CITATION: Bozsik v. Livingston, 2019 ONSC 5340
COURT FILE NO.: 5270/14
DATE: 2019-09-16

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: MICHAEL BOZSIK, Plaintiff

AND:

LIVINGSTON INTERNATIONAL INC., Defendant

BEFORE: Gray J.

COUNSEL: Louis Sokolov, David O'Connor, J. Adam Dewar and Jody Brown, for the Plaintiff

Linda Plumpton, Lisa Talbot and Rachael Saab, for the Defendant

Chris G. Paliare and Paul Davis, *amicus curiae*

HEARD: June 21, 2019

ENDORSEMENT

[1] On November 17, 2016, I certified this action as a class proceeding. On June 21, 2019, I entertained a motion to approve the settlement of the action, and to approve a distribution protocol. At the same time, I entertained a motion to approve the fees and disbursements of counsel for the representative plaintiff. I approved all proposed orders and undertook to provide written reasons in due course. These are the reasons.

[2] By endorsements dated April 10 and 11, 2019, I appointed Chris G. Paliare as *amicus curiae*, to assist the court with respect to the reasonableness of the settlement and the reasonableness of the fees and disbursements of counsel for the plaintiff.

[3] The action involved the alleged failure to compensate employees of the defendant for overtime that had been worked, but not paid for, or perhaps even recorded. In addition to the other common issues that I certified, I held that it was appropriate to certify aggregate damages

as a common issue. Apparently, this had not been done before in other alleged unpaid overtime cases.

[4] After considerable disclosure and negotiations, the parties ultimately agreed, subject to court approval, to a settlement of the claims of the class members in the aggregate amount of $19,000,000 to be distributed to members of the class in accordance with a detailed distribution protocol.

[5] As part of the settlement, it was agreed that counsel for the class would receive 33 per cent of the settlement amount, once again subject to court approval.

[6] It is well understood that a settlement, being a compromise of the positions of both parties, is unlikely to represent a complete victory in favour of the plaintiff. It is in that context that the reasonableness of the settlement must be assessed.

[7] In this case, the parties used as an appropriate starting point an analysis of various electronic time keeping mechanisms, and the data obtained through them, in order to acquire at least a rough understanding of how much uncompensated overtime might be at issue. Both parties had their respective experts analyze the underlying data, and were able to come up with competing estimates. After considerable negotiation, a bridging of the positions of each party was achieved.

[8] Balanced against what might be considered to be a less than perfect outcome, from the perspective of the plaintiff, is the uncertainty of outcome if the matter were to be pursued to trial, and the ensuing delay and expense.

[9] Generally speaking, in my view, the parties must be accorded considerable latitude in arriving at a settlement of the matter, and any second-guessing by the court should be kept to a minimum. In this case, the settlement was arrived at by experienced counsel after considerable negotiation, and it is based on a rational analysis of the available evidence. In the final analysis, the settlement is reasonable, and I had no hesitation in approving it. The distribution protocol was also reasonable, and I approved it.

[10] The fees of class counsel are on a contingency basis, and are consistent with other contingency-based fees that have been approved by many other class proceedings judges. The fees must be sufficiently attractive in order to encourage experienced counsel to undertake actions of this sort, and must be high enough to reflect the risk that counsel undertake. If the matter were to proceed to trial and the action were to be dismissed, counsel would receive nothing. The flip side is that if a reasonable settlement is achieved, counsel must be adequately rewarded.

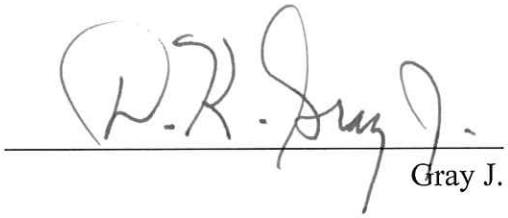
[11] In the result, the fees of class counsel are reasonable, and I had no hesitation in approving them.

[12] Before closing, I should specifically note the assistance I was given by *amicus* in this process. As I noted in my endorsement appointing Mr. Paliare, a judge entertaining a motion to approve a settlement, and the fees of class counsel, is at a distinct disadvantage. Both parties will urge that the settlement be approved. The defendant has no interest in challenging the reasonableness of the fees of class counsel. It is important, in my view, that some process be available to the court in order to assist in exercising due diligence. As discussed by the Court of Appeal in *Smith Estate v. National Money Mart Co.*, 2011 ONCA 233, 106 O.R. (3d) 37, one method of doing so is through the appointment of *amicus*.

[13] In this case, Mr. Paliare and Mr. Davis thoroughly analyzed the material and were able to provide considerable assurance to me that the settlement and the fees of class counsel were reasonable. One relatively minor error was uncovered, which resulted in a slight increase in the amount to be allocated to the class members. The error was promptly acknowledged by counsel for the plaintiff, and was corrected.

[14] I ordered that the fees and disbursements of *amicus* be defrayed, for the most part, out of the settlement funds and, to a lesser extent, by the defendant. In my view, the defendant has an interest in the settlement being approved, and it is appropriate that it pay at least some portion of the fees and disbursements of *amicus*. In this case, the defendant consented to do so, and offered to pay 25 per cent, which I accepted.

[15] I am very grateful for the assistance that Mr. Paliare and Mr. Davis provided to the court.



Gray J.

Date: September 16, 2019