CITATION: Lyons v. TD Home and Auto Insurance Co., 2023 ONSC 1149
COURT FILE NO.: CV-20-646789-00CP
DATE: 20230216

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: KEVIN LYONS, Plaintiff

– AND –

THE TORONTO-DOMINION BANK and TD HOME AND AUTO INSURANCE COMPANY, Defendants

BEFORE: Justice E.M. Morgan

COUNSEL: *Jordan Goldblatt, Alex Fidler-Wener, and Michael Gerhard* , for the Plaintiff

Jeff Galway and Anna Christiansen, for the Defendants

HEARD: February 15, 2023

CLASS ACTION SETTLEMENT AND FEE APPROVAL

[1] The Plaintiff in this action, which has been certified as a class action under the *Class Proceedings Act, 1992*, SO 1992, c. 6 (the "Act"), moves for approval of a proposed settlement and of class counsel fees.

[2] The action was commenced by Statement of Claim issued September 4, 2020 and amended November 20, 2020. It concerns travel insurance claims that were denied by the defendant, TD Home and Auto Insurance Company ("TD"), during the first months of the COVID-19 pandemic. The fundamental issue raised by the claim is whether TD can deny insurance coverage on the basis that its policy holders were offered credits, coupons or vouchers by their travel providers.

[3] The factual background to the case is set out in my certification endorsement of October 15, 2021: *Lyons v. TD Home and Auto Insurance Co*., 2021 ONSC 6877. The basis of the claim can be gleaned from the class definition:

> Any person in Canada insured under the terms of Policy TGV006 and the applicable Certificate of Insurance who, between March 16, 2018 and the date of certification had their claim for a Trip Cancellation Benefit under the Policy fully or partially denied based, wholly or in part, on the availability of non-monetary compensation such as credits, coupons, or vouchers.

[4] After the claim was issued, an important change occurred in terms of airline policy. Partly prompted by a government financing agreement, the airlines received government assistance if they changed their policies and began offering customers cash refunds instead of credits for travel cancelled due to COVID-19 and pandemic restrictions. As a result of this incentive, many, but not all airlines changed their policy and began offering cash refunds.

[5] In June 2022, the parties engaged in mediation of the claim. At the mediation, a valuation of the claim was submitted by NERA Economic Consulting (the "NERA Report"). The purpose of this was to set out the value of all travel reimbursement claims denied by TD.

[6] At the time of the mediation, the NERA Report estimated that the maximum value of all claims was $15.4 million. However, $9.2 to $9.4 of that belonged to the portion of the class that received, or that was eligible to receive, cash refunds. According to NERA, the balance of the claims came to a total of between $6.5 and $6.2 million.

[7] Subsequently, after considering opt-outs and additional information on provider-initiated versus customer-initiated cancellations, the maximum value of all claims, applying policy limits, has been determined to be $15.2 million. Of this, $8 to $8.2 million formed part of the group that were eligible for cash refunds. After factoring those out, the balance of the unrefunded claims came to $7 and $7.2 million.

[8] On October 6, 2022, the parties executed Minutes of Settlement, which provide:

> (a) a total payment by TD of $5,100,000, including $200,000 to defray counsel costs, and $100,000 to defray administration expenses, bringing the total amount of funds available for settlement to $4,800,000;
>
> (b) hiring RicePoint Administration Inc. ("RicePoint") to administer the settlement;
>
> (c) a Notice Plan consisting of notice predominantly by direct e-mail to the class;
>
> (d) a plan of distribution, intended to:
>
> > (i) pay $100.00, regardless of the value of the claim, to each class member who had the opportunity to obtain a cash refund directly from their travel provider.
> >
> > (ii) pay the balance of the settlement funds to the balance of the class members proportionate to the value of each of their claims; and
> >
> > (iii) give notice to the class of the anticipated amount they will receive in advance of payment; and

(e) charges on the settlement funds in favour of the Class Proceeding Fund and class counsel fees.

[9] In short, if the settlement is approved as submitted, each class member will receive, net:

(a) $100.00, if a cash refunded claim;

(b) at least 40% of the value of their claim, if not a cash refunded claim (up to policy limits); and

(c) the ability to make use of credits already conveyed to them by the travel providers.

[10] The Notice Plan submitted by class counsel is comprised of a primary e-mail notice campaign. This approach reflects the fact that in order to be part of the class, a class member would have had to have had their claim denied by TD. As a result, TD has contact information for virtually the entire class. In fact, RicePoint has advised that through e-mail, mailings, and direct phone calls, it has given notice to over 99% of the class members.

[11] Class counsel has advised that 70 timely opt-outs have been received from potential class members. This number does not trigger an opt-out threshold under the Settlement Agreement. Class counsel also advise that they have received no formal notice of objection to the settlement.

[12] The claim put forward by the Plantiff was not without its risks. In particular, it was uncertain whether putative class members who had received credits for cancelled travel would be eligible for compensation. There was also the usual risk of undue delay in pursuing the litigation and, in general, legal risk that TD could be held not liable under the applicable insurance contracts.

[13] On the positive side, the settlement represents certainty for the class members. They are to be compensated pursuant to a straightforward, easily comprehended regime. Most importantly, those who received travel credits to not have to give up those credits to participate in the settlement.

[14] It is by now well understood that a proposed settlement must be fair, reasonable, and in the best interest of the class: *Dabbs v Sun Life Assurance Co. of Canada*, 1998 CanLII 14855 (Ont Gen Div), aff'd (1998) 1998 CanLII 7165 (Ont CA), leave to appeal to SCC denied. In my view, the following features of the settlement result in this test being met:

(a) the likelihood that all class members would have enjoyed recovery had there been no settlement;

(b) the extent of the discovery that would have ensued had litigation gone to trial;

(c) the proposed settlement terms and reliability of receiving compensation;

(d) the recommendation of the settlement by experienced counsel and experienced mediators;

(e) the expense and likely duration of the litigation;

(f) the fact that there are no objectors;

(g) the good faith, arm's-length bargaining and the absence of collusion leading to the Settlement Agreement;

(h) 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.

[15] Turning to the request for class counsel fee approval, I note that class counsel was retained on August 27, 2020 by way of a retainer agreement that set out a 33.33% contingency fee in the event of success at trial or settlement. Significant risk was shouldered by class counsel, at least until adverse cost and disbursement funding for the claim was obtained from the Class Proceedings Fund in May 2021.

[16] As already explained, subsequent to the commencement of the litigation many travel providers changed their policies; those who had previously offered only credits instead offered cash refunds. This significantly changed the complexion of the litigation.

[17] On June 9, 2022, the parties agreed to mediate the dispute. A settlement was reached and a Settlement Agreement signed on October 6, 2022. As part of the settlement arrangement, class counsel's fees are to be paid largely from the settlement funds.

[18] Class counsel seek fees on the basis of a 21.5% contingency-rate applied to the $4.8 million of settlement funds. This amounts to a fee of $1,032,000, plus HST in the amount of $134,160. Of this, $200,000 will be paid directly by the Defendant. The class's contribution to its counsel's fees will thereby be reduced to 17% of the settlement. In addition, the class will contribute $480,000, to the Class Proceedings Fund in payment of its 10% levy on settlements in cases which it has supported. No other disbursements have been added to class counsel's request.

[19] Generally speaking, it is the court's duty to consider all of the factors surrounding the case, and to assess whether the amount is reasonable and "maintains the integrity of the profession": *Brazeau v. Attorney General (Canada)* 2019 ONSC 4721, at para 28, citing *Commonwealth Investors Syndicate Ltd. v. Laxton*, [1994] B.C.J. No. 1690 at para. 47 (B.C.C.A.). In making this assessment, I can start with the fact that the 17% rate – and even the 27% rate if the Class Proceedings Fund levy is added to the fee amount – is a discount from the 33.33% that class counsel is authorized to charge under the retainer agreement.

[20] It is well established that for cases this size, absent some extraordinary impairment of information or understanding by the class, a retainer fee of 1/3 of the settlement or award is considered "presumptively valid and enforceable": *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686, at paras 8-9. There is no suggestion of any such impairment of information here; the representative Plaintiff has deposed that he understood and in a free and informed way agreed to the retainer amount. The retainer agreement is in conformance with the requirements of section 32(1) of the Act.

[21] In the circumstances of this case, I view the fee request as fair and reasonable. It is proportionate to the size of the settlement and appropriately reflects the work invested and the risks taken by class counsel

[22] The fee request is also in line with fees approved in other comparable class actions in Ontario and across Canada: see *Brazeau*, *supra*; *Eidoo v Infineon Technologies AG*, 2016 ONSC 3628; *Frank v Caldwell*, 2014 ONSC 1484; *Sayers v Shaw Cablesystems Limited*, 2011 ONSC 962; *Condon v Canada*, 2018 FC 522; and *Watt v Health Sciences Association of British Columbia*, 2020 BCSC 280. The record before me provides ample support for approving the fee sought by class counsel.

[23] The settlement is hereby approved. The class counsel fee is likewise hereby approved.

[24] There will be Orders to go as submitted by class counsel.

Morgan J.

Date: February 16, 2023