

CITATION: Bernstein v. Peoples Trust Company, 2020 ONSC 5880
COURT FILE NO.: CV-13-493837-00CP
DATE: 2020/09/29

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:)	
)	
JOYCE BERNSTEIN)	<i>Louis Sokolov, Jonathan Schachter, Nadine</i>
)	<i>Blum and Charles Sinclair for the Plaintiff</i>
Plaintiff)	
)	
– and –)	
)	
PEOPLES TRUST COMPANY and)	<i>Lawrence Thacker, and Jonathan Chen for</i>
PEOPLES CARD SERVICES LLP)	<i>the Defendants</i>
)	
Defendants)	
)	
Proceeding under the <i>Class Proceedings Act, 1992</i>)	HEARD: September 25, 2020
)	

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION

[1] In this certified action under the *Class Proceedings Act, 1992*,¹ the Representative Plaintiff, Joyce Bernstein, brought a class action against Peoples Trust Company and Peoples Card Services LLP (collectively “Peoples Trust”). The action was brought on behalf of all consumers in Ontario within the meaning of the *Consumer Protection Act, 2002*,² who purchased or acquired a prepaid payment card sold or issued by Peoples Trust between November 29, 2011 and April 30, 2014. In her action, Ms. Bernstein alleged that Peoples Trust breached the Gift Card Regulations in *O. Reg. 17/05 (General)*, a regulation enacted pursuant to the *Consumer Protection Act, 2002*.

[2] The action was commenced by way of Statement of Claim issued November 29, 2013. It was certified as a class proceeding on January 21, 2017.³ The deadline for opting out of the proceeding passed and no one opted out. On May 13, 2019,⁴ I granted Ms. Bernstein a summary judgment in respect of Peoples Trust’s Single Load Payment (“SLP”) cards, and I dismissed the balance of her claim concerning General Purpose Reloadable (“GPR”) cards. By reasons dated August 9 and October 21, 2019,⁵ I granted Ms. Bernstein pre- and post- judgment interest, and costs.⁶

¹ S.O. 1992, c. 6.

² S.O. 2002, c. 30, Sched. A.

³ *Bernstein v. Peoples Trust Company*, 2017 ONSC 752.

⁴ *Bernstein v. Peoples Trust Company*, 2019 ONSC 2867.

⁵ *Bernstein v. Peoples Trust Company*, 2019 ONSC 4675.

⁶ *Bernstein v. Peoples Trust Company*, 2019 ONSC 6076.

[3] On June 12, 2019, Peoples Trust filed a Notice of Appeal in respect of the judgment, and on June 19, 2019, Ms. Bernstein filed a Notice of Cross-appeal in respect of the dismissal of the GPR card claim.

[4] Before the hearing of the appeal and cross-appeal, Ms. Bernstein and Peoples Trust entered into a Settlement Agreement, which is subject to court approval. This is the motion for approval of the settlement.

[5] Ms. Bernstein has drafted a protocol for distributing the funds to the Settlement Class Members. The Distribution Protocol is subject to court approval. This is the motion for approval of the Distribution Protocol.

[6] Class Counsel also seeks approval of its contingency fee agreement with Ms. Bernstein and for approval of the counsel fee. This is the motion for approval of the fee agreement and the fee.

B. FACTS

The Class Proceeding

[7] In September 2012, Ms. Bernstein, an epidemiologist living in Toronto, was given a Peoples Trust “Vanilla Prepaid Visa” card as a gift. The card had a face value of \$35. She did not attempt to use the card until September 2013 when she visited the website www.visaprepaidcanada.com. After registering the card online, she learned that her account balance was zero.

[8] Ms. Bernstein contacted Class Counsel at Goldblatt Partners LLP. She executed a Retainer Agreement with them as Class Counsel on October 30, 2013. The agreement provided that Class Counsel could seek up to a 35% percentage-based contingency fee if the action was successful after a common issues trial, with lower percentages if the action was resolved at an earlier stage. Class Counsel agreed to indemnify Ms. Bernstein from adverse costs consequences. Later, in November 2016, before the certification hearing, Class Counsel applied for and was granted funding by the Class Proceedings Fund.

[9] Class Counsel investigated the matter and learned that Peoples Trust offered two kinds of “prepaid credit cards”: Single Load Prepaid Cards (“SLPs”) and General Purpose Reloadable Prepaid Cards (“GPRs”). The card gifted to Ms. Bernstein was an SLP. It was Class Counsel’s opinion that: (a) the SLPs, and arguably the GPRs as well, could be “gift cards” within the meaning of Ontario’s *Consumer Protection Act, 2002* and its gift card regulation; and (b) Peoples Trust’s charging of monthly fees and its possession of unused or expired balances was arguably in contravention of the Act.

[10] Ms. Bernstein gave Class Counsel instructions to commence a class action on behalf of Ontario consumers who had purchased or received SLPs or GPRs issued by Peoples Trust. The action was commenced on November 29, 2013. The claim was on behalf of all consumers, within the meaning of the Act, who purchased or acquired prepaid credit cards issued by Peoples Trust after October 1, 2007. The class definition was subsequently amended to end on April 30, 2014, the day before the federal *Prepaid Payment Products Regulations*⁷ came into force.

[11] The Statement of Claim alleged, amongst other things, that: (a) Peoples Trust’s payment

⁷ SOR/2013-209.

cards were sold to consumers in Ontario and the transactions were subject to the Act and the Regulation as a type of “future performance agreement” known as a “gift card agreement”; and (b) the sale of Peoples Trust’s payment cards was contrary to the Regulation on two counts, namely: (i) Peoples Trust’s seizure or forfeiture of the balances on the cards after the “valid thru date” contravened the Act and the Regulation; and (ii) Peoples Trust charged fees that contravened the Act and the Regulation.

[12] Peoples Trust delivered its Statement of Defence on December 22, 2014 denying any breaches of the Act or the Regulation.

[13] In February 2015, shortly after the certification record had been completed, Justice Belobaba released his decision in *Sankar v. Bell Mobility Ltd.*,⁸ dismissing that case on summary judgment. *Sankar* also concerned the interpretation and application of the gift card Regulation. Class Counsel was concerned that, if Justice Belobaba’s decision was upheld on appeal, Ms. Bernstein’s case might not be viable. Class Counsel decided with the consent of Peoples Trust and with the approval of the Court, to pause the certification motion pending determination of the *Sankar* appeal.

[14] In April 2016, *Sankar* was upheld on appeal, but the Court of Appeal did not make any determination in respect of Justice Belobaba’s finding that the application of the Regulation was restricted to cash-equivalent cards that were purchased for third parties.⁹ It was Class Counsel’s opinion that Ms. Bernstein’s case was viable, and the certification motion was revived.

[15] The certification hearing was scheduled for January 2017. By this time, however, the British Columbia Supreme Court had released its decision in *Jiang v. Peoples Trust Company*¹⁰ in which it declined to certify a very similar case. The action in Ontario, nevertheless continued. The certification motion was heard on January 17 and 18, 2017. Peoples Trust aggressively challenged and opposed every aspect of the certification test.

[16] On January 31, 2017, I certified the action as a class proceeding. The certified action included the calculation of aggregate damages as a common issue. While Ms. Bernstein had proposed a class period beginning on October 1, 2007, I ruled that there was a two-year limitation period, which reduced the length of the class period. The class period was set from November 29, 2011 (being the two-year anniversary of the commencement of the action) to April 30, 2014. Peoples Trust did not seek leave to appeal the certification decision.

[17] Notice of Certification of the action was published, and Class Members were given until August 15, 2017 to opt out of the class action. No one opted out.

[18] The parties subsequently agreed that none of the certified common issues required a trial for resolution, and instead they agreed on a procedure for resolution of all common issues that would culminate in a summary trial. Ultimately, the action proceeded as a summary judgment motion. The summary trial was initially scheduled to be heard in September 2018.

[19] Peoples Trust subsequently did not produce documents or information pertaining to the identity of the cardholders or the quantum of unused funds in its possession. Ms. Bernstein moved

⁸ *Sankar v Bell Mobility*, 2015 ONSC 1976.

⁹ *Sankar v Bell Mobility Inc.*, 2016 ONCA 242. The plaintiff in *Sankar* sought leave to appeal to the Supreme Court of Canada. The Supreme Court remitted the case back to the Court of Appeal for rehearing (see 2016 CanLII 70291 (SCC), at which time the Court of Appeal affirmed its earlier judgment (see *Sankar v. Bell Mobility Inc.*, 2017 ONCA 295 (CanLII)).

¹⁰ 2016 BCSC 368, rev’d 2017 BCCA 119

for a production and her motion was heard on December 11, 2017, at which time, I approved with modifications, the Discovery Plan and a Timetable.

[20] In November 2017, Class Counsel retained the firm of Cohen Hamilton Steger experts in damages quantification, business valuation and forensic accounting, to prepare an expert report on the aggregate damages suffered by the Class.

[21] On November 13, 2018, the parties attended a mediation with the Honourable Mary Ellen Boyd, a retired British Columbia Supreme Court judge, as mediator. The mediation was not successful.

[22] The matter proceeded by way of motions for summary judgment which proceeded on April 5 and 6, 2019. Much like the certification motion, the summary judgment motion was vigorously contested. In reasons released on May 13, 2019, I granted judgment to Ms. Bernstein of \$15.3 million in compensatory damages with respect to the SLPs and \$1.5 million in punitive damages, plus pre-judgment interest of \$1,233,753 and post-judgment interest at the rate of 3% per annum. The balance of her claim with respect to Peoples Trust's GPR cards was dismissed.

[23] In my Reasons for Decision for the summary judgment motion, I noted that Peoples Trust contested everything, conceded nothing, and regardless of its strength or weakness or discordance with other arguments, Peoples Trust made every possible argument.

[24] Costs were subsequently awarded to Ms. Bernstein of \$905,244.02 plus post-judgment interest at the rate of 3% per annum from October 21, 2019. This award was in addition to costs previously awarded in the case in the amount of \$10,000 plus post-judgment interest at the rate of 2% per annum commencing on April 10, 2017.

[25] On June 12, 2019, Peoples Trust appealed from the decision granting judgment in respect of the SLPs. Ms. Bernstein filed a cross-appeal on June 19, 2019 from the judgment dismissing the claim in respect of the GPRs.

[26] Although Class Counsel believed that the Court's judgment with respect to the SLP cards was correct and ought to be upheld on appeal, there was a risk that the Court of Appeal would overturn the decision, leaving the Class with nothing. Conversely, there was a possibility with a concomitant risk for Peoples Trust that the Court of Appeal would allow Ms. Bernstein's appeal in respect of GPR cards. The risks were accentuated in this case, in part, because both parties were arguing that I erred in distinguishing between the SLPs and GPRs in interpreting and applying the exemption to the *Consumer Protection Act* set out in s. 2 (2) of the legislation.

[27] The appeals were originally scheduled to be heard on February 5 and 6, 2020, but at the request of Peoples Trust, the appeals were adjourned to June 9 and 10, 2020.

The Settlement

[28] The risk that both parties faced in the pending appeal hearing prompted a fresh round of settlement discussions a few days before the scheduled hearing. Counsel ultimately agreed, pending instructions from their clients, to settle the matter for the all-inclusive sum of \$17.0 million. The parties signed Minutes of Settlement on June 8, 2020.

[29] At the request of the parties, the Court of Appeal subsequently confirmed its agreement with the proposed arrangement set out in the Minutes of Settlement that it would issue an Order: (a) allowing Peoples Trust's appeal on the issue of punitive damages; (b) dismissing the balance of Peoples Trust's appeal; (c) dismissing the cross-appeal; and, (d) directing no costs of the appeals.

[30] The June 8, 2020 Minutes of Settlement entered into by the parties contained key terms of, but did not include, the complete terms necessary to conclude the action. It was therefore a term of the Minutes of Settlement that the parties agree to work towards entering into full and complete settlement agreement by no later than July 15, 2020. The parties signed the Settlement Agreement on July 15, 2020 which includes the following key terms:

- a. the payment by Peoples Trust of \$17.0 million to its counsel within sixty (60) days of execution of the Settlement Agreement;
- b. the Settlement Amount includes \$6,186,000 for credit balances existing after the “valid thru” date and shall be all-inclusive of all amounts.
- c. the payment of the Settlement Amount by Peoples Trust’s counsel to Class Counsel within four days of the issuance of the Approval and Appeal Orders;
- d. up to an aggregate of \$150,000, the cost of the notice and administration of the Settlement Agreement will be borne equally by the parties, following which any and all costs will be borne by the Class;
- e. following issuance of the Approval and Appeal Orders, the Court of Appeal shall issue its Order disposing of the parties’ respective appeals;
- f. following issuance of the Approval Order and payment of the Settlement Amount, the claims advanced in this action on behalf of Class Members up to the date of the Settlement Agreement will be released;
- g. upon the Effective Date, the Orders of this Court dated May 13, 2019 (Summary Judgment), August 7, 2019 (Pre-Judgment Interest) and October 21, 2019 (Costs) are set aside; and
- h. Class Counsel will prepare and file the various motions required to give effect to the Settlement Agreement and plan for distributing the settlements funds.

The Distribution Protocol

[31] The Settlement Agreement addresses the distribution of the settlement funds including the Distribution Fund, *i.e.*, the amount left over following deduction of Class Counsel fees and disbursements, administration expenses and the Class Proceeding Fund Levy.

[32] The Distribution Fund will be divided into two pools as follows:

- a. Pool “A” will consist of 29.2% of the fund will be distributed to the Class Members who held GPRs;
- b. Pool “B” will consist of 70.8% of the fund and will go SLP cardholders;
- c. Class Members will submit claims for compensation from either pool, depending upon which type of card they held. Each claimant with a valid claim will be entitled to be paid, on a *per capita* basis, up to the average amount of fees and expired balances incurred by Class Members who held either GPR (in the case of Pool A) or SLP (in the case of Pool B) cards;
- d. to the extent that either pool is undersubscribed, the payout may be increased up to two times the average amount of fees and expired balances incurred by Class Members who held the type of card attributable to that pool;

- e. to the extent that either pool remains undersubscribed after the reallocation, the remaining balance may be reallocated to the other pool up to the payout described above;
- f. to the extent that either pool remains undersubscribed after the reallocation, the remaining balance will be the subject of further motion to and direction by the Court; and
- g. to the extent that either pool is oversubscribed, each claim under that pool will be discounted on a *pro rata* basis.

[33] The rationale for the respective percentages applied to Pool A (29.2%) and Pool B (70.8%) is as follows.

- a. Cohen Hamilton Steger calculated the aggregate damages at \$36,842,000. Of that amount, the losses in respect of GPRs totalled \$21,512,000. This amount represents 58.4% of the total damages ($\$21,512,000 / \$36,842,000$).
- b. On the summary judgment motion before this Court, Ms. Bernstein's claim with respect to GPRs was dismissed. However, she cross-appealed. In light of the fact that her cross-appeal was of uncertain success, the pool available to GPR cardholders has been discounted.

[34] The rationale for the allocation can be summarized as follows. The proportionate share of Pool A has been calculated by taking the proportionate share of the overall damages of GPRs ($\$21,512,00 / \$36,852,00 = 58.4\%$) and applying a 50% discount having regard to the fact that the claim of Class Members holding GPR cards was dismissed on summary judgment and would only have been successful if Ms. Bernstein's cross-appeal had been allowed.

[35] Providing compensation on a *per capita* basis, without the need for individuals to provide documents in support of their claims or to prove the quantum of their damages, removes significant barriers to take-up. The Protocol in the immediate case does not require proof from any individual Class Member to establish an entitlement to compensation beyond attesting to the truth of the claims set out in the Administration Form.

Claims Administration

[36] Class Counsel is proposing RicePoint Administration Inc. ("RicePoint") as Claims Administrator. RicePoint has administered over 80 Canadian settlements of varying size and complexity, providing legal notification services in each case. RicePoint has administered 11 consumer or price-fixing cases involving large classes and simplified claims processes. RicePoint will also be providing support and maintenance of the Settlement Website as well as telephone support for any Class Members who have questions regarding the administration process.

[37] The Administration Form will be an electronic form posted on the Settlement Website and submitted by secure electronic portal. However, those Class Members who wish to submit a paper claim may print one out and submit it by mail or request a paper Administration Form from the Claims Administrator.

[38] The Claims Administrator will validate all claims to ensure that the Claimant is a Class Member and eligible to make a claim. With respect to GPR claims, the Claims Administrator will perform the additional validation of comparing the email address and/or telephone number of the claimant with the information provided by the Defendants to ensure that they are members of that part of the Class.

[39] Under the Distribution Protocol, no electronic claim will be accepted for submission unless the claimant has completed all of the required information on the Administration Form. Claimants who submit deficient paper claims will be contacted by the Claims Administrator via email or telephone and informed that their claims are deficient. They will then be given a single opportunity to cure any deficiencies within fifteen days, following which the claims will be rejected if the deficiencies have not been cured.

[40] RicePoint estimated that the total administration cost would be \$384,630. At the higher end, with take-up rates of 20% of SLP Class Members making claims and 50% of GPR Class Members making claims, RicePoint estimated that the total administration cost would be \$1,083,505.00.

[41] If, during the Administration Process, Class Counsel has reasonable and material concerns that the Administration and Distribution Protocol is producing an unjust result on the whole or to any material segment of the Class Members or that a modification is required or recommended, Class Counsel shall move to this Court for approval of a reasonable modification to the Administration and Distribution Protocol and/or for further directions with respect to the distribution of the Distribution Fund.¹¹

[42] If there remains any amount of the Distribution Fund after the distribution has been made to all valid claims, Class Counsel shall make an application to the Court to determine how such funds should be distributed, by way of a *cy prè*s distribution, if appropriate.

Notice and Notice Provider

[43] Class Counsel has received names and contact information for only a portion of the Class: namely, SLP cardholders who contacted Peoples Trust, and GPR cardholders. The GPR contact information is more reliable than the SLP contact information because: (a) consumers are required to fill in an application for GPRs; and (b) a review of the SLP contact information discloses many email addresses that appear fake.

[44] The class list contains contact information for 215,907 GPR cardholders and 29,117 SLP cardholders who, to the extent this information is valid, were sent direct notice of the Settlement Approval Hearing via text message or email. The recipients of these messages were encouraged to learn more about the Settlement at the Settlement Website (www.prepaidclassaction.ca), and to register with the website for updates.

[45] The majority of the Class Members are SLP cardholders for whom there is no contact information. Class Counsel formed the view that it would be most effective to retain the services of a separate company with particular expertise in electronic communications to perform the notice process with respect to the proposed settlement of this action.

[46] Class Counsel performed a separate RFP process to find an appropriate notice provider. After reviewing the proposals and conducting video interviews, Class Counsel selected Northern Commerce Inc. (“Northern”), a London, Ontario based e-commerce company. Northern estimates that the cost of the notice campaign will be \$110,000.

[47] The proposed notice plan consists of: (a) ads targeted through the Google Display Network, Facebook, Instagram and YouTube; and (b) ads targeted in connection with pre-specified Google search words. Class Members who are reached via the above notice program will be directed to the Settlement Website maintained by the Claims Administrator where they can submit their

¹¹ Distribution Protocol, *Motion Record (Distribution Protocol Approval)*, Tab 1, p. 14.

claims. Class Members who have identified themselves to Class Counsel by registering for email updates on the Settlement Website (including from the Settlement Approval Hearing notice campaign described below), will receive notices of the Settlement by email.

[48] Northern recommended that the campaign take place over a two-month period. This would enable it to analyze the effectiveness of the campaign on an ongoing basis, provide more precise targeting as time goes on and redeploy resources as it becomes apparent which channels are most effective in reaching class members.

[49] In addition, the Notice of Settlement Approval will be posted on the Settlement Website as well as the websites of Class Counsel.

[50] Class Members will be encouraged to submit their claims via an electronic portal on the Settlement Website maintained by the Claims Administrator but will be permitted to submit a paper claim by mail, upon request. Class Members will be limited to one claim per individual for each pool. Class Members will be able to elect to receive their payments by e-transfer or cheque.

Notice of the Settlement and Fee Approval Hearings

[51] In advance of the Settlement Approval Hearing, in accordance with the Court-approved Plan of Dissemination, Class Counsel posted the Notices of the Settlement Approval Hearing on the Settlement Website.

[52] Northern ran an online advertising campaign targeting Ontarians and directing consumers to consult the Settlement Website for more information about the Settlement Approval Hearing. As of September 3, 2020, the advertisements made 3.5 million impressions.

[53] Northern also sent text messages advising of the Settlement to those Class Members for whom telephone numbers were available. The phone information (which included landline and mobile phone numbers) is dated. As a result, a significant number of messages were undeliverable. Text messages were sent to 214,404 phone numbers, of which 78,444 messages were delivered.

[54] In addition, RicePoint sent Abbreviated Notices by email to Class Members whose email addresses are known. In total, emails were sent to 123,074 addresses.

[55] The emails and text messages encouraged Class Members to visit the Settlement Website to learn about the Settlement and to sign up for updates by providing their current email address.

[56] As of September 16, 2020, approximately 1,200 people have signed up for updates on this Settlement and no objections have been received.

Class counsel's submissions

[57] Ms. Bernstein and Class Counsel submit that the proposed settlement and the distribution plan represents a reasonable compromise and is in the best interest of the Class for the following reasons:

- a. the settlement of the action prior to the appeals being heard mitigates the risk of the decision of this Court with respect to SLPs being overturned;
- b. depending on the result of the parties' respective appeals, this litigation could face further significant delays;
- c. the proposed settlement provides for a portion of the Settlement Amount going to holders of GPRs, who were not otherwise eligible to receive compensation under this Court's summary judgment order;

- d. Peoples Trust markets its GPRs to “unbanked” persons – *i.e.*, individuals who do not or cannot, because of poor credit or otherwise, qualify for traditional credit cards. While Ms. Bernstein was seeking in the cross-appeal to have the dismissal of the claim with respect to GPRs overturned, there was no guarantee of success in this regard. Class Counsel was of the view from the outset that the case with respect to GPRs was more challenging than the SLPs.
- e. Class Counsel also believes that the take-up rate will be significantly higher for GPR cardholders than for SLP cardholders because Peoples Trust has contact information for many GPR cardholders, enabling direct notice of the settlement and distribution.
- f. Pursuant to the decision of this Court, the Class was awarded just over \$19.0 million (including costs and interest). The discount on this amount for the purposes of concluding the Settlement Agreement is reasonable when weighing the above-noted benefits of settling the claim now versus the risk that the judgment would be overturned as well as the delay of final resolution if it continued to be contested.

[58] Class Counsel seeks approval of notice and administration expenses as incurred, and payment of the Class Proceedings Fund levy, in the amount of \$301,524.44 for disbursements funded by the Fund plus 10 % of the Settlement Fund, after the deduction of all amounts that the Court orders to be paid to persons other than Class Members.

[59] Class Counsel seeks a fee award of 30% of the Settlement Amount, plus HST. The amount is equivalent to a multiplier of 3.2, which is lower than the multiplier specified in the Retainer Agreement. (The total of Class Counsel’s docketed time, including for the appeal, was \$1,585,546.64, without taxes.) Class Counsel’s fee request breaks down as follows: (a) 30% of the \$17.0 million as specified in the Retainer Agreement (\$5.1 million); HST on fees in the amount of \$663,000; and; disbursements and taxes of \$6,492.67.

C. SETTLEMENT APPROVAL

[60] Section 29 of the *Class Proceedings Act, 1992* requires court approval for the discontinuance, abandonment, or settlement of a class action. Section 29 states:

Discontinuance, abandonment and settlement

29.(1) A proceeding commenced under this Act and a proceeding certified as a class proceeding under this Act may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate.

Settlement without court approval not binding

(2) A settlement of a class proceeding is not binding unless approved by the court.

Effect of settlement

(3) A settlement of a class proceeding that is approved by the court binds all class members.

Notice: dismissal, discontinuance, abandonment or settlement

(4) In dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court shall consider whether notice should be given under section 19 and whether any notice should include,

- (a) an account of the conduct of the proceeding;
- (b) a statement of the result of the proceeding; and
- (c) a description of any plan for distributing settlement funds.

[61] 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.¹²

[62] 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.¹³

[63] 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.¹⁴ An objective and rational assessment of the pros and cons of the settlement is required.¹⁵

[64] The case law establishes that a settlement must fall within a zone of reasonableness. Reasonableness allows for a range of possible resolutions and is an objective standard that allows for variation depending upon the subject matter of the litigation and the nature of the damages for which the settlement is to provide compensation.¹⁶ A settlement does not have to be perfect, nor is it necessary for a settlement to treat everybody equally.¹⁷

[65] Generally speaking, the exercise of determining the fairness and reasonableness of a proposed settlement involves two analytical exercises. The first exercise is to use the factors and compare and contrast the settlement with what would likely be achieved at trial. The court obviously cannot make findings about the actual merits of the Class Members' claims. Rather, the court makes an analysis of the desirability of the certainty and immediate availability of a settlement over the probabilities of failure or of a whole or partial success later at a trial. The court

¹² *Kidd v. Canada Life Assurance Company*, 2013 ONSC 1868; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 at para. 43 (S.C.J.); *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 at para. 57 (S.C.J.).

¹³ *Kidd v. Canada Life Assurance Company*, 2013 ONSC 1868; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 at para. 45 (S.C.J.); *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 at para. 59 (S.C.J.); *Corless v. KPMG LLP*, [2008] O.J. No. 3092 at para. 38 (S.C.J.); *Jeffery v. Nortel Networks Corp.*, 2007 BCSC 69; *Fakhri v. Alfalfa's Canada, Inc.*, 2005 BCSC 1123.

¹⁴ *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 at para. 10 (S.C.J.).

¹⁵ *Al-Harazi v. Quizno's Canada Restaurant Corp.* (2007), 49 C.P.C. (6th) 191 at para. 23 (Ont. S.C.J.).

¹⁶ *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 at para. 70 (S.C.J.); *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.).

¹⁷ *McCarthy v. Canadian Red Cross Society* (2007), 158 ACWS (3d) 12 at para. 17 (Ont. S.C.J.); *Fraser v. Falconbridge Ltd.*, [2002] O.J. No. 2383 at para. 13 (S.C.J.).

undertakes a risk analysis of the advantages and disadvantages of the settlement over a determination of the merits. The second exercise, which depends on the structure of the settlement, is to use the various factors to examine the fairness and reasonableness of the terms and the scheme of distribution under the proposed settlement.¹⁸

[66] In the immediate case, in determining whether a settlement is reasonable and in the best interests of the class, the factors favour approving the settlement. The Settlement Amount, \$17 million, is a good result for the Class. It represents a modest discount of the amounts achieved on summary judgment, plus interest and costs and it mitigates the risk that the judgment could be overturned on appeal.

[67] In my opinion, the settlement in the immediate case is good, fair, reasonable, and in the best interests of the Class Members. I approve the Settlement Agreement.

D. FEE APPROVAL

[68] Ms. Bernstein and Class Counsel seek approval of the Retainer Agreement. Pursuant to s.32 of the *Class Proceedings Act, 1992*, retainer agreements are not enforceable unless approved by the court. A retainer agreement must be in writing and must: (a) state the terms under which fees and disbursements shall be paid; (b) give an estimate of the expected fee, whether contingent on success in the class proceeding or not; and (c) state the method by which payment is to be made, whether by lump sum, salary, or otherwise. In the immediate case, the Retainer Agreement complies with these requirements of the Act.

[69] The fairness and reasonableness of the fee awarded in respect of class proceedings is to be determined in light of the risk undertaken by the lawyer in conducting the litigation and the degree of success or result achieved.¹⁹

[70] Factors relevant in assessing the reasonableness of the fees of class counsel include: (a) the factual and legal complexities of the matters dealt with; (b) the risk undertaken, including the risk that the matter might not be certified; (c) the degree of responsibility assumed by class counsel; (d) the monetary value of the matters in issue; (e) the importance of the matter to the class; (f) the degree of skill and competence demonstrated by class counsel; (g) the results achieved; (h) the ability of the class to pay; (i) the expectations of the class as to the amount of the fees; and (j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.²⁰

[71] The court must consider all the factors and then ask, as a matter of judgment, whether the fee fixed by the agreement is reasonable and maintains the integrity of the profession.²¹

[72] In my opinion, having regard to the various factors used to determine whether to approve Class Counsel's fee request, Class Counsel's fee request in the immediate case should be approved. The class action was challenging and vigorously contested with considerable litigation risk. The outcome of the litigation both before and after the settlement was a good one for the class and the

¹⁸ *Welsh v. Ontario*, 2018 ONSC 3217.

¹⁹ *Fischer v. I.G. Investment Management Ltd.*, [2010] O.J. No. 5649 at para. 25 (S.C.J.); *Smith v. National Money Mart*, 2010 ONSC 1334 at paras. 19-20, varied 2011 ONCA 233; *Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374 at para. 13 (S.C.J.).

²⁰ *Fischer v. I.G. Investment Management Ltd.*, [2010] O.J. No. 5649 at para. 28 (S.C.J.); *Smith v. National Money Mart*, 2010 ONSC 1334, varied 2011 ONCA 233.

²¹ *Commonwealth Investors Syndicate Ltd. v. Laxton*, [1994] B.C.J. No. 1690 at para. 47 (B.C.C.A.).

distribution protocol treats the class members fairly. I approve the Counsel Fee request.

E. DISTRIBUTION PLAN

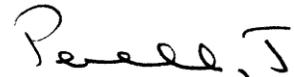
[73] The Court's authority to approve Distribution Plans or Compensation Protocols is grounded in its jurisdiction to approve settlements.²² Subject to court approval, Class Counsel are required to develop a distribution scheme that is in the best interests of the class.²³ A Plan will be appropriate if it is fair, reasonable, and in the best interests of the class.²⁴ Deciding what is fair and reasonable can involve considerations of what is economical and practical on the facts of a particular case.²⁵

[74] The test for approving a Distribution Plan is analogous to the test that the Court applies when deciding whether to approve a settlement.²⁶ A settlement must fall within a zone of reasonableness to be approved.²⁷ The zone of reasonableness assessment allows for variation between settlements depending upon the subject matter of the litigation and the nature of the damages for which settlement provides compensation.²⁸ A settlement is to be reviewed on an objective standard which accounts for the inherent difficulty in crafting a universally satisfactory settlement.²⁹

[75] In my opinion, the Distribution Protocol in the immediate case is within the zone of reasonableness, and is fair, reasonable, and in the best interests of the class. It should be approved, and I approve it.

F. CONCLUSION

[76] For the above reasons, I approve the settlement, the Distribution Protocol, and Class Counsels' fees and I grant the related relief.



Perell, J.

Released: September 29, 2020

²² *Eidoo v. Infineon Technologies AG*, 2015 ONSC 5493.

²³ *Eidoo v. Infineon Technologies AG*, 2015 ONSC 5493 at para. 108.

²⁴ *Zaniewicz v. Zungui Haixi Corporation*, 2013 ONSC 5490 at para 59.

²⁵ *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2014 BCSC 1936 at para 34; *Markson v. MBNA Canada Bank*, 2012 ONSC 5891.

²⁶ *Zaniewicz v. Zungui Haixi Corporation*, 2013 ONSC 5490 at para 59; *Eidoo v Infineon Technologies AG*, 2014 ONSC 6082; *Eidoo v. Infineon Technologies AG*, 2015 ONSC 5493 at para 74.

²⁷ *Rosen v. BMO Nesbitt Burns Inc.*, 2016 ONSC 4752 at para 12; *Leslie v. Agnico-Eagle Mines*, 2016 ONSC 532 at para. 8.

²⁸ *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 at para. 70 (S.C.J.).

²⁹ *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 at para. 80 (S.C.J.).

CITATION: Bernstein v. Peoples Trust Company, 2020 ONSC 5880
COURT FILE NO.: CV-13-493837-00CP
DATE: 2020/09/29

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

JOYCE BERNSTEIN

Plaintiff

– and –

**PEOPLES TRUST COMPANY and PEOPLES CARD
SERVICES LLP**

Defendants

REASONS FOR DECISION

PERELL J.

Released: September 29, 2020