CITATION: Kwong v. iAnthus Capital Holdings Inc., 2024 ONSC 1311
COURT FILE NO.: CV-20-00644524
DATE: 20240304

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Timothy Kwong

AND:

iAnthus Capital Holdings Inc., Hadley Ford and Julius Kalcevich

BEFORE: J.T. Akbarali J.

COUNSEL: *Manjit Singh*, for the plaintiff

Jeffrey Levine, for the defendanats iAnthus Capital Holdings, Inc. and Julius Kalcevich

Corey Groper, for the defendant Hadley Ford

Vincent DeMarco, for the objector Michaël Bordeleau-Tassile

Matt Prange, class member in person

HEARD: February 20, 2024

Proceeding under the *Class Proceedings Act, 1992*

ENDORSEMENT

Overview

[1] This class action was settled by the parties, subject to court approval. The action has been certified on consent for purposes of settlement. On this motion, I am asked to approve the settlement of the action, class counsel fees, and an honorarium for the representative plaintiff.

[2] One class member has objected to the settlement and retained counsel for that purpose. One class member attended in person to make submissions opposing the honorarium, but did not otherwise oppose the settlement or class counsel fees.

[3] I am advised that no class member has opted out of the settlement.

Brief Background

[4] In this action, the plaintiff makes claims against the defendants under s. 138.3 of the *Ontario Securities Act*, R.S.O. 1990, c. S. 5, and common law claims for misrepresentations in the secondary market and common law oppression.

[5] The corporate defendant, iAnthus Capital Holdings, Inc., is a cannabis company. The claim alleges that between May 14, 2018, and March 9, 2020, iAnthus released statements within its core and non-core documents containing misrepresentations because they omitted material facts.

[6] The claim alleges that, on April 6, 2020, the defendants released a public corrective statement reporting that: (i) iAnthus could not release its Q4 2019 financial statements, its MD&A ending December 31, 2019, and its 2019 annual financial statements and MD&A, (ii) it had engaged a special committee to investigate possible wrongdoing of the individual defendant, Mr. Ford, (iii) it had engaged Canaccord Genuity Corp, an investment bank, to analyze various financial options for iAnthus that would result in a material change; and (iv) it had defaulted on senior secured and unsecured convertible debentures.

[7] The claim further alleges that on April 7, 2020, iAnthus's common shares closed down 64%, and the price and value of iAnthus's common shares never recovered. The plaintiff pleads that most class members lost 100% of their investment.

[8] There are four alleged misrepresentations in the claim:

a. The defendants did not disclose a side letter agreement between iAnthus and its primary secured creditor, Gotham Green Partners, LLC ("GGP") that provided that iAnthus would pay an exit fee if the secured loan went into default;

b. iAnthus did not re-establish, fund or maintain its interest escrow obligations arising from its loan facility with GGP;

c. Mr. Ford, the then-CEO of iAnthus, obtained personal loans from GGP's managing partner along with loans from other iAnthus counterparties;

d. iAnthus knew that it would not release its Q4 2019 financial results in a timely manner but failed to disclose that fact.

[9] The defendants deny all the misrepresentation allegations. In brief, they argue:

a. The exit fee did not have to be disclosed because it was not material;

b. Public disclosure of the alleged escrow misrepresentation was, in fact, made;

c. iAnthus states that it was not aware of Mr. Ford's personal loans, and thus could not make a misrepresentation about them. Mr. Ford's evidence is that there was nothing untoward about the loans, and he in fact disclosed them to iAnthus each year at audit time;

d. iAnthus diligently worked towards disclosing its Q4 2019 financial results on April 6, 2020 (as it had said it would do on March 9, 2020). It was only two business days after iAnthus determined it could not release its financial results as it had intended to do that iAnthus disclosed the delay publicly.

[10] The defendants also argue that the class members' claims against them have been released through a 2020 court-sanctioned plan of arrangement pursuant to the British Columbia *Business Corporations Act*. The plan released all claims of "affected equityholders", which include at least some of the class members, "other than liabilities or claims attributable to [the]…gross negligence, fraud or wilful misconduct" of the released parties, which include the defendants.

Procedural History

[11] The procedural history of this action is unusual.

[12] On May 19, 2020, a class proceeding was filed against the defendants and others, including GGP, in the Southern District of New York.

[13] On July 30, 2020, a putative class action was commenced against the defendants in Ontario by Blue Sky Realty Corporation, represented by Morganti & Co., Professional Corporation.

[14] On September 15, 2020, a second putative class action was commenced against the defendants in Ontario by Sean Zaboroski, represented by M. Singh Law Professional Corporation.

[15] About a year later, I ordered the two putative class actions consolidated into the within action, in which Mr. Kwong is the proposed representative plaintiff. The unopposed order included a term that M. Singh Law Professional Corporation be granted carriage of the litigation as plaintiff's counsel.

[16] The Canadian and US proceeding deal with the same underlying events, and overlap, but not perfectly. The US proceeding alleges a conspiracy involving GGP, in addition to alleging materially false and misleading statements made by iAnthus.

[17] Because the Canadian proceeding is a secondary market misrepresentation case, leave to proceed is required. I scheduled the intended motion for leave to proceed under part XXIII.1 of the *Securities Act* to be heard on February 28, 2022, but subsequently vacated the return date. The parties later advised me that they had reached a settlement, subject to court approval. On November 14, 2023, I certified the action as a class proceeding for purposes of settlement approval, appointed Mr. Kwong the representative plaintiff of the class, appointed an administrator, approved the plan of notice, and named M. Singh Law Professional Corporation as class counsel.

[18] The record before me indicates that the US proceeding settled before the Canadian proceeding. The US settlement class period is May 14, 2018, through July 10, 2020, or about 26 months of trading, and is limited to iAnthus's securities traded in US transactions. The US federal District Court for the Southern District of New York will hold a hearing to determine whether it ought to approve the settlement on April 10, 2024.

The Settlement in this Case

[19] The terms of the settlement proposed in this case provide that the defendants will pay $500,000 in exchange for releases provided by the class.

[20] The proposed division of the $500,000 is as follows:

a. Class counsel fees of $150,000, representing 30% of the settlement, plus HST;

b. An honorarium for the representative plaintiff of $15,000;

c. Disbursements of $1,000;

d. Claim administrator fee of $118,712.15.

[21] If these requests are approved, the net settlement fund available for distribution to the class will be $195,787.85 CAD.

[22] In contrast, the US settlement is very different. The record indicates that the US class proceeding has settled for $2.9 million USD.

[23] At the same time, the objector has adduced evidence from an expert[1] that indicates that, in the period May 14, 2018, to April 5, 2020, 60.5% of total trading in iAnthus common shares took place in Canada, compared to 39.3% in the United States and 0.2% in Germany.

Issues

[24] The issues raised on this motion are:

a. Is the proposed settlement fair, reasonable, and in the best interests of the class?

b. Should class counsel's requested fees and disbursements be approved?

[1] No party objected to the admission of this expert evidence. Notwithstanding, I am cognizant of my gatekeeping role and the need to ensure that the criteria for the admission of expert evidence set out in *R. v. Mohan*, [1994] 2 S.C.R. 9, and *White Burgess Langille Inman v. Abbott and Haliburton Co*, 2015 SCC 23, [2015] 2 S.C.R. 182 are met. Having reviewed the expert's qualifications, I am satisfied that he is qualified to give evidence on the comparison of trading data in iAnthus common shares during the relevant period. I am also satisfied that this information is necessary and relevant to assist me in evaluating the reasonableness of the settlement. No one has alleged an exclusionary rule applies, and I see none that would. The evidence thus passes the threshold enquiry for admission of expert evidence. Nor do I see any reason to exercise my discretion to exclude the evidence. I am satisfied that the potential helpfulness of the evidence is not outweighed by the risks of the dangers associated with expert evidence materializing.

c. Should an honorarium of $15,000 for the representative plaintiff be approved?

Legal Principles Governing Approval of Settlements in Class Actions

[25] Under s. 27.1(1) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("*CPA*"), a proceeding brought under the *CPA* may only be settled with court approval. The court shall not approve a settlement unless it determines that the settlement is fair, reasonable, and in the best interests of the class: s. 27.1(5) of the *CPA*; *Sheridan Chevrolet Cadillac v. T. Rad Co.*, 2018 ONSC 3786, at para. 6; *Mancinelli v. Royal Bank of Canada*, 2017 ONSC 2324, at para. 36.

[26] There is a strong presumption of fairness when a proposed settlement, which was negotiated at arms-length, is presented for court approval on the recommendation of experienced class counsel: *Loewenthal v. Sirius XM Holdings, Inc. et al.*, 2021 ONSC 4482, at para. 11. In *Serhan v. Johnson & Johnson*, 2011 ONSC 128, at para. 55, the court held:

> Where the parties are represented – as they are in this case – by highly reputable counsel with expertise in class action litigation, the court is entitled to assume, in the absence of evidence to the contrary, that it is being presented with the best reasonably achievable settlement and that class counsel is staking his or her reputation and experience on the recommendation.

[27] The key question is whether the settlement falls within a zone of reasonableness: *Sheridan*, at para. 6; *Yeo v. Ontario*, 2021 ONSC 4534, at para. 13. The burden lies on the party seeking approval: *Nunes v. Air Transat A.T. Inc.*, [2005] O.J. No. 2527 (S.C.) at para. 7.

[28] Settlements need not be perfect; they are compromises: *Bancroft-Snell v. Visa Canada Corporation*, 2015 ONSC 7275, at para. 48; *Lozanski v. The Home Depot, Inc.*, 2016 ONSC 5447, at para. 71; *Patel v. Groupon Inc.*, 2013 ONSC 6679, at para. 14. To find that a settlement is not fair and reasonable, it must fall outside a range of reasonable outcomes: *Nunes*, at para. 7; *Loewenthal*, at para. 11; *Haney Iron Works v. Manufacturers Life Insurance*, (1998), 169 D.L.R. (4th) 565 (Ont. S.C.), at para. 44.

[29] In assessing whether a settlement agreement is fair and reasonable, it is not the court's function to substitute its judgment for that of the parties or attempt to renegotiate a proposed settlement. Neither is it the court's function to litigate the merits of the action, nor to rubber-stamp a settlement: *Loewenthal*, at para. 12; *Nunes*, at para. 7.

[30] An objective and rational assessment of the pros and cons of a settlement is required: *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corporation*, 2014 ONSC 5812, at para. 33.

[31] In *Doucet v. The Royal Winnipeg Ballet*, 2022 ONSC 976 at para. 48, Perell J. summarized the factors that may be considered in determining whether a settlement is reasonable and in the best interests of the class:

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.

Analysis

[32] In this case, in considering whether the settlement ought to be approved, I take particular note of the following factors.

[33] First, there is risk in this class proceeding. The defendants' defences may carry the day. There may be merit to the defendants' factual defences. Moreover, the release of the affected equityholders in the BC Plan of Arrangement is broad, and while not all class members' claims would be barred by it, its impact could significantly minimize the recovery for the class.

[34] Second, the record does not allow me to understand the nature of the investigation done by the plaintiff. There is no evidence that the plaintiff retained an expert to assist with the evaluation of the claim. No discoveries have been undertaken, although affidavits on the motion for leave to proceed were exchanged. Production appears to be limited to the exhibits to the affidavits prepared for the leave motion.

[35] Third, the proposed settlement terms are inferior by a wide margin to those obtained in the US proceeding. This is true when looking only at the monetary value of the settlement: $500,000 CAD versus $2.9 million USD. The disparity becomes more acute when one considers that the trading volume of iAnthus common shares is about 1.5 times the volume in the United States.

[36] The disparity is explained by two factors:

a. The defendants were willing to settle for a greater amount in the United States because the American class actions regime would have compelled them to produce significant documentation and be engaged in lengthy dispositions, leading to significant unrecoverable legal costs for the defendants even if they were successful;

b. The responsive policy of insurance has been eroded such that only about $500,000 USD of the original $5 million USD is left, and the defendants were not willing to settle the Canadian proceeding outside of policy limits.

[37] There is another policy of insurance for $2,000,000 USD that could cover the individual defendants, but I am advised that iAnthus has agreed to indemnify the individual defendants, which decision engages an exclusion in the second policy. There is no evidence to allow me to understand why iAnthus would agree to indemnify the individual defendants for claims that might be insured. Nor was I directed to any evidence about the context, or scope of, the indemnity iAnthus has provided to the individual defendants.

[38] Fourth, counsel recommends the settlement. He articulates his concern that there is risk in the proceeding, and apart from the litigation risk, given the erosion of the insurance proceeds, there is risk that the class will not recover anything. He recommends taking the bird in the hand.

[39] Fifth, the litigation, if it continues, is likely to be ongoing for some time, and likely to generate significant legal expense for the defendants, and require a significant commitment from plaintiff's counsel. The litigation is at an early stage. If the settlement is not approved, the consent certification order will no longer apply, and the parties will have to litigate the motion for leave to proceed and certification, before turning to discoveries and eventually, a trial.

[40] Sixth, there is one objector to the settlement. No one else has objected, and no one has opted out. The objector argues that the proposed settlement is improvident, having regard to the US settlement, and the $2 million USD policy of insurance, which he states the parties have not proven would not respond[2]. Of particular note, the objector points out that the plaintiff has not given me any evidence with respect to the likely recovery per class member. The objector argues that a net settlement fund of less than $200,000 CAD will result in almost no recovery per class member. He notes that, in the material filed in support of the US settlement, the $2.9 million figure is estimated to be 16.6% of recoverable damages in that action, making estimated damages over $17 million USD. Given that the trading volumes in the US were significantly lower than in Canada, the estimated recovery per class member is likely to be minimal.

[41] I pause to note the plaintiff's argument that damages in this case are more than 1.8% of 17.5 million (the figure he used), which, according to a report filed, is the median recovery in securities class actions in the United States. It is not clear to me if the 17 million USD figure used in the American filings represent the damages of the potential class members in that action, or of all equityholders. Either way, I understand the plaintiff's point that just because the US action settled on extremely favourable terms does not mean the Canadian settlement is out of the range of reasonableness. The problem is, as I have noted, the record before me does not assist me in understanding what the likely recovery for shareholders might be if this settlement is approved. Put another way, the evidence on this motion is notable having regard to what is not included in the material.

[42] Seventh, I accept that the negotiations between the parties was at arms-length and did not involve any collusion. I accept the plaintiff's submission that the proposed settlement figure is

[2] The objector also makes arguments about procedural unfairness, which I need not address.

250% higher than the defendants' original offer. However, there is very little evidence in the record about the dynamics of the negotiations between the parties.

[43] Finally, the representative plaintiff deposes that he has been in touch with over 400 class members during the litigation. As I have noted, there is only one objector and there have been no opt-outs.

[44] There is another aspect to this motion: there is an underlying dispute between plaintiff's counsel, and Mr. Morganti, who did not appear on this motion, but whose firm acts for the objector. I note it here because it was difficult to miss, but in my view, it is not relevant. Whatever the dynamics between Mr. Singh and Mr. Morganti, the question for me is about the reasonableness of the settlement for the class. Skirmishes between counsel play no role in that determination.

[45] Having considered all the factors noted above, I conclude that the plaintiff has failed to meet his burden, on a balance of probabilities, to prove that the settlement is fair, reasonable, and in the best interests of the class. Notwithstanding the strong presumption of fairness, when a settlement is negotiated by experienced counsel at arms-length, and notwithstanding the risks of the proceeding, and of recovery, I am troubled by certain aspects of this settlement. In particular, I am troubled by the gross disparity between the US and Canadian settlements. I am troubled by the lack of evidence about estimated class size, and recovery per class member. I am troubled by the lack of any full explanation about the indemnity the company has offered to the individual defendants and the consequent unavailability of the $2 million insurance policy. I am troubled by the lack of evidence about the investigations undertaken in this litigation.

[46] It is not for the court to re-write settlements. My choices are limited to approving or not approving the settlement.

[47] For the reasons I have explained, I do not approve the settlement.

[48] It is therefore unnecessary to consider the issue of class counsel fees and the honorarium. I would, however, like to express my appreciation to Mr. Prange, the class member who spent a morning of his time at the settlement approval hearing in order to participate in the process and make his submissions about the appropriateness of the honorarium if the settlement were to be approved. The engagement and interest of class members in class action litigation is encouraged by our system, and I am grateful for Mr. Prange's participation which was appropriate, important, and relevant.

[49] The parties should contact my assistant to schedule a case conference to determine next steps in the litigation.

J.T. Akbarali J.

Date: March 4, 2024