IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Jastram Properties Ltd. v. HSBC Bank Canada*, 2024 BCSC 1833

Date:20241007
Docket: S179117
Registry: Vancouver

Between:

Jastram Properties Ltd.

Plaintiff

And

HSBC Bank Canada

Defendant

Brought under the *Class Proceedings Act,* R.S.B.C. 1996, c. 50

In Chambers

Before: The Honourable Mr. Justice Gomery

Reasons for Judgment

Counsel for the Plaintiff:	P.R. Bennett M. Mounteer
Counsel for the Defendant:	M. Maniago
The Attendee, D.J. Giefing in person for Henry G. Geifing and Maureen M. Giefing:	D.J. Giefing
Place and Date of Hearing:	Vancouver, B.C. September 18, 2024
Place and Date of Ruling:	Vancouver, B.C. September 18, 2024
Place and Date of Reasons:	Vancouver, B.C. October 7, 2024

Introduction

[1] These reasons address an application to approve the settlement of a class proceeding and the fees and disbursements of class counsel.

[2] The plaintiff represents a class of investors who were defrauded in a Ponzi scheme carried out by Virginia and Patrick Tan. The defendant, HSBC, provided banking services to the Tans from 2011 to early 2013. The Tans carried out their scheme through their accounts at HSBC.

[3] There is no dispute that the Tans were engaged in a Ponzi scheme operated through Ms. Tan's accounts with HSBC from 2011 through March 2013. Details are set out in my certification reasons indexed at 2021 BCSC 2204, at paras. 1 to 7.

[4] The claim against HSBC is that, in March 2013, it became suspicious that its accounts were being used by the Tans for fraudulent purposes, at which point it owed persons who were then investors a duty to investigate and warn. Instead, HSBC required the Tans to take their banking elsewhere. They did so and continued with the scheme until early 2016 when it collapsed, as Ponzi schemes inevitably do. The plaintiff maintains that the losses suffered after March 2013 by investors who were involved at that time resulted from HSBC's failure to investigate and warn.

[5] The plaintiff prosecuted and settled a separate class proceeding against the Tans under which it recovered approximately $3.5 million for the benefit of a class of investors who suffered net losses in the scheme; *Jastram Properties Ltd. v. Tan,* 2020 BCSC 1610 and 2021 BCSC 2432.

[6] Following certification of this proceeding in November 2021, the parties pursued discovery and exchanged expert reports. A trial was scheduled to take place in May 2024. Shortly before trial, the plaintiff and HSBC negotiated a settlement, since documented by written agreement, under which the bank will pay 25% of the investors' losses, to a maximum of $1.2 million.

[7] The plaintiff applied to court for an order approving the settlement agreement and the fee payable to class counsel pursuant to a retainer agreement previously approved by the court. After hearing the application, I granted the orders for reasons to follow. These are those reasons.

Objection of D.J. Geifing

[8] The present class proceeding is brought on behalf of a smaller class of persons than in the proceeding against the Tans, because it is limited to investors who were investors prior to March 21, 2013 and suffered net losses. The limitation was put forward when the plaintiff sought certification to strengthen its claim that HSBC owed a duty of care, by limiting the class to investors whose funds had passed through HSBC's accounts.

[9] Pursuant to an order made on August 14, 2024, notice of the settlement and this application was given by email to the larger class represented by the plaintiff in the earlier litigation. D.J. Giefing, who is the son of two investors who invested in 2015 and suffered losses through the Ponzi scheme, wrote to class counsel and came to court on his parents' behalf to oppose approval of the settlement. The Giefings are not members of the class certified in this action, having only invested funds well after the Tans had ceased doing business with HSBC. Counsel for the parties did not object to my hearing submissions from Mr. Giefing.

[10] In these reasons, I will not address Mr. Giefing's objections to the settlement, except to observe that they are directed to the position of persons who suffered loss because of the Ponzi scheme, not persons whose funds for investment passed through HSBC accounts. Mr. Geifing and his parents are not members of the class on whose behalf this action is brought. They lack standing to complain, because they are unaffected by the settlement. To the extent that they have any rights vis-à-vis HSBC, those rights are not foreclosed by the settlement.

[11] Mr. Giefing submits that the class is defined too narrowly, and should include persons such as his parents. That is not an argument available on this application. The class definition was fixed by the certification order made in November 2021.

The Giefings were notified of the class definition on December 1, 2022. At that point, they had to appreciate that they could not obtain any benefit from this proceeding. It is not open to them to complain that the settlement obtained for the class is inadequate.

The application to approve the settlement

The settlement

[12] The essential terms of the settlement are as follows:

a) HSBC will pay 25% of the "Eligible Loss" suffered by class members, to a maximum of $1.2 million in total;

b) "Eligible Loss" is defined as the total invested by a class member in the Tan Investment Scheme after March 20, 2013, less (i) the total of amounts received by the member from the Scheme after March 20, 2013, together with (ii) the amount received by the member from the previous class action settlement, all together with prejudgment interest;

c) Class counsel will determine the validity of claims advanced by class members through a stipulated claims process, subject to appeal to the Court;

d) If the total of valid claims of Eligible Loss exceeds $1.2 million, the individual claims will be reduced proportionately;

e) HSBC and related persons, including its shareholder, the Royal Bank of Canada, will be released from all claims that were or could have been advanced on behalf of the class in this action, and the action will be dismissed with prejudice and without costs.

[13] The rationale of the settlement is that the plaintiff's likelihood of success was in the order of 50%, but a defence of contributory negligence would probably have reduced the recovery of class members to 50% of their actual loss. Class counsel's

view is that the total claims will probably not exceed the $1.2 million liability cap afforded HSBC under the settlement.

Legal test for approval

[14] Section 35 of the *CPA* provides that a class proceeding may only be settled with approval of the court. Upon approval, class members who have not opted are bound by the terms of settlement.

[15] The guiding principle is that a settlement must be "fair and reasonable and in the best interests of the class as a whole," *Wilson v. Depuy International Ltd.*, 2018 BCSC 1192, at paragraph 58 quoting *Cardozo v. Becton, Dickinson and Company*, 2005 BCSC 1612, at paragraph 16.

[16] The question is not whether the settlement is perfect. It is whether it is reasonable. The court must consider risks and benefits associated with continuing the litigation. *Wilson* at paragraph 59, citing *Bodnar v. The Cash Store Inc.*, 2010 BCSC 145, at paragraphs 17 and 18.

[17] In *Bodnar* the court stated at paragraph 20:

> The recommendation and experience of counsel are significant factors for consideration on an approval application. There is a presumption of fairness when a proposed settlement is negotiated at arm's length by class counsel and presented to the court for approval ...

[18] In *Wilson*, Justice Branch emphasized the weight to be given to the recommendation of experienced class counsel and added at paragraph 60 that:

> Public policy favours the settlement of complex litigation. There is a strong presumption of fairness where a settlement has been negotiated at arm's length. Experienced class counsel is in a unique position to assess the risks and rewards of the litigation and his or her recommendations are given considerable weight by the reviewing court: *VitaPharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.* (2005), 2005 CanLII 8751 (ON SC), 74 O.R. (3d) 758 (S.C.J.) at paras. 111-114, 144.

[19] In *Fakhri et al v. Alfalfa's Canada, Inc.*, *cba Capers*, 2005 BCSC 1123, at paragraph 8, Justice Gerow identified a list of factors to consider in assessing the

reasonableness of a settlement. It provides a helpful framework for analysis (*Wilson* at paragraph 61), and reads as follows:

> The test for approval is whether the settlement is fair and reasonable and in the best interests of the class as a whole. Factors which courts have considered in making that determination include:
>
> 1. The likelihood of recovery, or the likelihood of success;
> 2. The amount and nature of discovery evidence;
> 3. Settlement terms and conditions;
> 4. Recommendations and experience of counsel;
> 5. Future expense and likely duration of litigation;
> 6. Recommendations of neutral parties, if any;
> 7. Number of objectors and nature of objections;
> 8. Presence of good faith and absence of collusion;
> 9. Degree and nature of communications by counsel and the representative plaintiffs with class members during litigation;
> 10. Information conveying to the court the dynamics of, and the positions taken by the parties during the negotiation.

Assessment

[20] I turn to consider the *Fakhri* factors.

1) The Likelihood of Recovery or the Likelihood of Success

[21] I accept class counsel's evidence that the total Eligible Losses suffered by class members are unlikely to exceed $4.8 million.

[22] For class members to recover $4.8 million, the plaintiff would have to succeed at trial and on an inevitable appeal. A further appeal to the Supreme Court of Canada would be at least plausible. The plaintiff having succeeded at all levels of court, class members would have to advance their individual claims and address HSBC's defence of contributory negligence.

[23] I find that the recovery afforded the class by the settlement of 25% of their Eligible Losses, to a maximum of $1.2 million, represents a reasonable compromise of the claims advanced by the plaintiff against HSBC for the following reasons.

[24] The theory of the claim advanced against HSBC on behalf of the class is one of a duty of care owed by the bank to investigate and warn investors with whom it had no direct dealings, but whose funds had passed through its accounts. In the certification reasons at paras. 28-24, I reviewed relevant authorities in some detail and agreed with the parties that the legal issue was novel. I rejected HSBC's argument that it was plain and obvious that the claim was bound to fail.

[25] Supporting the settlement, counsel for HSBC, Ms. Maniago, describes the issues as highly contested. I agree; the contest is evident from the certification reasons. In my view, it is reasonable to view the plaintiff's case on the common issues as a 50:50 proposition.

[26] HSBC has a strong argument that the investors were contributorily negligent. Contributory negligence of 40% was assessed against investors claiming against the innocent promoter of a Ponzi scheme in *Brausam v. Roland,* 2011 BCSC 1349 at paras. 60-65. Justice Fenlon (then of this Court) observed at para. 62 that:

> … the rate of return described at the reception and confirmed by the monthly trading statements they received for their investments would cause a reasonable person to question how that could be so. To put it colloquially, if something seems too good to be true, it probably is.

[27] A 50% chance of recovering damages of $4.8 million, subject to a live defence of contributory negligence in the vicinity of 40% to 60%, is reasonably valued at $1.2 million, especially considering the costs and delay involved in pursuing the class proceeding through trial and, after trial, the issue of contributory negligence for each individual class member.

2) The Amount and Nature of Discovery Evidence

[28] The parties entered into the litigation following substantial factual investigations by the Tans' trustee in bankruptcy. The investigations are described in my reasons approving the settlement of the action against the Tans; *Jastram Properties Ltd. v. Tan,* 2020 BCSC 1610 at paras. 31-33. The settlement in this case was achieved on the eve of trial following fulsome documentary discovery,

examinations for discovery of somewhat less than one day on each side, and an exchange of expert reports authored by former senior banking executives.

3) Settlement Terms and Conditions

[29] The terms of settlement are outlined above.

4) Recommendations and Experience of Counsel

[30] Class counsel are experienced and well known to the court. In an affidavit, Mr. Mounteer affirms his opinion that the settlement is a fair and reasonable settlement of the claims of the class against HSBC and is in the best interests of the class. Mr. Bennett supports the settlement from the bar as counsel. Ms. Maniago is also experienced in class proceedings. She concurs in recommending the settlement from the bar.

5) Future Expense and Likely Duration of Litigation

[31] The trial was scheduled to take two weeks. As already noted, the issues are such as to make an appeal inevitable and a further appeal to the Supreme Court of Canada at least plausible. Absent a settlement, the parties would have to wait two to four years for a final resolution of the common issues. If the plaintiff was ultimately successful, the class members would not recover damages until individual issues, including the question of contributory negligence, were addressed. That process could take another one to two years.

[32] In short, taking everything into account, without a settlement, successful investors would probably not achieve recovery until at least 2027, and possibly not until 2030.

[33] Class counsel have pursued this action in the expectation of a contingency fee of one-third of the amount recovered. The fee agreement provides for the conduct of proceedings in this Court, though not on appeal. Class members would incur additional legal expenses in connection with the expected appeal proceedings.

6) Recommendation of Neutral Parties If Any

[34] There are no recommendations from neutral parties.

7) Number of Objectors and Nature of Objections

[35] There are no objections from persons affected by the settlement.

8) Presence of Good Faith and an Absence of Collusion.

[36] Nothing in the evidence before me suggests that the settlement is marred by bad faith in the settlement negotiations, or that it is the product of collusive behaviour. To the contrary, it is the product of arm's length negotiations following lengthy investigations by experienced class counsel. I am satisfied that the plaintiff and class counsel propose it in good faith.

9) Degree and Nature of Communications by Counsel and the Representative Plaintiffs with Class Members During the Litigation

[37] The plaintiff is a company whose principal, Mr. Doetsch, has worked closely with class counsel since at least 2017. The class is relatively small – the investor class as a whole has approximately 150 members – and cohesive. Class counsel communicate with the class members by email and attended to the distribution of $3.521 million to class members from the settlement of the earlier class action against the Tans. In this context, the absence of objections from within the class carries particular weight.

10) Information Conveying to the Court the Dynamics and/or Positions Taken By the Parties During the Negotiation

[38] Except as noted above, the parties have not provided details of the bargaining that led to the settlement.

Conclusion

[39] Taking all these matters into account, in my view the settlement is clearly fair and reasonable and should be approved by the court. It is a reasonable compromise of a somewhat novel claim presenting challenges for both sides. The

settlement is the product of arm's length non-collusive negotiations culminating in an agreement reached on the eve of trial, following full discovery. It offers real benefits to the class, avoids time consuming and expensive further legal proceedings, and is recommended by experienced class counsel. No one with standing objects to the settlement.

[40] Public policy favours the settlement of complex litigation. I am entirely satisfied that this settlement offers a fair, appropriate and reasonable resolution of the claims advanced against HSBC in this case.

Application to approve the fee payable to class counsel

[41] Class counsel claim legal fees of one-third of the settlement funds recovered for the benefit of the class pursuant to a retainer agreement negotiated between Jastram and class counsel in September 2017. The retainer agreement was approved by the court in earlier proceedings; *Jastram Properties Ltd. v. Tan,* 2021 BCSC 2432. Mr. Doetsch of Jastram agrees with the fee.

[42] Section 38 of the *CPA* requires that Jastram's agreement to the fee be in writing and be approved by the court. The retainer agreement satisfies these and other requirements of s. 38. Factors to be considered in assessing whether the fee is fair and reasonable include:

a) the results achieved;

b) the risks undertaken;

c) the time expended;

d) the complexity of the matter;

e) the degree of responsibility assumed by counsel;

f) the importance of the matter to the class;

g) the quality and skill of counsel;

h) the ability of the class to pay;

i) the client and the class's expectation; and

j) fees in similar cases.

Green v. Tecumseh Products of Canada Limited, 2016 BCSC 217, at para. 57; *Pearce v. 4 Pillars Consulting Group Inc.*, 2021 BCSC 136, at para. 56.

[43] If the Eligible Losses of the class members total $1.2 million, the maximum amount contemplated by the settlement, class counsel will recover a fee of $400,000, at an effective hourly rate of no more than approximately $370. The lawyers have recorded 1,050 hours of time spent to date and expect to record a further 30 hours attending to administration of the settlement without further charge. The usual hourly rates charged by the lawyers who did this work range between $575 and $750.

[44] The percentage contingency fee class counsel is claiming is not out of line with the percentage fees approved in other cases. It appears, from the chart at Appendix E of *Class Actions in Canada, 2nd Edition*, Ward K. Branch and Matthew P. Good, that the vast majority of approved percentage fees fall in the range of 20 to 33%.

[45] This was challenging litigation featuring a novel legal issue in which class counsel have achieved satisfactory results for the investors for much less than their usual hourly rates. Class counsel bore the risk that all of their efforts would be for naught, and paid the disbursements. The claim is undoubtedly important to the investors, none of whom objects to the fee. Taking into account all the considerations I have listed, I am satisfied that the proposed fee of one-third of the settlement amount recovered by the class is fair and reasonable.

[46] In addition to their fees, class counsel’s firm has incurred disbursements of $14,731.60, inclusive of taxes. I find that these disbursements were necessarily and reasonably incurred.

Disposition

[47] For these reasons, as noted above, I approved the settlement and the fee and disbursements claimed by class counsel.

"Gomery, J."