CITATION: "Hi! Neighbor" v. Hickory Springs, 2017 ONSC 2455
COURT FILE NO.: CV-10-15164, CV-11-17279 and CV-12-18219
DATE: 20170421

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: "Hi! Neighbor" Floor Covering Co. Limited, Plaintiff

AND:

Hickory Springs Manufacturing Company; Valle Foam Industries (1995), Inc.; Domfoam International, Inc.; The Carpenter Co.; Carpenter Canada Co.; Woodbridge Foam Corporation; Flexible Foam Products, Inc.; Leggett & Platt, Inc.; Vitafoam Products Canada Limited; Vitafoam, Inc.; Mohawk Industries, Inc.; Dean Brayiannis; Bruce Schneider; Robert Magee; Michael Lajambe; David Carson; Louis Carson; Douglas Dolphin; Anthony Dacosta; Future Foam, Inc.; and Foamex Innovations, Inc., Foamex Innovations Canada, Inc., Vincenzo Bonaddio, Michael Calderoni, and Donald Phillips (collectively the "FXI" defendants), Defendants

BEFORE: Justice L. C. Leitch

COUNSEL: Heather Rumble Peterson and Reidar Mogerman, for the plaintiff

HEARD: April 20, 2017

ENDORSEMENT

[1] The plaintiff seeks an order approving a settlement agreement reached with the last remaining defendants in these actions: Foamex Innovations, Inc., Foamex Innovations Canada, Inc., Vincenzo Bonaddio, Michael Calderoni, and Donald Phillips (collectively referred to as the "FXI defendants").

[2] In addition, the plaintiff seeks approval of a distribution protocol in relation to all of the settlement amounts paid in these actions, an order approving a budget for notice, and an order approving an honorarium for the representative plaintiff.

Background

[3] In these three actions, the plaintiff alleges that the defendants unlawfully conspired to fix prices of polyurethane foam and products that contain polyurethane foam or carpet

underlay. Parallel actions were commenced in the province of British Columbia and the province of Quebec[1].

[4] The actions have been previously settled against all defendants other than the FXI defendants.

[5] At this settlement approval hearing, class counsel advised that in addition to the interim distribution order made by the monitor in the CCAA proceedings relating to the Domfoam defendants on October 30, 2015, it is projected that a further distribution will be made by the monitor in the amount of $1,123,068.33 within the next 60 days and a further distribution in the range of $8,003,000 is also anticipated.

[6] These actions were certified for settlement purposes against the FXI defendants on October 21, 2016 and the preapproval notice and the related plan of dissemination was also approved.

[7] The FXI defendants have committed to pay $2,450,000 for the benefit of settlement class members if the courts of British Columbia, Quebec and Ontario approve the settlement on behalf of the class.

[8] The Quebec and British Columbia courts have previously approved the settlement as well as the proposed distribution protocol.

[9] I note that at a hearing on October 29, 2015 where prior settlements were approved, Mr. Eric Letts, an end consumer of flexible foam products, was permitted to participate in the hearing by teleconference notwithstanding the fact that he had not filed any objection to the settlement within the time period provided for objections. Mr. Letts raised concerns with respect to the distribution process and requested that a distribution protocol be provided prior to the approval of the settlements.

[10] In reasons released December 9, 2015, I approved the settlements before the court and noted that notice would be given to the class in respect of a proposed distribution process and Mr. Letts could participate in that approval process.

[11] At this hearing, counsel advised that in addition to receiving notice as a class member, Mr. Letts was served by email as a courtesy by class counsel and provided with a copy of the proposed distribution protocol. Mr. Letts has not responded to these communications and did not participate in the hearing.

The Proposed Settlement with the FXI Defendants

[12] In assessing the reasonableness of the proposed settlement with the FXI defendants, class counsel directed the court to the fact that they had considered the amount paid in a settlement in the United States, which was supported by an analysis of what the average

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[1] *Majestic Mattress Mfg. Ltd. v. Vitafoam Products Canada Limited et al.*, No. VLC-S-S-106362; *Trillium Project Management Ltd., v. Hickory Springs Manufacturing Company et al.*, No. S-106213

overcharges were. Further, as class counsel pointed out, the FXI defendants took the position in the United States and Canada that they had no exposure because of a reorganization, which occurred in 2009. As noted at para. 20 of class counsel's factum, "the strength of the case against FXI was gravely complicated by its 2009 reorganization. FXI was in a position to argue that the current company was not responsible for the acts and conduct of the predecessor entities. The initiation of the conspiracy would have occurred in the period prior to the reorganization. FXI took the position that there was no post-reorganization conduct that would have made FXI responsible for the earlier formed conspiracy".

[13] It is also important to note that class counsel determined that "a comparative translation" of the direct purchasers' settlement in the United States considering sales in Canada after the FXI organization, yields an amount comparable to the proposed settlement based on class counsel's research and analysis. Class counsel indicated that given the state of American and Canadian law, the "US direct purchaser settlement yields an appropriate 'apples to apples' comparison" and supports the amount of the proposed settlement in Canada.

[14] The affidavit filed in support of this motion thoroughly outlined the procedural and litigation risks in proceeding to trial, which included what was referred to in American decisions as the "unique defences" available to the FXI defendants. The affidavit also outlines the extensive information available to class counsel permitting them to provide their opinion to the court that the proposed settlement was fair and reasonable.

[15] The representative plaintiff has confirmed that it instructed counsel to seek approval of the proposed settlements.

[16] I also note that there are no objections to this settlement. I further note parenthetically that a representative of a corporate class member attended the hearing and through class counsel indicated their support for the proposed settlement and distribution protocol.

[17] Considering the well-settled factors relevant to the approval of negotiated settlements outlined in earlier reasons released in this action, in particular to the settlement with the Domfoam defendants: the likelihood of recovery or likelihood of success; the amount and nature of discovery evidence; settlement terms and conditions; recommendation and experience of counsel; future expense and likely duration of litigation; recommendation of neutral parties, if any; number of objectors and nature of objections; and, the presence of good faith and the absence of collusion, I am satisfied that in all the circumstances, this settlement is a fair and reasonable resolution of the action in relation to the FXI defendants and is in the best interest of the class members.

Distribution protocol

[18] As counsel indicated in previous hearings, consultations were in progress with class members and experts in order to determine a fair and equitable system for distribution of the settlement amounts. These efforts have culminated in a distribution protocol which

class counsel advised was identical to that approved by the court in *Eidoo et al. v. Infineon Technologies AG et al.*, 2005 ONSC 5493.

[19] In *Infineon*, Justice Perell, in approving the distribution protocol, concluded that the Ontario Human Rights Code does not apply to such a protocol and even if it was engaged, it is not contravened by the protocol (findings and conclusions which were responsive to objections made by Mr. Letts on behalf of a class member).

[20] In this case, the net proceeds anticipated for distribution pursuant to the protocol are $31,144,999.21, representing the amounts paid pursuant to all of the settlements, plus accrued interest less approved class counsel fees and disbursements and taxes as particularized in the motion materials.

[21] The affidavit filed in support of this motion outlined in detail the process class counsel followed in developing the proposed distribution protocol and class counsel further elaborated on this process when the motion was heard.

[22] Class counsel advised that the proposed distribution protocol "reflects a balance of economic, practical and legal principles".

[23] Dr. Douglas Allen, an economist, was retained "to provide independent and objective guidance as to an appropriate overcharge proxy and the distribution of loss as a result of the overcharge, and in particular where the overcharge came to rest in the chain of distribution".

[24] Class counsel indicated that Dr. Allen's goal was to determine how much of the overcharge impacted each class member with class counsel's guiding principle being "the importance of effectively delivering 'real money to real class members', and fairly balancing the interests of settlement class members at different levels of the distribution chain with regard to both the amount of the overcharge absorbed at each level and the anticipated take-up rates of different categories of settlement class members".

[25] The motion materials contain an affidavit of Dr. Allen explaining his opinion and his conclusion that buyers of flexible polyurethane foam fall into three major markets (carpets and underlay, furniture and bedding, and automotive industry) which have certain distribution channels within each of the three major markets.

[26] Dr. Allen analysed each of the three markets separately. He ultimately concluded that the carpet underlay market accounts for approximately 20 percent of the foam produced in Canada and taking that conclusion into account together with his findings respecting other market shares, five funds were created which represent different markets. The distribution protocol indicates that settlement proceeds will be allocated to five funds: (general manufacturers fund 44%, carpet only manufacturers fund 3%, foam reseller fund 4%, carpet underlay seller fund 3.55% and consumer fund 48.15%).

[27] At the hearing, counsel further explained the process of developing the distribution protocol. The allocation of the settlement amongst the different levels of the distribution chain was robustly debated by class counsel assigned to adversarial roles. The

representative plaintiffs (which in Quebec is a consumer association), class members, Dr. Allen and an experienced furniture designer were consulted. The plan of allocation approved in the parallel American action for indirect purchasers was also taken into account.

[28] Pursuant to the protocol, the indemnification for direct purchasers is relatively straight forward. Understandably, indemnification of indirect purchasers is more complex and class counsel have gone to considerable effort to devise what they describe as a simple and practical means of facilitating and valuating claims by employing a system whereby the foam purchases can be given a dollar value, which is set out in an appendix to the distribution protocol.

[29] The protocol also provides for a fair and reasonable method to permit end consumers to participate as class members and as class counsel indicated, the protocol has been designed to make the advancement of end consumer claims as simple as possible and provides for a minimum $20 benefit or such greater amount as the pro rata formulation provides, subject to a cap which is clearly explained.

[30] Class counsel and the representative plaintiffs recommend the approval of the distribution protocol as fair, reasonable and in the best interest of the class.

[31] I find that the proposed protocol is a fair and reasonable result for all class members and therefore approve it.

Administration Protocol

[32] Class counsel have also reported that they have put considerable work into developing the administration protocol and selecting a claims administrator, including engaging in a robust request for proposals process to select the claims administrator.

[33] Class counsel have recommended that Rice Point be appointed as claims administrator.

[34] The administration protocol provides flexibility for class counsel and the claims administrator to extend the claims' period if they consider the extension to be necessary and reasonable for fair administration of the distribution protocol. The administration protocol also permits an appeal of rejections or categorizations of claims to an arbitrator to be appointed by the court. Class counsel have recommended Ms. Laura Bruneau to be appointed as arbitrator.

[35] The qualifications of the claims administrator and the arbitrator are included in the motion materials.

[36] I am satisfied that the administration protocol is fair, reasonable and in the best interests of the class as a whole.

Notice Program

[37] Class counsel have indicated a commitment to achieving "the highest take-up rate possible" and are determined to implement a robust and effective notice program. They have had preliminary conversations with marketing and advertising professionals and seek approval of the court to a notice/communication plan budget of approximately $1,000,000 to engage professionals to assist them in preparing a notice/communication plan to submit to the court for approval.

[38] Considering the quantity of the settlement, the nature of the claims to be made and the number of potential claimants, I am satisfied that it is fair and reasonable to approve this requested budget in the interest of ensuring that individual consumers, and other class members are made aware of their right to participate in the settlement.

Honorarium for Representative Plaintiff

[39] Class counsel seek an honorarium for the representative plaintiff in recognition of its six plus years of what class counsel describe as competent service in these proceedings, which culminated in a positive result for the settlement class.

[40] The representative plaintiff served in that capacity in three actions in Ontario. The president of the representative plaintiff has understood and fulfilled her responsibilities as a representative plaintiff. In the circumstances of these actions, I am satisfied that the honorarium of $5000 requested on behalf of the representative plaintiff should be approved.

Orders Signed

[41] A form of order presented to the court in relation to the settlement has been signed for the foregoing reasons.

Justice L. C. Leitch

Date: April 21, 2017