

CITATION: Vistoli v. Haventree Bank, 2024 ONSC 3785
COURT FILE NO.: CV-20-00651976-00CP
DATE: 20240702

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Karin Vistoli

AND:

Haventree Bank, also known as Banque Haventree

BEFORE: J.T. Akbarali J.

COUNSEL: *Vadim Kats, Chelsea Smith and Nicole Taylor*, for the plaintiff

Laura Jackson, for the defendant

HEARD: June 28, 2024

Proceeding under the *Class Proceedings Act, 1992*

ENDORSEMENT

Overview

[1] On April 2, 2024, I certified this action for the purposes of settlement: *Vistoli v. Haventree Bank*, 2024 ONSC 1887. On this motion, the parties seek court approval of their settlement, class counsel fees, and an honorarium for the representative plaintiff.

Background

[2] The action relates to the defendant's practice of automatically renewing mortgages that come up for renewal.

[3] The plaintiff's claim alleges that, together with her former spouse, she refinanced her home in Toronto on May 7, 2015. By May 2019, the mortgage came up for renewal. At that time, it was in good standing, and had applicable rate of interest of 5.37%.

[4] The plaintiff received a renewal letter from the defendant which included options to renew the mortgage on various terms. The plaintiff did not select any of the voluntary renewal options. The defendant, relying on an automatic renewal agreement in the renewal letter, automatically renewed the plaintiff's mortgage, at an interest rate of 9.99%.

[5] The plaintiff was unable to make mortgage payments at this higher rate, and the mortgage went into default. Ultimately, the plaintiff sold the property. The plaintiff alleges that as a result of the automatic renewal of the mortgage, she incurred additional interest, fees, and costs.

[6] In this proceeding, the plaintiff alleges that the defendant breached the *Interest Act*, R.S.C. 1985, c. I-15, and the terms of its contract with the plaintiff and class members in connection with the automatic and/or involuntary renewal of mortgages, resulting in additional interest, costs and fees to the class.

[7] Prior to the settlement, the proceeding had been litigated for about four years, and had reached the stage where the plaintiff had served her factum on the then-contested certification motion.

[8] Following some settlement discussions between the parties, the parties attended a mediation for assistance in resolving the dispute. They reached a settlement in October 2023 with the assistance of the mediator. Between October 2023 and February 2024, the parties negotiated the terms of the settlement agreement.

[9] As noted, in furtherance of the proposed settlement, I certified the class for settlement purposes.

[10] The certified settlement class is:

All persons situated in Canada (including their heirs, estates, executors, trustees or personal representatives) whose mortgages held by the Defendant were involuntarily and/or automatically renewed, and who paid any amount of interest, costs and fees as a result.

[11] The certified common issue is:

Did the Defendant breach the terms of its contracts with the Settlement Class Members, including the duty of good faith and honest contractual performance, in connection with the involuntary and/or automatic renewal of mortgages and/or were these terms enforceable?

[12] I approved a Notice Plan to advise the class of the certification and settlement approval hearing. The notice included information about the proposed settlement, proposed class counsel fees and proposed honorarium. It also included information on how to object, and how to opt out of the class proceeding.

[13] The Notice Plan was executed as contemplated. The Claims Administrator received no opt-outs and no objections. A few observers attended the settlement approval hearing. I asked whether any class members were present who wished to address the court. No one identified themselves or sought to make submissions.

The Proposed Settlement

[14] The settlement provides for payment of \$1,500,000 inclusive of the approved claims, administration expenses, honorarium, class counsel fees, interest and taxes.

[15] The evidence indicates that about 1000 mortgages were automatically renewed and are captured by the settlement. Some of those mortgages had more than one mortgagor or co-signors, so the number of class members is higher than the number of mortgages. The estimated number of class members is 3,340 over the class period.

[16] Under the terms of the settlement, settlement class members with approved claims are eligible for up to \$5,000 per mortgage. If there is more than one mortgagor, they will share in the amount per mortgage equally.

[17] The amount allocated per mortgage will depend on the take-up rate. Under the terms of the settlement, there will be no need for class members to prove their individual loss. Rather, the net settlement funds will be shared equally between the eligible mortgages, up to a maximum of \$5,000 per mortgage. If, after distributing \$5,000 per mortgage, there are net settlement funds remaining, the parties propose to donate the funds to a *cy-près* recipient, to be agreed upon and approved by the court.

[18] The distribution protocol proposed is quite simple, requiring class members to fill out a form with minimal information, and to confirm their mortgage was automatically renewed.

[19] The evidence before me suggests that the average value of the affected mortgages was approximately \$300,000, and that, on average, automatically renewed mortgages stay open for two to three months. The average excess charges per mortgage are \$500-\$700. This is significantly less than the actual excess charges incurred by the representative plaintiff, who deposes that following the automatic renewal of her mortgage, her monthly payments went up by more than \$3,500.

[20] The Claims Administrator estimates a take-up rate of 10-20%. With a 20% take-up rate, eligible class members are expected to receive \$3,800 per mortgage. At a 15% take-up rate, eligible class members are expected to receive the maximum \$5,000 per mortgage.

[21] In exchange, the class members provide releases to the defendant.

[22] The proposed distribution of the settlement amount is as follows:

- a. To satisfy class counsel fees of \$450,000, plus HST of \$58,500 plus disbursements of \$50,000, inclusive of HST;
- b. To pay administration expenses and applicable taxes;
- c. To pay the honorarium of \$15,000 CAD to the representative plaintiff;
- d. To settlement class members with approved claims in accordance with the distribution protocol;

- e. Finally, any remaining amount to be donated to a *cy-près* recipient to be agreed upon and approved by the court.

Issues

[23] 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?
- c. Should an honorarium of \$15,000 for the representative plaintiff be approved?

Legal Principles Governing Approval of Settlements in Class Actions

[24] 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.

[25] 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.

[26] 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.

[27] 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.

[28] 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.

[29] 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.

[30] 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

[31] In considering whether the proposed settlement ought to be approved, I note the following:

- a. Prior to reaching a settlement agreement, this proceeding had advanced to the stage where the plaintiff had delivered her factum on a contested certification motion. The parties had undertaken cross-examinations on motions, and the plaintiff had retained an expert on the topic of aggregate damages. The parties had reasonably well-developed information about the number of mortgages that had been automatically renewed, the average excess cost per mortgage, and the number of class members. Accordingly, a reasonable amount of evidence had been gathered, and examinations and investigation undertaken.
- b. Even if the take up rate is higher than estimated, it is likely that the average class member will receive more from the settlement than the average excess fees incurred per mortgage. For many class members, the settlement will be excellent. For class members like the representative plaintiff, the settlement will not make them whole, but will defray the excess fees to a reasonable degree, and for them, would represent a compromise as is typical of settlements.

- c. The class is represented by two firms that have experience in class proceedings. Both firms recommend the settlement.
- d. Were the litigation to continue, it would be likely to take some time. The action would have to be certified on a contested motion, and go through the production and discovery stage, before it could reach trial. Certification or any other pre-trial motion decisions would be subject to rights of appeal. Accordingly, it would take years before the action could be resolved on the merits.
- e. Despite a Notice Program that included clear information about the settlement, class counsel's proposed fees, and the proposed honorarium, there are no objectors to the settlement, and no person has opted-out of the settlement.
- f. The settlement discussions occurred between arms-length parties, and were concluded with the assistance of a mediator. Negotiating the specific terms of the settlement agreement took months. There is no evidence of collusion; rather, the evidence suggests there was good faith, arm's length bargaining.

[32] In these circumstances, particularly given the good results of the settlement for all class members, many of whom stand to be made whole, I am satisfied that the settlement is fair and reasonable, and in the best interests of the class.

[33] The plaintiff also asks me to approve the continued appointment of Equip Class Action Services Canada Inc. ("Epiq") as Claims Administrator. Epiq was approved as Claims Administrator for purposes of the certification decision. Epiq has discharged its duties in this class proceeding competently thus far, and is familiar with this proceeding. I am satisfied that the continued appointment of Epiq as Claims Administrator is appropriate.

[34] I also approve the Notice Plan, which follows the same protocol as the Notice Plan I approved for the Notice of Certification and the Settlement Approval Hearing. Moreover, I approve the form of the Notice of Settlement Approval, and the form and content of the Claim Form. I am satisfied that both of these documents are clear and will convey to the class members the information they need to know to make their claims.

Class Counsel Fees

[35] Class counsel seeks fees of \$450,000, or 30% of the recovery amount, plus HST of \$58,500 and disbursements of \$50,000, inclusive of HST. The retainer agreement between counsel and the representative plaintiff provides for fees of 30% of the recovery amount.

[36] Counsel's actual fees based on hourly rates and time incurred is approximately \$638,000 plus HST of \$82,940 and disbursements of \$50,000. In addition, class counsel expects to incur additional fees which, on an hourly rate basis, it expects will total approximately \$75,000-\$100,000.

[37] Counsel thus seeks approval of fees that are roughly two-thirds of their fees calculated on an hourly basis.

[38] As Morgan J. noted in *Austin v. Bell Canada*, 2021 ONSC 5068, at para. 10, citing *Commonwealth Investors Syndicate Ltd. v. Laxton*, [1994] O.J. No. 2922, at para. 63 (S.C.J.), generally speaking, when considering whether to approve class counsel fees, “the amount payable under the contract is the starting point for the application of the court’s judgment.”

[39] In *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686, at para. 10, Belobaba J. found that a contingency fee of up to 33% is presumptively valid and enforceable.

[40] The general principles to apply to the assessment of class counsel’s fees were set out by Juriansz J.A., in *Smith Estate v. National Money Mart Co.*, 2011 ONCA 233, at para. 80:

- a. the factual and legal complexities of the matters dealt with;
- b. the risk undertaken;
- 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;
- j. the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.

[41] In this case, I approve the counsel fees and disbursements for the following reasons:

- a. As noted, the fees sought are significantly less than the fees actually incurred by counsel.
- b. Class counsel was not backed by a third-party litigation funder, and agreed to indemnify the plaintiff from adverse costs awards as a term of the retainer agreement. Accordingly, class counsel took on significant risk in pursuing this action.
- c. The result achieved for the class is good.

- d. Class counsel dedicated significant time to this litigation, resulting in an opportunity cost to it.
- e. The settlement provides the class members with the ability to pay the fees while still obtaining a reasonable award for their losses.
- f. No one has objected to the counsel fees sought.
- g. The fees sought are consistent with the retainer agreement, signed by the representative plaintiff.

Honorarium

[42] The plaintiff seeks an honorarium in the amount of \$15,000 to recognize her contribution to the proceedings.

[43] In *Doucette v. Royal Winnipeg Ballet Company*, 2023 ONSC 2323, the Divisional Court considered the circumstances under which a representative plaintiff may be entitled to an honorarium. The Divisional Court found that a modest payment to the representative plaintiff could be made in exceptional circumstances. In considering whether to approve or disapprove a request for an honorarium, the court should consider the following factors (*Doucette*, at para. 92):

- a. The nature of the case, including whether the representative plaintiff brings forward a claim (such as for sexual abuse) in which they expose themselves to re-traumatization for the benefit of the class.
- b. The nature of the remedies available for the cause of action asserted, particularly cases where even complete success would lead to only a tiny monetary remedy for each class member or none at all.
- c. The steps taken by the representative plaintiff, who must do more than taking an active role and fulfilling the normal steps required in class proceedings, [in] achieving a settlement. Exceptional circumstances include enduring significant additional personal or financial hardship in connection with the prosecution of the class proceeding.
- d. The rationale for the requested payment, which must not be added compensation for losses or damages that fall within the potential remedies available for the causes of action asserted in the claim itself or for the necessary steps to fulfill the responsibilities of a representative plaintiff.
- e. The exposure to a real risk of an adverse costs award.
- f. The quantum of the requested payment, which must be modest both in general terms and in relation to the remedies available to the class members in the settlement.

[44] Thus, in *Doucette*, the Divisional Court affirmed that to receive an honoraria, a representative plaintiff must do something more than fairly and adequately represent the class; something exceptional is required.

[45] The record before me establishes that the representative plaintiff has appropriately discharged her duties as representative plaintiff, and obtained a good result for the class. That is not enough to meet the bar the Divisional Court has set for the award of honoraria.

[46] In the result, I decline to approve the honorarium requested.

Summary of Orders

[47] In summary, I make the following orders:

- a. I approve the settlement, which I find to be fair and reasonable, and in the best interests of the class;
- b. I approve the continued appointment of Epiq as Claims Administrator;
- c. I approve the Notice Plan and the Notice of Settlement Approval;
- d. I approve the form and content of the Claim Form;
- e. I approve counsel fees of \$450,000, plus HST of \$58,500 plus disbursements of \$50,000, inclusive of HST;
- f. I do not approve an honorarium to be paid to the representative plaintiff;
- g. Orders with respect to (i) settlement approval, and (ii) class counsel fee approval to go in the form that I have signed.

J.T. Akbarali J.

Date: July 2, 2024