CITATION: Dufault v. The Toronto-Dominion Bank, 2024 ONSC 961
COURT FILE NO.: CV-21-656203-00CP
DATE: 20240215

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Tyler Dufault

AND:

The Toronto-Dominion Bank and The Canada Trust Company

BEFORE: J.T. Akbarali J.

COUNSEL: *Celeste Poltak, Adam Tanel and Elie Waitzer*, for the plaintiff

Christine Lonsdale and Adriana Forest, for the defendants February 13,

HEARD: February 13, 2024

Proceeding under the *Class Proceedings Act*, 1992

ENDORSEMENT

Overview

[1] The plaintiff moves for an order approving the settlement of this class action, approving counsel's fees, and approving an honoraria for the representative plaintiff.

Brief Background

[2] This action concerns the practice of the defendants ("TD") charging fees to customers who have insufficient funds to clear payments they have attempted to make from their accounts ("NSF fees"). More particularly, the claim concerns pre-authorized debits ("PADs") that TD declines by reason of insufficient funds in a class member's account, resulting in an NSF fee to the class member, and which PADs are then re-presented for payment by the payee a second time and again declined for insufficient funds, for which TD charges the class member a second NSF fee.

[3] The plaintiff alleges that the NSF fee charged on the re-presentment of a PAD (in other words, the second NSF fee charged on the same PAD) is in violation of TD's standard form contract with the class, and contrary to consumer protection legislation.

[4] This claim was commenced on February 2, 2021. Since then, a sequencing motion has been heard, the result of which was to allow TD to bring a summary judgment motion seeking dismissal of the plaintiff's claims in their entirety before hearing the certification motion. The summary judgment motion was heard and dismissed. The judge hearing the motion, Belobaba J., also declined to award summary judgment in favour of the plaintiff. A motion for leave to appeal the summary judgment motion was dismissed in May 2022.

[5] Thereafter, the parties delivered their records on the plaintiff's certification motion, and eventually negotiated a consent certification. Following that, the parties resumed settlement discussions that had begun earlier, but stalled. At the same time, the plaintiffs brought a motion for summary judgment. The parties exchanged productions and the plaintiff was examined for discovery. As the parties moved towards the adjudication of the plaintiff's summary judgment motion, they also continued settlement negotiations, including holding a two-day mediation. After the mediation, they continued to work with the mediator as they conducted additional negotiations.

[6] By August 2023, the parties had reached an agreement in principle, and by November 2023, the parties signed a settlement agreement. Notice of the proposed settlement has been given, and on this motion, I am asked to approve the settlement. I am also asked to approve counsel's fees and disbursements, the payment to the third-party funder, and an honorarium for the representative plaintiff.

Issues

[7] The issues raised on these motions 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, including the third-party funder fees, be approved?

c. Should an honorarium of $10,000 for the representative plaintiff be approved?

The Settlement Agreement

[8] The settlement agreement provides for the payment of an all-inclusive amount of $15,900,000, from which will be paid (i) compensation estimated to be $88 to eligible class members; (ii) any *cy-près* donation; (iii) class counsel fees and disbursements; (iv) third-party funder litigation fees; and (v) an honorarium of $10,000 to the representative plaintiff.

[9] A *cy-près* donation is contemplated in the event there are any residual funds following the *pro rata* distribution of funds to eligible class members. The donation is intended to be made on behalf of the class to ACORN Canada, a national community organization that advocates on behalf of low- and moderate-income Canadians in respect of issues that include unfair banking fees. The donation is expected to be low, as most if not all of the settlement funds are expected to be distributed to eligible class members.

[10] In addition, the settlement agreement provides for the following:

a. TD will bear the expenses associated with delivering direct notice of certification, the settlement, and the fee approval hearing (all of which has been done), and the settlement approval order to the class members who continue to have active accounts with TD;

b. TD will bear the expenses associated with distributing the settlement fund *pro rata* to qualifying class members by crediting individual compensation directly into the qualifying class members' TD accounts without the need for any claims process;

c. TD intends to amend the NSF fee disclosure provision in its standard form agreements to clarify the scope of the existing NSF fee; and

d. TD has changed its NSF fee reversal policy such that it now provides for discretion to permit a 100% reversal of the NSF for a first-time issue raised by a customer.

[11] The certification order defines the class as:

> Every person resident in Canada who is or was a personal deposit account holder with TD Bank and whose personal deposit account has been charged a non-sufficient funds fee by TD Bank on a re-presented pre-authorized debit transaction between February 2, 2019 and November 27, 2023.

[12] Under the settlement, not all class members are eligible to participate in the settlement funds. Eligible class members are those who are part of what the parties refer to as the "Active Group", which consists of each class member who is a TD customer and whose account is able to accept deposits as of the distribution date, and who TD's records show may have been charged an NSF fee on a PAD transaction from the same merchant and in the same amount as a previous PAD transaction within 30 days with respect to which an NSF fee was charged during the class period.

[13] Thus, those class members who no longer have an open TD account are ineligible to participate in the settlement. The evidence before me indicates that a meaningful portion of the closed accounts are likely to have belonged to people who are now deceased. The record before me suggests that, given the fact that there is no claims process, and funds can be directly distributed to the eligible class members, close to 90% of living class members will receive funds under the settlement.

The Principles Governing Settlement Approval

[14] 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.

[15] 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.

[16] 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.

[17] 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.

[18] 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.

[19] 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.

[20] 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.

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

[21] Applying the legal framework above, I note the following.

[22] First, by the time this action settled, it had been very well developed. The plaintiff had succeeded in resisting TD's summary judgment motion, and had obtained favourable findings from

the motion judge with respect to TD's liability for breach of contract. However, the motion judge did not go so far as to grant summary judgment in the plaintiff's favour.

[23] Moreover, those findings were incomplete, and in particular, did not address TD's defence premised on a verification clause in the standard form contract, which TD maintained operated to bar all class members who had not notified TD of the allegedly improper NSF fees within the timeline prescribed by the verification clause.

[24] Thus, at the time of settlement, given the steps that had occurred in the action, counsel were in an excellent position to assess the risks of litigation, and while on certain matters, the plaintiff's claim appeared strong, risk remained, particularly with respect to the verification defence.

[25] Second, in the course of negotiations, TD disclosed significant confidential information that both parties provided to their experts for purposes of preparing damages calculations. Thus, the parties' theories on damages, like their theories on liability, were well-developed and well-understood.

[26] Third, had a settlement not been reached, the steps remaining to litigate the action would have taken time. The plaintiff's summary judgment motion had to be argued, and may or may not have been successful, and may or may not have been appealed. If the motion were not successful, a trial would have had to occur. The ongoing costs would have increased class counsel's claim to fees, and resulted in delay before the action could be concluded. In addition, even if the plaintiff succeeded at trial or on summary judgment motion, it was possible that the plaintiff's claim of aggregate damages could not be established, and individual damages assessments would have had to be held, adding cost, complexity and delay.

[27] Fourth, the terms of the settlement itself are, in my view, excellent. I reach this conclusion because:

a. The direct distribution aspect of the settlement means that almost 90% of living class members will benefit from the settlement without having to do anything. This is an almost-unheard-of take-up rate;

b. The quantum of the settlement that each eligible class member is estimated to receive is almost twice the value of an NSF fee, an amount that is reasonable in the circumstances;

c. The value of the settlement fund is not depleted by administrative costs, since the settlement will be effected by direct distribution;

d. TD has borne most of the costs of the notice program by delivering direct notice to most of the class members, which has preserved the value of the settlement fund further;

e. By reason of the factors listed above, the settlement advances the goal of the *CPA* of promoting access to justice. Individual class members would not have suffered losses in an amount sufficient to justify taking individual action, and would not have achieved any access to justice without this proceeding;

f. On the other hand, were class members to bring individual actions, the result would be a strain on scarce judicial resources;

g. The non-monetary aspects of the settlement, including TD's intended change to its standard form contract, and its change to its policy regarding reversals of NSF fees, suggest that this litigation has prompted TD to modify its behaviour (while not admitting liability). These changes are likely to benefit TD's customers who are low- or moderate-income Canadians, who are most likely to be charged multiple NSF fees, and who likely include many of the class members.

[28] Fifth, the record includes an affidavit from the experienced mediator the parties retained to assist with their negotiations. His evidence confirms that the settlement negotiations were hard-fought, lengthy, conducted at arms-length, and in good faith.

[29] Sixth, plaintiff's counsel is experienced and deservedly well-respected. Their support of the settlement is a factor militating in favour of approving it.

[30] Seventh, there were five objectors in total, of whom a maximum of three are class members, which is well less than 1% of the class. One objector raises concerns outside the scope of this litigation. One raises concerns with the quantum, and suggests that each class member ought to receive the equivalent of three NSF fees. On a gross basis, the settlement is roughly three NSF fees per eligible class member, but will be reduced by the need to pay fees and disbursements.

[31] One class member objects on the basis that the settlement excludes those class members who have closed their accounts with TD. This is a valid objection, and goes to the root of what makes this settlement imperfect: it does not reach all class members, but only those who remain TD customers.

[32] In effect, this objection could only be dealt with by running a claims process, either in parallel to, or instead of, the direct distribution. The results of such a process would be to increase the cost to the class of implementing the settlement (in a parallel process) and both increasing costs and decreasing take-up of the settlement (in an alternative process), in view of the historical take-up rates in consumer protection class action settlements, which can range in the single digits at the low end. Generally, settlements with a take-up rate of 30-40% are considered reasonable.

[33] Thus, there will be people who will be excluded for the settlement. While not ideal, the question must be whether the settlement is in the best interests of the class as a whole, not the small segment of the class that will be ineligible under the settlement.

[34] For the reasons I express above, I conclude that this settlement, overall, is excellent, and in the best interests of the class.

Class Counsel Fees

[35] Section 32 of the *CPA* provides that class counsel's fees must be approved by the court. Section 33 of the *CPA* allows class counsel to enter into a contingency fee arrangement for payment of its fees for a class proceeding.

[36] The basic test is whether class counsel's proposed fees are fair and reasonable in all of the circumstances. Fair and reasonable fees may include a premium for the risk undertaken and the result achieved, but the fees must not bring about a settlement that is in the interests of the lawyers, but not in the best interests of the class as a whole: *Lavier v. MyTravel Canada Holidays Inc.*, 2011 ONSC 1222, at para. 32.

[37] As the court held in *Middlemiss v. Penn West Petroleum*, 2016 ONSC 3537, at para. 19, "it is only through a robust contingency fee system that class counsel will be appropriately rewarded for the wins and losses over many files and many years of litigation and that the class action will continue to remain viable as a meaningful vehicle for access to justice."

[38] As Morgan J. noted in *Austin v. Bell Canada*, 2021 ONSC 5068, at para. 10, 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." If approving a fee pursuant to a contingency agreement, the court must consider all the relevant factors and circumstances to determine whether the fee is reasonable and maintains the integrity of the profession: *Hodge v. Neinstein*, 2019 ONSC 439, at para. 46.

[39] A contingency fee of up to 33% is presumptively valid and enforceable provided that the arrangement is fully understood and accepted by the representative plaintiff, the contingency amount is not excessive, and the contingency fee is not so large as to be unseemly or otherwise unreasonable: *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686, at paras. 8-10.

[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, 106 O.R. (3d) 37 (C.A.), at para. 80:

a. the factual and legal complexities of the matters dealt with;

b. the risk undertaken, including the risk that the matter might not be certified;

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, the retainer agreement provides for a fee of 30% of the recovery, less the fee portion of any costs already paid to class counsel, plus HST. "Recovery" is defined as "the amount actually recovered by award, judgment, settlement or otherwise, including any amounts awarded or paid in any assessment of damages or other process ordered by the court, excluding any amount separately identified or specified as costs and/or disbursements."

[42] Despite the fact that the retainer agreement would allow class counsel to seek 30% of the recovery, class counsel seeks 27.5% on this motion, plus disbursements and the third-party funder's fee, which I address below.

[43] Class counsel's dockets reveal that they have spent time valued at over $1.5 million in fees to investigate, organize and prosecute this action. Before taking into account time that they must still spend, the fee sought, $4,252,500 before taxes, represents a multiplier of approximately 2.8.

[44] Class counsel also incurred disbursements totaling $389,732.44, plus taxes. The third-party funder covered $376,046.86 of that amount. Counsel expects to incur another approximately $2,000 in disbursements relating to the implementation of the settlement.

[45] In my view, the fees sought by class counsel are fair and reasonable in the circumstances of this settlement:

a. The litigation was complex, hard-fought, and litigated to an advanced stage;

b. The terms of the settlement are excellent for almost all members of the class. In particular, the direct distribution aspect, and direct notice aspect, of the settlement has ensured that (i) the value of the settlement is preserved for the class, and (ii) the take-up of the settlement will be extraordinarily high;

c. Moreover, from a behaviour modification standpoint, the non-monetary aspects of the settlement are also excellent results to arise from the litigation;

d. Class counsel assumed a significant degree of responsibility. Before a third-party funder was located, class counsel indemnified the representative plaintiff for disbursements and adverse costs awards. Even once the funder was located, class counsel continued to indemnify the representative plaintiff for adverse costs awards exceeding the amount for which the third-party funder had agreed to indemnify the plaintiff;

e. Class counsel devoted significant time to the litigation, resulting in a significant opportunity cost that had no certainty of providing any return;

f. While Belobaba J.'s summary judgment motion decision reduced the risk in the litigation, the question of the risk assumed by counsel must be measured from the outset, when counsel agreed to act. At that time, the risks were much greater, and counsel was faced with a well-resourced and motivated defendant, which availed itself of its litigation options, as one would expect it to;

g. The value of the litigation and the settlement is significant, and provides the class with the ability to pay the fees sought while still preserving a meaningful recovery for the eligible class members. Given that the class is likely made up in substantial measure of low- and moderate-income Canadians, many members of the class would not have had the ability to pursue litigation with respect to the second NSF fee without a class action in which counsel agreed to be compensated on a contingency fee basis;

h. Finally, the fees sought are in the expectation of the class; the certification notice set out the fees that class counsel would seek. No objection to class counsel's proposed fee was raised. The representative plaintiff supports class counsel's claim to fees.

[46] The disbursements sought by class counsel are also reasonable. The most significant component of the disbursements are the expert fees which were reasonably incurred to assist counsel in developing the plaintiff's damages case and proved important in settlement negotiations.

[47] The retainer agreement also provides that class counsel will apply on the plaintiff's behalf for financial support and an indemnity from a private third-party funder. Counsel did so, and was able to engage a third-party funder on better terms than those available through the Class Proceedings Fund.

[48] Under the terms of the agreement with the third-party funder, which was approved by Belobaba J. on August 20, 2021, the funder's return is calculated at 8% of the "Net Recovery Amount", which is defined as the gross settlement amount, less any court-approved legal fees, disbursements, honorarium, claims administration fees, and applicable taxes. The funder is also entitled to a repayment of a funder administration fee of $97,500, and a repayment of the disbursements it funded. If the counsel fees and the honorarium sought are approved, the total payable to the funder is $1,328,982.26. I am satisfied that the funder is entitled to payment in accordance with the terms of the agreement.

Honorarium

[49] The plaintiff seeks an honorarium in the amount of $10,000 to recognize his contribution to the proceedings.

[50] 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.

[51] In this case, I am satisfied that the circumstances are extraordinary and warrant an honorarium of $10,000 paid to the plaintiff:

a. The results of the settlement achieved are excellent, with an almost-unheard-of take-up rate;

b. Without the litigation, in view of the small amount of loss suffered by each class member, the remedies available to them would have been impractical;

c. The representative plaintiff was actively involved in the litigation. This in itself is not an exceptional circumstance, but is relevant in the context of all the circumstances;

d. The representative plaintiff is employed in security, earning $18/hour. At times, he was required to take unpaid time off work to meet the obligations of a representative plaintiff that would not have been required were he an individual litigant. He is out of pocket for those losses that were incurred wholly to advance the interests of the class, and not his personal interests;

e. The quantum of payment requested is in line with other honoraria awarded to representative plaintiffs;

f. In view of the excellent results of the settlement, and the hard-fought negotiation process, the honorarium cannot be said to create a conflict of interest or an appearance of a conflict of interest.

Conclusion

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

a. The settlement is approved;

b. Class counsel fees of $4,252,500 plus HST of $552,825 are approved;

c. Payment of disbursements totaling $391,732.44, inclusive of taxes, are approved and shall be distributed as follows:

i. $15,675.58 to class counsel;

ii. $376,056.86 to the third-party funder;

d. In addition to the disbursements payable to the third-party funder and approved at para. (c) above, the payment to the third-party funder of $952,935.40 is approved;

e. Payment of a $10,000 honorarium to the representative plaintiff is approved.

[53] Counsel has provided me with two draft orders: one dealing with the settlement and one dealing with the fee and honorarium approval. I have signed the orders, and they shall go in that form.

[54] I draw counsel's attention to the fact that I located an error on the first page of the proposed long-form notice notifying class members of the approval of the settlement. I have corrected the document on its face in the schedule attached to the order.

J.T. Akbarali J.

Date: February 15, 2024