COURT FILE NO.: 06-CV-304599CP
DATE: 20060913

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
CBS PICTURES CANADA INC. Applicant	***J.A. Prestage and Caroline L. Helbronner*** **-- for the Applicant**
- and -	
GERALD DILLON, DOUGLAS G. LAWLESS AND RBC DEXIA INVESTOR SERVICES TRUST Respondent	***Ari N. Kaplan and Clio Godkewitsch*** -- for the Respondents
	HEARD: September 11, 2006

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

JUDGMENT

CULLITY J.

[1] For reasons delivered on June 20, 2006, I certified this application as a class proceeding with Gerald D. Dillon, Douglas G. Lawless and Dudley Dumond as representative respondents.

[2] The substantive issues in the litigation relate to the respective rights to surplus of the applicant, as employer under a pension plan, and the class members who are either retired pensioners, persons with a deferred vested entitlement or surviving beneficiaries of past members. Relevant facts are set out in my earlier reasons. These include communications between the applicant and officials on the staff of the superintendent of financial services, notices of proposals issued by the superintendent, events leading up to the retainer of Koskie

Minsky LLP as class counsel, and the negotiation of a surplus sharing agreement between the applicant and the respondents. The settlement is conditional upon – among other things - the court's approval of it and, also, on the consent of the superintendent to a payment of part of the surplus to the applicant.

[3] Notice of certification, and of the hearing set down for September 11, 2006 to approve the settlement, was given. No class members opted out. There are 139 of them in total. I was informed by counsel that 131 have consented to the settlement, seven have remained non-committal and, as yet, the remaining member has not been located.

[4] At the conclusion of the hearing, I indicated that, subject to one minor qualification, and my review of the fees and expenses of counsel, there would be an order approving the settlement pursuant to section 29 of the CPA as, in my judgment, it was fair and reasonable and in the interests of the class members. In reaching this conclusion, I was influenced by the nature and extent of the litigation risks and the delays that would occur if the matter proceeded to trial. Many of the class members are elderly and the possibility of substantial delays in the event of appeals would not be in their interest. Class counsel were particularly concerned that, if the settlement was not approved, the applicant would oppose the wind-up of the plan.

[5] There have been extensive communications between the respondent representatives, class counsel and the members of the class and the fact that none of the class members has objected to the settlement, and so many are in favour of it, must, I believe, be given considerable weight. In addition, class counsel have had extensive experience in pension matters and I believe this is a case in which a high degree of deference should be paid to their assessment of the litigation risks and their recommendation that the settlement should be approved as being fair and reasonable and in the interests of the class. In negotiating an agreement for a 50/50 split of the net surplus of approximately $34.6 million between the applicant and the class, they have achieved a result that is significantly more beneficial to the class than the original offer made by the applicant - an offer that many of the class members had previously indicated that they were prepared to accept.

[6] The 50 per cent of the net surplus to be distributed to, or for, the plan members will be allocated in proportion to the pension liabilities of each member as at December 31, 2001. Members will be able to choose to receive their surplus share in cash or in a combination of cash and benefit enhancements. The average payment to the class members is estimated to be about $113,000.

[7] The retainer agreement executed by the representative respondents, and the other 128 consenting members, provides for class counsel to be paid reasonable legal and other costs out of the surplus prior to its distribution among members of the class. This would appear to be a contingency fee agreement within the meaning of section 33 of the CPA as it is conditioned on a finding, or an agreement, that class members have an entitlement to surplus. However, I have not been asked to approve it and, without such approval, it would be unenforceable pursuant to section 32 (2) of the CPA. As I will indicate, the condition has, in any event, been superseded by the provisions of the settlement agreement.

[8] I was informed by class counsel that the provisions of sections 3.1 and 4.1 of the settlement contain the only other agreement with respect to their fees. They submitted that such agreement was not one within the meaning of section 32, or section 33, of the CPA and that "the court should be considering the issue of class costs within the entire framework of whether the settlement as a whole is in the best interests of the class".

[9] The combined effect of sections 3.1 and 4.1 of the agreement is that, if the settlement is approved and regulatory consents to the distribution of surplus are obtained, the reasonable legal and actuarial costs of the representative respondents are to be paid out of the total surplus before the net distributable amount is determined. In the first place, they are to be paid by the applicant and it will then be reimbursed from the total amount of the surplus if the settlement is approved. If the settlement is not approved, section 5.2 of the agreement provides that the applicant will remain liable to pay the reasonable legal costs and expenses of the representative respondents. It is, I believe, implicit in this provision that – as between class counsel and their clients – the former's right to fees is no longer contingent on approval of a settlement, or on a finding that members of the class are entitled to surplus. If approval of the settlement is withheld, and no surplus is distributable to the class, their counsel can still charge their clients for their fees and disbursements, and the clients would have rights to be indemnified by the applicant. I note, in passing, that this conclusion appears to be inconsistent with paragraph 6 of the draft judgment that I have been asked to approve.

[10] Class counsel have been billing their clients in accordance with accrued time so that their reasonable fees will be covered by a payment to the clients from the total surplus if the settlement is approved and the regulatory consents obtained.

[11] Contrary to the tentative opinion I expressed at the hearing, I do not think that, by themselves, the provisions of sections 3.1 and 4.1 constitute an agreement between class counsel and their clients within the meaning, and for the purpose, of section 32 of the CPA. They provide for payments of the clients' legal fees out of the total surplus but otherwise do not change or affect the rights that the lawyers and their clients would have *inter se* in the absence of an agreement. Class counsel could charge for their fees and disbursements on a *quantum meruit* basis whether or not the settlement is approved and irrespective of a client's use of funds paid by the applicant pursuant to section 3.1 of the agreement. Such an arrangement is unusual in class proceedings but it does not in my opinion constitute an agreement within the meaning of section 32 of the CPA any more than it would be a fee agreement within the meaning of sections 15 through 31 of the *Solicitors Act*, R.S.O.1990, c. S. 15.

[12] In consequence, I am in agreement with the submission of class counsel that, in the circumstances of this case, the provisions of sections 3.1 and 4.1 should be considered in the course, and as part, of the enquiry under section 29 of the CPA into the fairness and reasonableness of the settlement in the light of the interests of the class members.

[13] The detailed invoices delivered by class counsel to their clients disclose fees and disbursements - inclusive of GST - of $247,121.93 as of August 31, 2006. Only half of that amount would be offset against the amount otherwise payable to the class. Having reviewed the

invoices, I have no hesitation in accepting this as an acceptable amount for the work that class counsel have performed since they were retained in August, 2005, and I do not think it detracts materially from the reasonableness of the settlement from the standpoint of the class.

[14] Section 4.1 of the agreement provides for repayment of $1,153,732 out of the total surplus "in recognition" of the applicant's costs incurred to August 31, 2006. This amount includes the $247,121.93 to be paid to the respondent representatives pursuant to section 3.1 as well as the costs and expenses incurred by the applicant in connection with the wind up of the plan; in its communications with class members prior to the participation of class counsel and with the Financial Services Commission and the tribunal; and in considering the issues relating to entitlement to the surplus and potential alternative methods of dealing with it.

[15] While I have yet to receive a breakdown of the fees and expenses incurred by the applicant - other than the amount payable to class counsel - I am satisfied that it is fair and reasonable for the expenses of the kind mentioned to be paid to the applicant prior to the division of the net surplus. The work done on its behalf - both before and after class counsel were retained - has benefited the members of the class as well as the applicant. The applicant's application to the regulatory authorities, and its attendances on them, were necessary for the purpose of the attempts to obtain consent to a wind up of the plan and a distribution of surplus. Counsel have been working co-operatively and in concert for the purpose of this application.

[16] I am satisfied that, in the circumstances of this case - and for the purpose of determining whether the settlement is fair and reasonable in the interests of class members pursuant to section 29 of the CPA – it is not unfair to the class for the burden of the reasonable fees and other disbursements and taxes paid, or payable, by the applicant, like those of the representative respondents, to be shared equally by it and the class as legitimate expenses incurred for the purpose of obtaining the benefits of the settlement for them all. In principle, therefore - and subject to my review of the amount of the applicant's costs to date - I have no problem with their proposed treatment in section 4.1 of the agreement.

[17] My only concern with the terms of the settlement relates to the provisions of sections 3.1 and 4.1 that contemplate the payment of fees and expenses that will be incurred during its implementation The settlement provides only that those of class counsel should be "reasonable" and those of the applicant "incurred". At the hearing I suggested that the requirement of reasonableness should be attached to the latter and that all implementation costs should be approved by the trustee of the pension fund, or by the court if the trustee's approval was withheld. Without marked enthusiasm, counsel indicated that the suggestions were acceptable and that the terms of the settlement will be amended to incorporate them.

[18] Accordingly, I will provisionally approve the settlement with the above amendments pending receipt of the applicant's breakdown of the fees and costs it has incurred.

[19] As Mr Dudley Dumond died on July 14, 2006, the judgment will include an order removing him as one of the representative respondents. The style of cause will be amended

accordingly and also to reflect the applicant's change of name to "CBS Pictures Canada Inc.", and that of the trustee to "RBC Dexia Investor Services Trust"

CULLITY J.

Released: September 13, 2006

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