 30);

(iv) The plaintiff's evidence was that "given the relative size of my personal loss, I would not have been willing to take on this role [as representative plaintiff] had [plaintiff's lawyers] not provided me with an indemnity against adverse costs awards";

(v) Consequently, the Funding Agreement is necessary in order to provide the plaintiff and class members with access to justice;

(vi) The plaintiff commenced the action in good faith before seeking the assistance of CFI, and the underlying litigation was not manufactured by CFI. There was a gap of approximately seven months before the plaintiff first entered a funding agreement with CFI on January 2, 2018, which was then amended and signed in the current form more than three months later on April 17, 2018;

(vii) The plaintiff received independent legal advice on the nature and terms of the Funding Agreement, as well as his obligations and potential liability. Independent counsel provided a certificate of independent legal advice advising that "I am satisfied that Mr. Marriott fully understands the nature and effect of executing the [Funding Agreement] and that in executing the [Funding Agreement], Mr. Marriott is acting freely and voluntarily, and not under any undue influence exercised by Claims Funding International, PLC, [his] Lawyers, or any other persons";

(viii) The plaintiff also reviewed and discussed the Funding Agreement with his counsel before it was executed, including discussions that (a) courts in Ontario can order a losing party to pay a portion of the legal fees of the successful party on a motion or at trial; (b) a representative plaintiff can be individually responsible for such an award; and (c) such an award could total hundreds of thousands of dollars for major motions, like a certification motion;

(ix) The plaintiff also discussed with his counsel the possibility that the plaintiff could apply to Ontario's Class Proceedings Fund ("CPF") for litigation financing, but the plaintiff understood that the CPF would be entitled to 10% of any net recovery for the class which "would be far greater than the capped commission outlined in the [Funding] Agreement";

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(x) The Funding Agreement was promptly disclosed to the court, and could not come into force without court approval;

(xi) The Funding Agreement does not interfere with the rights of the plaintiff to instruct counsel. It makes clear that counsel's obligations are owed to the plaintiff, not to CFI. It does not cause the plaintiff to "become indifferent in giving instructions to Class Counsel in the best interests of the class members" (*Kinross*, at para. 41);

(xii) The Funding Agreement is fair and reasonable. The 7% commission in the Funding Agreement is less than the 10% premium applied by the CPF and is capped at a fixed amount, unlike the CPF;

(xiii) The parties' rights to terminate the Funding Agreement are narrowly prescribed. The Funding Agreement may only be terminated upon notice, in the event that (a) the parties do not fulfill their contractual obligations; (b) the plaintiff appoints new counsel; or (c) CFI chooses not to fund any related appeals;

(xiv) The Funding Agreement protects the confidentiality of any communication or document that may pass between counsel, the current plaintiff and any additional plaintiffs in this action and CFI, and makes that information subject to solicitor-client privilege, litigation privilege, and settlement communication privilege;

(xv) Under the Funding Agreement, CFI can only use the information for the purpose for which it was provided and may not disclose the information to any person other than the plaintiff and the plaintiff's lawyers retained in the proceeding;

(xvi) Pursuant to the order, CFI is bound by the deemed undertaking rule to the extent any evidence obtained from the defendants is provided to CFI; and

(xvii) The parties have agreed as a term of the order that CFI shall post security for costs with the court in accordance with a fixed schedule.

Conclusion

[10] At the hearing, I granted the motion for approval of the Funding Agreement and signed the applicable order. My above reasons set out the basis for that decision.

GLUSTEIN J.

Date: 20180420

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