CITATION: Glube v. Pella, 2013 ONSC 6164
COURT FILE NO.: CV-11-432294-00CP
DATE: 20131003

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: **Harry Glube and Carolyn Terpstra**, Plaintiffs

AND:

Pella Corporation and Pella Windows & Doors of Ontario Corp. (collectively, "Pella"), Defendants

BEFORE: Conway J.

COUNSEL: *Joel Rochon* and *John Archibald*, for the Plaintiffs

Scott Maidment, *Lindsay Lorimer* and *Calie Adamson*, for the Defendants

HEARD: October 1, 2013

Proceeding under the *Class Proceedings Act, 1992*

REASONS FOR DECISION
(re: Certification, Settlement and Class Counsel Fee Approval)

Conway J.

[1] The plaintiffs move for an order (i) certifying this action as a class proceeding for settlement purposes; (ii) approving the settlement pursuant to s. 29(2) of the *Class Proceedings Act, 1992*, S.O. 1992, c.6 (the "**Act**"); and (iii) approving class counsel fees.

[2] I signed the order at the conclusion of the hearing. These are my reasons for doing so.

Background and the Settlement

[3] This is a product liability case. In the proposed class action, the plaintiffs allege that design and manufacturing defects in Pella windows and doors allowed water to penetrate the aluminum cladding and failed to protect the surrounding wood from rot. They allege that class members suffered damage, including the cost of repairing or replacing the Pella products.

[4] The statement of claim was issued on August 5, 2011. A parallel U.S. proceeding was already underway. From the outset class counsel in the Ontario action had a relationship with the lead counsel in the U.S. proceeding, as well as with their U.S. fenestration (window and door) expert.

[5] A settlement was reached in the U.S. proceeding in the spring of 2012.[1] Counsel in this Canadian proceeding entered into settlement discussions in May 2012.

[6] Negotiations ensued and on April 3, 2013, the parties signed a settlement agreement (the "**Settlement Agreement**"), the terms of which are consistent with those in the U.S. settlement.

[7] The proposed class originally consisted of all Canadian purchasers of Pella's Pro-Line Series, Architect Series and Designer Series. The settlement class (the "**class**") is more restricted. It consists of Canadian residents who are current or former owners of structures containing ProLine Casement Windows manufactured by Pella between 1991 and 2006, except for Pella's current employees.[2] There are approximately 6300 members of the class. The action will be discontinued with respect to owners of the Architect Series and Designer Series, on a without prejudice basis.

[8] The Settlement Agreement contains the following principal terms:

a. Eligible claimants may receive cash benefits under the settlement either through a claims process or an expedited and streamlined arbitration process. Under the former, they may receive a maximum amount of $750 per structure; under the latter, they may receive up to $6000 per structure.

b. Pella will offer discounts, at various rates, to class members who repaired or replaced their windows.

c. Pella will pay each of the two plaintiffs an honorarium of $5000 based on their important assistance in the investigation of the case and their roles in shepherding it forward.

d. Pella will pay class counsel a class counsel fee of $650,000, which amount is inclusive of all disbursements and taxes, subject to court approval.

e. Pella will pay all notice costs and the costs of settlement administration.

Certification

[9] The plaintiffs propose that the action be certified as a class proceeding for settlement purposes. Pella consents to the certification. I note that the requirements for certification need not be as rigorously applied in the settlement context as they would be in the litigation context: see *Gariepy v. Shell Oil Co.*, [2002] O.J. No. 4022 (S.C.J.), at para. 27.

[10] The five-part certification test in s. 5(1) of the Act has been met.

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[1] The U.S. settlement agreement was approved in April 24, 2013, despite the arguments of objectors. That decision is currently under appeal.

[2] Pella denies all liability and denies that any of its products were defective. However, it agreed to provide benefits to owners of the ProLine series because Pella's rates of customer warranty claims for those products (which Pella says were still low), were higher than those for the Architect Series and Designer Series.

[11] The pleading discloses a cause of action in negligence. The class is a readily identifiable one. The parties have identified and agreed to a common issue for purposes of this consent certification motion.[3]

[12] A class proceeding is the preferable procedure. It will enable class members to obtain compensation where the size of their individual claims might not have justified pursuing an individual action. Further, the procedures in the Settlement Agreement for compensating class members are streamlined and manageable.

[13] Ms. Terpstra is a suitable representative plaintiff who falls within the proposed class definition and is able to fairly and adequately represent the interests of the class. She has been actively involved in the litigation and the settlement and there is no evidence of a conflict with other class members.[4]

[14] I certify this action as a class proceeding for purposes of settlement.

Settlement Approval

[15] To approve a settlement of a class proceeding, the court must find that in all the circumstances the settlement is fair, reasonable, and in the best interests of those affected by it: *Dabbs v. Sun Life Assurance Co. of Canada*, (1998) 40 O.R. (3d) 429 (Gen. Div.), at p. 440-44, aff'd (1998), 41 O.R. (3d) 97 (C.A.). The factors to be considered in approving a settlement are well-established: see *Dabbs*, at paras. 30-46; *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.), at paras. 71-72; *Bilodeau v. Maple Leaf Foods Inc.*, 2009 CanLII 10392 (On. S.C.J.), at paras. 45-46.

[16] Considering those factors, I approve the proposed settlement. It is fair, reasonable and in the best interests of the class members.

[17] This is a product liability case that raises complex issues of liability and causation. If it proceeds to certification and trial, there are numerous defences available to Pella at both stages of the litigation. Even if the matter progresses to a trial and the class succeeds on the common issues, each member will still have to prove issues of causation and damages on an individual basis.

[18] The Settlement Agreement simplifies the ability for class members to recover damages, either through the claims process or an expedited arbitration process.

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[3] The common issue is "when was the first ProLine Casement Window marketed in Canada?" Counsel concedes that this restricted issue might not be sufficient in a contested certification hearing but agreed to it for certification purposes. They also concede that this would be a fundamental issue to be resolved in the context of a negligence claim and is common to all class members.

[4] Mr. Glube, the other named plaintiff, is not seeking to be a representative plaintiff because he owns Designer Series windows and is not in the class. However, he will receive a $5000 honorarium under the settlement to reflect his contribution to the advancement of the litigation.

[19] The Settlement Agreement provides benefits to the members of the class despite their varying circumstances. The benefits extend to current and former owners of Pella ProLine Casement windows; owners who did and did not give notice to Pella of window performance concerns; and owners who did and did not receive some warranty benefits. The Settlement Agreement is structured to allow a range of benefits to class members up to 15 years after the manufacture of the windows. There is no cap on the total value of the benefits to be paid to class members.

[20] While discoveries have not been conducted, class counsel's evidence is that it has conducted significant investigation, both with respect to the legal issues and with the fenestration expert to understand the relevant design and manufacturing issues.

[21] If this case is not settled, class members will encounter years of delay as the case proceeds to what is likely to be a highly contested certification hearing and common issues trial. Given that some of the purchases in question date back to 1991, it is in the interests of class members to resolve their claims without further delay.

[22] The Settlement Agreement was negotiated at arm's length, with experienced counsel on both sides. Class counsel supports the settlement, particularly since the results achieved in this proceeding are on a par with those achieved in the U.S. litigation. The representative plaintiff supports the settlement.

[23] The court-approved form of notice of hearing was disseminated through a robust notice program that reached approximately 80% of the class.[5] There is a strong level of interest in the settlement demonstrated by the number of hits to the settlement website, calls to the toll-free phone lines and claim/arbitration forms downloaded from the website.

[24] There has been only one objection.[6] The objector's complaint is that she received defective windows that were not her order when her house was built in 1992 and wants Pella, at its cost, to fully replace these windows. Her objection raises issues that relate to her individual claim, not to the merits of the settlement. These are not issues to be considered at this hearing: see *Directright Cartage Ltd. v. London Life Insurance Co.*, 2001 CarswellOnt 3658 (S.C.J.), at para 25. Her objection also does not recognize the fact that a settlement is a compromise that reflects the risk, delay and expense of continuing with the litigation: see *Stewart v. General Motors of Canada Ltd.*, 2008 CarswellOnt 6590 (S.C.J.), at para. 23.

[25] Finally, I have considered that the action will be discontinued with respect to the owners of the Architect Series and Designer Series. There is no prejudice to those owners as the

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[5] A national press release was issued on July 19, 2013. Direct mail notice was sent to the class members known to Pella (over 3661), only 401 of which were returned as undeliverable. An informational website and toll-free phone lines went live on July 19, 2013. Starting on July 27, 2013, notice was published in Ontario and national media publications. The notice directs all class members to the website for further information about the results of this hearing, how to opt-out and how to make a claim. Given how extensive the notice program was and the fact that class members are already accessing the website as directed by the notice, I am satisfied that the dissemination of the notice meets the requirements of Canadian principles of natural justice and the notice requirements of the Act.
[6] The objection was in writing. The objector did not attend the hearing.

Settlement Agreement does not compromise or release their claims. They will be free to pursue a class or individual actions against Pella should they choose to do so.

[26] I approve the settlement on the terms set forth in the Settlement Agreement and as set out in the signed order. I order that the parties report back to the court once the settlement has been administered.

Legal Fees

[27] The Settlement Agreement provides that Pella will pay class counsel, subject to court approval, legal fees in the all-inclusive amount of $650,000.

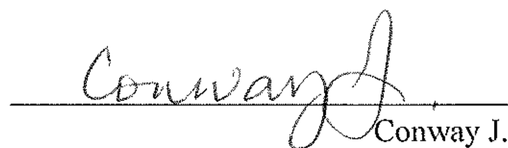
[28] Class counsel submits that it has spent over 450 hours on the case as of September 22, 2013, representing over $250,000 in unbilled time, exclusive of taxes. It anticipates spending another $40,000 to $60,000 on the hearing and subsequent administration of the settlement. Disbursements are approximately $10,000. That works out to a multiplier of 2.2 times counsel's base fee as of September 22, 2013 and a multiplier of less than 2 when the additional fees are included.

[29] Considering the factors in *Smith Estate v. National Money Mart Co.* (2011), 106 O.R. (3d) 37, at paragraph 80 (C.A.), I am satisfied that the fees claimed are reasonable. They fairly compensate counsel for its work in conducting the litigation, negotiating a settlement, and ensuring that proper notice was given to the class. In addition, they recognize the risks undertaken by counsel in prosecuting the action. I note that there will be no additional fees sought – the approved fee includes all work to date as well as all future work in administering the settlement.

[30] I approve the payment of fees and disbursements by Pella to class counsel in the amount of $650,000, all inclusive.

Orders

[31] Order accordingly. If the parties require assistance during the course of administering the settlement, I may be spoken to.



Conway J.

Date: October 3, 2013