CITATION: de Muelenaere v. Great Gulf Homes Limited, 2015 ONSC 7442
COURT FILE NO.: CV-14-512447CP
DATE: 20151130

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
ETIENNE DE MUELENAERE	)	*Theodore P. Charney* for the Plaintiff
Plaintiff	)	
– and –	)	
GREAT GULF HOMES LIMITED, GREAT GULF (JARVIS-CHARLES) LTD. and JARVIS-CHARLES G.P. INC.	)	*Monique Jilesen* for the Defendants
Defendants	)	
Proceeding under the *Class Proceedings Act, 1992*	)	**HEARD**: November 18, 2015

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION

[1] This motion raises the complex problem of how, if at all, during the pre-certification phase of a proposed class action under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, the court should regulate communications with putative class members, including the communication of settlement offers made by the defendant.

[2] Etienne de Muelenaere is the Plaintiff in a proposed class action under the *Class Proceedings Act¸1992*, His proposed Class Counsel are Charney Lawyers and Sutts, Strosberg LLP. Pursuant to s. 12 of the *Act,* Mr. de Muelenaere brings a motion for an order: (a) setting aside settlements that have been reached between the Defendants Great Gulf Homes Limited, Great Gulf (Jarvis-Charles) Ltd. ("Great Gulf (JC)") and Jarvis-Charles G.P. Inc. (collectively "Great Gulf Homes") and several putative Class Members; i.e., he seeks rescission of the settlements; (b) directing Great Gulf Homes to correct certain provisions in a standard form offer to settle/letter and release; and (c) directing Great Gulf Homes to implement a procedure whereby putative Class Counsel receive notice of the offers.

[3] For the reasons that follow, I dismiss the Plaintiff's motion, with costs in the cause.

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B. FACTUAL AND PROCEDURAL BACKGROUND

[4] Great Gulf Homes built a 44-storey residential condominium in Toronto with 437 residential units.

[5] Mr. de Muelenaere owns a resale unit in the condominium complex; i.e., he has no contractual relationship with Great Gulf Homes. In the proposed class action, Great Gulf Homes takes the position that it has no liability to persons other than with whom there was privity of contract.

[6] One of the features of the residences at the condominium complex when the units were originally sold by the developer was a pressure-balanced valve for the bathtubs and the showers, but Mr. de Muelenaere alleges that non-pressure-balanced valves were installed with the consequence of unpredictable temperature fluctuations including a serious risk of harm.

[7] On September 18, 2014, Mr. de Muelenaere commenced a proposed class action against Great Gulf Homes. The proposed definition of the Class is as follows:

> *"Class"* and *"Class Members"* means those persons, excluding the defendants and their senior officers and directors, who owned, rented, and/or ordinarily resided in a residential condominium unit at the premises municipally known as 110 Charles Street West, in the City of Toronto, during the period commencing on November 8, 2010.

[8] In his proposed class action, Mr. de Muelenaere's claim for relief includes:

- An interim order that the Defendants replace all non-pressure-balanced valves in the bathtubs and/or showers in the bathrooms of each unit and that they submit the plan for repairs to the court before the work commences;
- A declaration that the Defendant, Great Gulf (JC), breached the contract and is liable in damages to Class Members who purchased units from Great Gulf (JC);
- A declaration that the Defendants were negligent in monitoring the design, installation, and supply of the valves and are liable in damages to the Class;
- General damages in the amount of $25 million or such other sum as this Honourable Court finds appropriate; and
- Special damages and the costs of administering the plan of distribution of the recovery of this action in the amount of $4 million or such other sum as this Honourable Court finds appropriate.

[9] On January 26, 2015, Class Counsel hosted an information session at an open meeting at the condominium complex to provide information about the proposed class action. The Board and management of the condominium corporation circulated a notice of the meeting.

[10] In March 2015, Mr. de Muelenaere and Great Gulf Homes attended mediation but the mediation did not produce a settlement.

[11] On May 25, 2015, there was a Class Action Town Hall Meeting to inform putative Class Members about the proposed class action including the proposed solution to the water pressure problem that was being proposed by putative Class Counsel.

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[12] In the summer of 2015, after the condominium corporation advised unit owners that Great Gulf Homes had proposed its own solution to the valve problem, several unit owners contacted Great Gulf Homes directly.

[13] In response to these inquiries, Great Gulf Homes responded with a settlement offer letter. It is to be noted that the settlement offer was not distributed to all unit owners, and it was rather the response to inquiries by a few unit owners.

[14] Great Gulf Homes did not inform putative Class Counsel of these communications with putative Class Members. The settlement offer letter, which in its early iteration did not include a reference to the proposed class action, stated:

> Dear [PURCHASER]:
>
> RE: X Condos — Pressure Balanced Valves
>
> Unit # , 110 Charles Street East, Toronto (the "Property"): Unit , Level , Toronto Standard Condominium Plan 2117 (the "Unit")
>
> We write to you because we understand you are the registered owner of the Unit and that you are interested in accepting our proposal for settling matters relating to the pressure balanced valves at the Property.
>
> As you know, we developed the Property. The original specifications for the Property included pressure balanced valves for the bathtub/shower combinations in the units. As a result of inadvertence, pressure balanced valves were not installed in the bathtub/shower combinations when the Property was originally developed.
>
> We are committed to rectifying this situation and would like to deal with any claim you may have in a fair and reasonable manner.
>
> We worked with a leading manufacturer and a government approved laboratory and together have developed, tested and certified a pressure balance[d] valve insert (the "Rubinet Valve") capable of being added to the existing fixture. We have had these inserts manufactured in sufficient quantities for each unit in the building and are ready to have them installed in the bathtub/shower units in the building (further information attached). The installation can be completed with minimal disruption to owners or tenants.
>
> A video of the installation can be viewed at https://copy.com/1 AymerlFyRoi0Do0Z.
>
> As part of our settlement proposal in addition to installing the insert we are offering to make a payment to you of $500 to compensate you for the inconvenience.
>
> To summarize, our offer is as follows:
>
> (a) We will pay you the all-inclusive amount of $500;
>
> (b) We will arrange installation of the Rubinet Valve in your Unit; and
>
> (c) You will execute the Full and Final release that is attached to this letter.
>
> This offer to settle is made with no admission of liability, breach or fault on the part of us, our affiliates and suppliers.
>
> It would be appropriate for you to obtain independent legal advice before accepting this offer. If you are already represented by a lawyer, please bring this letter to your lawyer's attention. As you may be aware, a class action relating to the absence of pressure balanced valves in the units at the

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Property has been commenced. The class action has not yet been certified by the Court as a class action. If you wish, you may contact the intended class action law firms: Charney Lawyers (416-964-7950), specifically Theodore Charney (TedC@charneylawyers.com or 416-964-7950 ext.225) and Samantha Schreiber (SamanthaS@charneylawyers.com or 416-964-7950 ext.249), and Sutts Strosberg LLP (1-866-316-5311), specifically Harvey Strosberg (harvey@strosbergco.com or 1-866-316-5308) and Sharon Strosberg (sharon@strosbergco.com or 1-866-316-5308). We understand that further information regarding the intended class proceeding may be found at http://wwvv.xcondosclassaction.com.

If you would like to accept this offer please return a signed copy of this letter and the attached release to Great Gulf at angie.morra@greatgulf.com (mailing a copy to Angie Morra at 3751 Victoria Park Avenue, Toronto, Ontario, M1W 3Z4 to follow your email) along with your contact information so we can arrange scheduling. If you have any questions about the offer please contact Angie Morra at Great Gulf at 416-774-2189 or at angie.morra@greatgulf.com.

If you are represented by a lawyer please have them contact our outside counsel, Monique Jilesen at 416-865-2926 or mjilesen@litigate.com. If you accept the offer, we will be in contact with you directly to finalize the paperwork and make arrangements to schedule an appointment for the installation of the pressure balanced valve.

Yours truly,

Great Gulf (Jarvis-Charles) Ltd.

Per:

I wish to accept your proposal:

Name:

Date:

[15] To date, 24 unit owners have accepted the offer and have had Rubinet Valves installed. The 24 unit owners that accepted the offer signed the releases that came with the settlement offer letter. The release states:

FULL AND FINAL RELEASE

IN CONSIDERATION of the payment of the sum of FIVE HUNDRED DOLLARS ($500) plus other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the undersigned (being the registered owner(s) of Unit # ______ (the "Unit") at 110 Charles Street East, Toronto, being Unit _____, Level ____, Toronto Standard Condominium Plan No. 2117) on behalf of themselves, their family members, tenants, guests, invitees, predecessor owners, and on behalf of their respective heirs, administrators, executors, assigns, agents, successors and on behalf of any party or parties who claim a right of interest through them (the "Releasors") hereby release and forever discharge **Great Gulf Homes Limited, Great Gulf (Jarvis-Charles) Ltd. and Jarvis-Charles G.P. Inc.** and their current and former affiliates, subsidiaries, parents, heirs, executors, administrators, assigns, servants, suppliers, agents, partners, associates, employees, servants, directors, officers, shareholders and agents, and their heirs, executors and administrators (the "Releasees"), from any and all actions, causes of action, suits, debts, dues, accounts, bonds, covenants, contracts, claims, demands and proceedings whatsoever which against any of the Releasees, any Releasors, their heirs, executors, administrators or assigns, or any of them, we ever had, now have or may hereafter have for or by reason of any cause, matter or thing whatsoever existing up to the present time with respect to pressure balanced valves, or the lack thereof, in the Unit of the condominium development located at 110 Charles Street East, and any matters related thereto, and particularly we release the Releasees from any

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> and all claims which were or could have been advanced in Action No. CV-14-512447-00CP in the Ontario Superior Court of Justice (the "Class Action").
>
> **IT IS UNDERSTOOD AND AGREED** that the said payment or promise of payment is deemed to be no admission whatever of liability on the part of the Releasees.
>
> **IT IS UNDERSTOOD AND AGREED** that the intent of this Release is to conclude all issues between the Releasors and the Releasees in respect of the Class Action and that the Releasors have by this release and associated settlement, released any and all right to participate in the Class Action.
>
> **THE RELEASORS FURTHER AGREE AND UNDERTAKE** not to make any claim or take any proceedings against any other person or entity which might claim contribution or indemnity from the Releasees.
>
> **THE RELEASORS FURTHER ACKNOWLEDGE** that we have had the opportunity to seek independent legal advice with respect to the terms of this settlement and have read this Release carefully and have signed it of our own free will and without any form of duress being exerted upon by the Releasees or anyone acting on their behalf.
>
> **IN WITNESS WHEREOF, we have hereunto set our hand this ---- day of ---, 2015.** …

[16] Mr. de Muelenaere submits that the combination of the offer and the release is problematic and misleading for seven reasons.

[17] First, because the offer is written in the singular, but the release purports to bind family members, tenants, children (for which court approval of a settlement may be necessary), and others, the offer is misleading. Further, it is debatable whether, the person signing the release has the legal authority to bind others. Second, the offer is deficient for not disclosing the guarantee or warranty available for the Rubinet Valve that is being installed. Third, the alternative solution proposed in the class action is not disclosed. Fourth, the offer encourages direct communications between the recipient and Great Gulf Homes that would not involve Class Counsel and this is alleged to have the potential for abuse. Fifth, the offer does not inform the recipient that Class Counsel are available to provide free legal advice. Sixth, Class Counsel's contact information is out of date and inaccurate. Seventh, because the offers were not copied to Class Counsel, they are unable to contact the 24 unit owners to discuss the implications of the offer.

[18] With respect to the last point, Great Gulf Homes says that it does not have the unit owner's permission to disclose their names or contact information.

C. DISCUSSION AND ANALYSIS

1. The Problems Associated with Defendant Settlement Offers

[19] How, if at all, during the pre-certification phase of a proposed class action should the court manage settlement offers made by the defendant?

[20] The problem posed by this question is complex because, at first rosy blush, it seems a social good that a defendant sued by a plaintiff on behalf of a group of injured persons should do the socially responsible thing and, with or without an admission of liability, offer compensation or remediation to the injured members of the group. Typically, the members of the group (who will comprise the putative class) will be competent adults, and it would seem that the court

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should not intervene and rather the court should leave it to the parties to negotiate a settlement. A settlement achieves access to justice, behaviour modification, and judicial economy.

[21] However, in the context of a proposed class action, there are questions and problems that take the blush off the settlement rose.

[22] The settlement offers may be improvident to accept and the putative class members may be being taken advantage of for a second time. But, how can a court determine the improvidence of the settlement offer without deciding the merits of the putative class member's cause of action? Outside of class actions (and infant settlements), courts do not evaluate the worth of negotiated settlements between parties, and a settlement offer pre-certification is made outside of the class action regime, and, moreover, the matter of determining whether a settlement is fair and reasonable to a class is an altogether different matter from scrutinizing a settlement between competent individual parties. How, if at all, should the court respond to misleading information in the settlement offer? Should the court be concerned about whether the putative class members are being misled, perhaps a second time by the defendant? Should the court be concerned that the negotiations were fairly conducted? Normally, the court does not get involved in assuring that parties to a settlement offer have independent legal advice, but do the circumstances of a possible class action make a difference? Does it make a difference if the defendant's offer is with or without the strings-attached of releases and waivers of claims? How, if at all, does the court respond to tactical manoeuvers of the defendant? The settlement offer may be a tactic by the defendant to divide and conquer the class and gut the class action so that it is no longer certifiable or worth certification for the Class Counsel. Should the prospect of hobbling the putative class action, concern the court? But, regardless of whether the settlement offer is improvident or a tactic, ought not the putative class members at least be told that they may have the alternative of taking their chances at a better result by participating in a proposed class action? Should the court be concerned to ensure that the putative class members at least know that they have alternatives to settlement? Should the court be concerned about whether any lawyers involved in pre-certification communications are complying with the Law Society of Upper Canada's *Rules of Professional Conduct*? In terms of lines of communication, does it make a difference if the settlement offer to the putative class members comes from the defendant's lawyer, who has a professional obligation not to communicate with a represented party? Rule 7.2-6 of the *Rules of Professional Conduct* provides that with certain qualifications if a person is represented by a legal practitioner in respect of a matter, a lawyer shall not, except through or with the consent of the legal practitioner: (a) approach or communicate or deal with the person on the matter; or (b) attempt to negotiate or compromise the matter directly with the person, but how would the defendant's lawyer know whether the putative class member has retained a lawyer? Do the logistics of the channels of communication make a difference? Visualize, a defendant franchisor may know to whom and how to make a settlement offer to its franchisees who are the putative class members and a negligent transporter of goods or people may know its clients or passengers, but how does a manufacturer reach out to make a settlement offer to its thousands and possibly millions of consumers who are the victims of price-fixing or a defective product? If the settlement involves the replacement of a dangerous part or component of a product, would or could court supervision respond quick enough for the exigencies? Should notice of the settlement offer be given to putative class counsel? However, if notice is given to putative class counsel is there not the problem that putative class members are not yet clients of the putative class counsel and should class counsel be permitted to solicit his or her services to a

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stranger? And, there is the question of whether the court has jurisdiction and the extent of it to regulate pre-certification settlement offers.

[23] In the United States, the Federal Judicial Centre, *Manual for Complex Litigation (4th)*, 2004, s. 21.12 at pp. 248, 249 describes the problem of pre-certification communications:

> Direct communications with class members, however, whether by plaintiffs or defendants, can lead to abuse. For example, defendants might attempt to obtain releases from class members without informing them that a proposed class action complaint has been filed. .... Misrepresentations or other misconduct in communicating with the class may impair the fairness and adequacy of representation under Rule 23(a)(4), may affect the decision whether to appoint counsel under proposed Rule 23(g), and may be prohibited and penalized under the court's Rule 23(d)(2) plenary protective authority. Defendants and their counsel generally may communicate with potential class members in the ordinary course of business, including discussing settlement before certification, but may not give false, misleading, or intimidating information, conceal material information, or attempt to influence the decision about whether to request exclusion from a class certified under Rule 23(b)(3). Ethics rules restricting communications with individuals represented by counsel may apply to restrict a defendant's communications contract with the named plaintiffs. [footnotes omitted]

[24] In *Lundy v. Via Rail Canada Inc.*, 2012 ONSC 4152, which concerned a pre-certification settlement offer, I discussed at paras. 14-16 some of the reasons why regulating communications with putative class members is problematic. I stated:

> 14. Regulating communications with putative class members is problematic largely for three reasons. First, the legal nature of the relationship between some putative class members and the lawyer for the proposed representative plaintiff is unclear. In many proposed class actions, a putative class member will not even know that there is a proposed class action until after the certification hearing, and, practically speaking, during the pre-certification phase, the putative class member may be a distant stranger to the lawyer. Thus whether and how the traditional rules and privileges about communications between lawyer and client apply pre-certification is unclear in the context of a proposed class action and, accordingly, how to govern those communications is problematic.
>
> 15. Second, although the legal nature of the relationship between putative class members and the lawyer for the proposed representative plaintiff is unclear, some putative class members will have a traditional lawyer and client relationship with the lawyer for the representative plaintiff or these putative class members will have independent legal representation from other lawyers. In other words, putative class members may have diverse legal relationships with lawyers during the pre-certification phase, and, accordingly, how to govern communications in these circumstances is not clear and is problematic.
>
> 16. Third, the attitude of the putative class member to the proposed class action is also unclear during the pre-certification phase. Some class members may not even know about the proposed class action, and those that do know may have a range of attitudes about participating in the class action. How to regulate communications with a group of persons who might benefit from participating in the class action but who have a widely diverse attitude towards participating is not clear and hence is problematic.

[25] Most of these problems do not arise in the case at bar, but some problems do arise, and there is the added complication that the settlement offers in the case at bar were not initiated by the Defendant but are responsive to the inquiries of putative Class Members who likely were aware of the existence of the class action.

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2. The Rules and the Law about Pre-Certification Communications

[26] One of the reasons that the issue of regulating pre-certification communications with putative class members is complicated is that the issue involves not only the provisions of the *Class Proceedings Act, 1992* but also the ethical and professional duties of lawyers. In this section of my Reasons for Decision, I will examine the rules, the statutory provisions, and most particularly the case law about pre-certification communications with putative class members.

[27] Beginning with the *Rules of Professional Conduct*, the Advisory Committee that reviewed the Ontario Law Commission's report that studied class actions and that prepared draft class actions legislation for Ontario recommended that to accommodate the special circumstances of class actions, the Law Society of Upper Canada should consider rule changes about professional obligations. (See Ministry of the Attorney General, Report of the Advisory Committee on Class Action Reform (Toronto: Ministry of the Attorney General, 1990), p. 32.) However, the Law Society did not amend its *Rules of Professional Conduct* to specifically address the unique circumstances of a class proceeding. Thus, the issue of communications with putative class members is governed by the general rules of the *Rules of Professional Conduct*. Of these, at least, Rules 1.1-1, 3.2-4, 4.1-1, 4.1-2, 4.2-0, 4.2-1, 7.2-4, 7.2-6, 7.2-7 and 7.2-9 are pertinent to the issue of communications with putative class members. These rules from the Law Society's *Rules of Professional Conduct* are set out in Schedule "A" to these Reasons.

[28] Before turning to the case law, it should be noted that the *Class Proceedings Act, 1992* addresses the matter of communications with putative class members and class members in sections 17-22 of the *Act*. These provisions are set out in Schedule "B" to these Reasons.

[29] Turning then, to the case law, after certification, there is a lawyer and client relationship between class counsel and the class members: *Ward-Price v. Mariners Haven Inc.*, (2004), 71 O.R. (3d) 664 (S.C.J.); *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada*, [2003] O.J. No. 1016 (Master); *Glover v. Toronto (City)*, [2009] O.J. No. 1523 (S.C.J.) at paras. 89-94, but before certification, putative class members are not parties to the proceeding; however, they are not strangers or simply witnesses to a wrongdoing, because they are potential claimants and there is a potential lawyer and client relationship should certification be granted.

[30] In other words, pre-certification, putative class members' rights are at stake along with the rights of the putative representative plaintiff and these rights are connected to class counsel's proposed class action. The result is that the case law recognizes that there is a *sui generis* relationship between proposed class counsel and the putative class members that may impose some responsibilities on the proposed class counsel: *Heron v. Guidant Corp.*, [2007] O.J. No. 3823 (S.C.J) at para. 10, leave to appeal to Div. Ct. refd., [2008] O.J. No. 48 (Div. Ct); *Fantl v. Transamerica Life* Canada, [2008] O.J. No. 1536 (S.C.J.) at para. 78, leave to appeal granted [2008] O.J. No. 2593 (Div. Ct.), affd. [2008] O.J. No. 4298 (Div. Ct.), affd. 2009 ONCA 377.

[31] Before certification, all of the representative plaintiff, putative class counsel, the defendant and the defendant's lawyer may have appropriate and legitimate reasons to communicate with putative class members, and although s. 19 of the *Class Proceedings Act, 1992* provides that at any time in a class proceeding the court may order any party to give such notice as it considers necessary to protect the interests of any class member or party or to ensure the fair conduct of the proceeding, the case law establishes that not every communication to

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members of the class needs to receive court approval: *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.*; *Ward-Price v. Mariners Haven Inc., supra* at para. 25.

[32] Before certification the parties are free to communicate to the public about a class proceeding, and, for instance, a press release that provides information to the media that does not evade or undermine the formal notice requirements of the *Act* is not a notice regulated by the *Class Proceedings Act, 1992*: *Bywater v. Toronto Transit Commission* (1999), 43 O.R. (3d) 367 (Gen. Div.).

[33] Class counsel are obviously free to communicate with the plaintiff, and it is frequently the case that class counsel will have been retained by a group of individuals from whom one or more proposed representative plaintiffs are selected and class counsel is equally free to communicate with these individuals.

[34] The defendant may have an ongoing relationship with the putative class members, who may be the defendant's customers, clients, investors, shareholders, suppliers, employees, franchisees, taxpayers, etc., depending upon the circumstances of the particular case, and the defendant may have legitimate and proper reasons to communicate with the putative class members. Before the certification of a proposed class action, a defendant is entitled to communicate with putative class members as if they were non-parties, with the exception that the defendant may not communicate in a manner that would visit an injustice on the putative class members or would otherwise undermine the integrity of the class proceeding by disparaging the plaintiff or by intimidating the putative class members to not support the class proceeding: *Vitelli v. Villa Giardino Homes Ltd. supra*; *Pearson v. Inco. supra* at para. 18.

[35] The case law recognizes that defence counsel may contact putative class members pre-certification to gather evidence and to make settlement offers: *Vitelli v. Villa Giardino Homes Ltd.* (2001), 54 O.R. (3d) 334 (S.C.J.). Although defence counsel may contact putative class members pre-certification, to comply with the *Rules of Professional Conduct*, counsel must make it clear to the unrepresented persons that he or she is acting exclusively in the interests of the defendant: *Vitelli v. Villa Giardino Homes Ltd. supra*.

[36] The case law recognizes that the court has the power to regulate communications with putative class members and to sanction communications to putative class members by class counsel, the defendant, or the defendant's lawyer that undermine the statutory mandate of the *Class Proceedings Act, 1992* and to ensure that class members are given appropriate information when required to make decisions in relation to their legal rights in a class proceeding, but the court must be careful to craft an order that limits the rights of the parties as minimally as possible: *Bywater v. Toronto Transit Commission, supra*; *Vitelli v. Villa Giardino Homes Ltd. supra*.

[37] Where a communication to a putative class member (or a class member) constitutes misinformation, a threat, intimidation, coercion, or is made for some other improper purpose aimed at undermining the process, the court may intervene: *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 (S.C.J.) at para. 76, affd (2004), 70 O.R. (3d) 182 (Div. Ct.); *Ward-Price v. Mariners Haven Inc. supra* at paras. 21-22; *Smith v. National Money Mart Co.*, [2007] O.J. No. 1507 (S.C.J.).

[38] Where a defendant is making a settlement offer to putative class members that includes a release and the defendant is aware of a proposed class action against the defendant, then the offer

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to settle should indicate that there is a proposed class action about the matter and provide information about the nature of the class action and about how to contact class counsel. The offer should include a recommendation that the recipient obtain independent legal advice about the settlement including obtaining advice by contacting class counsel. The offer should indicate that if the recipient signs the release, he or she may be prevented from participating in the class action. If the defendant fails to include this information in the offer, it may be ordered to do so pursuant to s. 19 of the *Class Proceedings Act, 1992*: *Lewis v. Shell Canada Limited* (2000), 48 O.R. (3d) 612 (S.C.J.); *White v. IKO Industries Ltd.*, 2010 ONSC 3920.

[39] In addressing the matter of communications between a defendant and a putative class member, the power of the court under s. 12 of the *Class Proceedings Act, 1992* to make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination should be sparingly employed so as to not interfere with what otherwise would be the normal rights of putative class members to conduct their affairs as they see fit, to protect their own interests, and to seek their own advice without interference by the court: *Pearson v. Inco.* (2001), 57 O.R. (3d) 278 (S.C.J.), leave to appeal refused [2002] O.J. No. 2134 (Div. Ct.).

[40] In addition to the court's power under s. 12 of the *Class Proceedings Act, 1992*, the court has an inherent power to control its own process, and the court may harness this power to supervise the conduct of a proposed class action in its pre-certification stages to make orders to protect putative class members: *Fantl v. Transamerica Life* Canada, *supra*, at paras. 57-59; *Fenn v. Ontario*, [2004] O.J. No. 2736 (S.C.J.) at paras. 13-17; *Vitelli v. Villa Giardino Homes Ltd.*; *Lewis v. Shell Canada Ltd., supra*. See also: *Coleman v. Bayer Inc.*, [2004] O.J. No. 1974 (S.C.J.) at paras. 30-39; *Burnett Estate v. St. Jude Medical Inc.*, [2008] B.C.J. No. 192 (S.C.) at paras. 32-35; and *Logan v. Canada (Minister of Health)*, [2004] O.J. No. 2769 (C.A.).

[41] In the United States, the approach to pre-certification communications is described in the Federal Judicial Centre, *Manual for Complex Litigation (4th)*, 2004, s. 21.12 at pp. 247-249 as follows:

> s.21.12 *Precertification Communications with the Proposed Class* Rule 23(d) authorizes the court to regulate communications with potential class members, even before certification. Such regulations, however, could implicate the First Amendment. Moreover, restrictions of this type may be difficult to implement given the ease and speed of communicating with dispersed groups. For example, many class actions' attorneys establish Internet Web sites for specific class actions, in addition to using conventional means of communication, such as newspapers. Most judges are reluctant to restrict communications between the parties or their counsel and potential class members, except when necessary to prevent serious misconduct.
>
> ... If defendants are in an ongoing business relationship with members of a putative class, the court might consider requiring production of communications relating to the case. In appropriate cases, courts have informed counsel that communications during an ongoing business relationship, including individual releases or waivers, must be accompanied by notification to the members of the proposed class that the litigation is pending.
>
> Judicial intervention is generally justified only on a clear record and with specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties. Such intervention "should result in a carefully drawn order that limits speech as little as possible, consistent with the rights of the parties under the circumstances." Even if the court finds that there has been an abuse, less burdensome remedies may suffice, such as requiring parties to initiate communication with potential class members only in writing or to file copies of all nonprivileged communications with class members. If class members have received inaccurate

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> precertification communications, the judge can take action to cure the miscommunication and to prevent similar problems in the future. Rule 23 and the case law make clear that, even before certification or a formal attorney-client relationship, an attorney acting on behalf of a putative class must act in the best interests of the class as a whole.

3. Application of the Rules and the Law to the Case at Bar

[42] This brings the discussion to the matter of the relief requested by Mr. de Muelenaere, which includes a request that the court rescind the releases signed by 24 unnamed unit owners.

[43] For several reasons, the remedy of rescission is not available. There is no evidence that any of these 24 unit owners wish to have their releases rescinded. There is no evidence that putative class counsel has been retained by any of the 24 unit owner to have their releases rescinded, and while the court has the jurisdiction to rescind contracts, including releases, the exercise of that jurisdiction would typically require a trial or a summary judgment motion.

[44] The request for rescission, therefore, must be rejected, and the issue becomes what the court should do, if anything, to resolve the problems, if any, of the immediate case about communicating settlement offers to putative Class Members.

[45] In my opinion, apart from correcting the contact information for Class Counsel, which Great Gulf Homes is consensually prepared to do, there is nothing that needs to be done.

[46] Based on the evidentiary record of this case, there does not appear to be any breach of the guidelines established by the case law and no violation of the provisions of the *Class Proceedings Act, 1992* or the *Rules of Professional Conduct*. The putative class members do not appear to be in need of court intervention to protect their interests.

[47] In the circumstances of this case, I see no purpose in having the identity of the 24 unit owners who signed releases revealed to Class Counsel. It appears that the existence of the class action has some notoriety. Those unit owners signing the releases likely would have been aware of the class action from Class Counsel's open meetings at the condominium complex and, in any event, they were alerted to the class action in the settlement offer. With knowledge of the proposed class action, the 24 unit owners made their own decision to come to an agreement with Great Gulf Homes and no purpose would be served at this juncture requiring the Defendant to disclose their identity to Class Counsel.

[48] I see no reason to have the 24 individuals who have signed releases advised at this juncture that there is a dispute about the scope of the releases to bind them or others. The issue of the role of the releases and the extent to which they are binding may become a matter to be determined at the certification hearing motion, where the matter of the scope of the releases may be relevant to defining the Class or the common issues. By the time of the certification motion, there may actually be a putative Class Member seeking rescission or a declaration about the scope of the releases. It is also possible that the issue of the scope of the releases may be an issue for an individual issues trial if the action goes the distance. In any event, it is premature, at this juncture, to give those who signed a release information that there may be an issue about the scope of their releases to bind others.

D. CONCLUSION

[49] I, therefore, dismiss the Plaintiff's motion.

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[50] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with Great Gulf Homes' submissions within 20 days followed by Mr. de Muelenaere's submissions with a further 20 days.

Perell, J.

Released: November 30, 2015

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Schedule "A" – Excerpts from the *Rules of Professional Conduct*

1.1-1 In these rules, unless the context requires otherwise, …

"client" means a person who:

> (a) consults a lawyer and on whose behalf the lawyer renders or agrees to render legal services; or
>
> (b) having consulted the lawyer, reasonably concludes that the lawyer has agreed to render legal services on their behalf and includes a client of the law firm of which the lawyer is a partner or associate, whether or not the lawyer handles the client's work;

Commentary

[1] A solicitor and client relationship may be established without formality.

[2] When an individual consults a lawyer in a representative capacity, the client is the corporation, partnership, organization, or other legal entity that the individual is representing.

[3] For greater clarity, a client does not include a near-client, such as an affiliated entity, director, shareholder, employee or family member, unless there is objective evidence to demonstrate that such an individual had a reasonable expectation that a lawyer-client relationship would be established.

…

"independent legal advice" means a retainer where

> (a) the retained lawyer, who may be a lawyer employed as in-house counsel for the client, has no conflicting interest with respect to the client's transaction,
>
> (b) the client's transaction involves doing business with
>
> > (i) another lawyer,
> >
> > (ii) a corporation or other entity in which the other lawyer has an interest other than a corporation or other entity whose securities are publicly traded, or
> >
> > (iii) a client of the other lawyer,
>
> (c) the retained lawyer has advised the client that the client has the right to independent legal representation,
>
> (d) the client has expressly waived the right to independent legal representation and has elected to receive no legal representation or legal representation from the other lawyer,
>
> (e) the retained lawyer has explained the legal aspects of the transaction to the client, who appeared to understand the advice given, and
>
> (f) the retained lawyer informed the client of the availability of qualified advisers in other fields who would be in a position to give an opinion to the client as to the desirability or otherwise of the proposed investment from a business point of view;

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“independent legal representation” means a retainer where

(a) the retained lawyer, who may be a lawyer employed as in-house counsel for the client, has no conflicting interest with respect to the client’s transaction, and

(b) the retained lawyer will act as the client’s lawyer in relation to the matter;

Commentary

[1] Where a client elects to waive independent legal representation but to rely on independent legal advice only, the retained lawyer has a responsibility that should not be lightly assumed or perfunctorily discharged.

…

Encouraging Compromise or Settlement

3.2-4 A lawyer shall advise and encourage the client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis and shall discourage the client from commencing or continuing useless legal proceedings.

Commentary

[1] It is important to consider the use of alternative dispute resolution (ADR). When appropriate, the lawyer should inform the client of ADR options and, if so instructed, take steps to pursue those options.

…

Making Legal Services Available

4.1-1 A lawyer shall make legal services available to the public in an efficient and convenient way.
….

Restrictions

4.1-2 In offering legal services, a lawyer shall not use means

(a) that are false or misleading;

(b) that amount to coercion, duress, or harassment

(c) that take advantage of a person who is vulnerable or who has suffered a traumatic experience and has not yet had a chance to recover;

(d) that are intended to influence a person who has retained another lawyer for a particular matter to change their lawyer for that matter, unless the change is initiated by the person or the other lawyer; or

(e) that otherwise bring the profession or the administration of justice into disrepute.

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Commentary

[1] A person who is vulnerable or who has suffered a traumatic experience and has not yet had a chance to recover may need the professional assistance of a lawyer, and this rule does not prevent a lawyer from offering their assistance to such a person. A lawyer is permitted to provide assistance to a person if a close relative or personal friend of the person contacts the lawyer for this purpose, and to offer assistance to a person with whom the lawyer has a close family or professional relationship. The rule prohibits the lawyer from using unconscionable or exploitive or other means that bring the profession or the administration of justice into disrepute.

MARKETING

Marketing of Professional Services

4.2-0 In this rule, "marketing" includes advertisements and other similar communications in various media as well as firm names (including trade names), letterhead, business cards and logos.

4.2-1 A lawyer may market legal services if the marketing

(a) is demonstrably true, accurate and verifiable;

(b) is neither misleading, confusing, or deceptive, nor likely to mislead, confuse or deceive; and

(c) is in the best interests of the public and is consistent with a high standard of professionalism.

Commentary

[1] Examples of marketing that may contravene this rule include

(a) stating an amount of money that the lawyer has recovered for a client or referring to the lawyer's degree of success in past cases, unless such statement is accompanied by a further statement that past results are not necessarily indicative of future results and that the amount recovered and other litigation outcomes will vary according to the facts in individual cases;

(b) suggesting qualitative superiority to other lawyers;

(c) raising expectations unjustifiably;

(d) suggesting or implying the lawyer is aggressive;

(e) disparaging or demeaning other persons, groups, organizations or institutions;

(f) taking advantage of a vulnerable person or group;

(g) using testimonials or endorsements which contain emotional appeals.

Communications

7.2-4 A lawyer shall not in the course of professional practice send correspondence or otherwise communicate to a client, another legal practitioner, or any other person in a manner that is abusive, offensive, or otherwise inconsistent with the proper tone of a professional communication from a lawyer.
…

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Communications with a Represented Person

7.2-6 Subject to rules 7.2-6A and 7.2-7, if a person is represented by a legal practitioner in respect of a matter, a lawyer shall not, except through or with the consent of the legal practitioner

(a) approach or communicate or deal with the person on the matter; or

(b) attempt to negotiate or compromise the matter directly with the person.

Second Opinions

7.2-7 A lawyer who is not otherwise interested in a matter may give a second opinion to a person who is represented by a legal practitioner with respect to that matter.

Commentary

[1] Rule 7.2-6 applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract, or negotiation, who is represented by a legal practitioner concerning the matter to which the communication relates. A lawyer may communicate with a represented person concerning matters outside the representation. This rule does not prevent parties to a matter from communicating directly with each other.

[2] The prohibition on communications with a represented person applies only where the lawyer knows that the person is represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation, but actual knowledge may be inferred from the circumstances. This inference may arise where there is substantial reason to believe that the person with whom communication is sought is represented in the matter to be discussed. Thus, a lawyer cannot evade the requirement of obtaining the consent of the other legal practitioner by closing their eyes to the obvious.
…

[4] Rule 7.2-7 deals with circumstances in which a client may wish to obtain a second opinion from another lawyer. While a lawyer should not hesitate to provide a second opinion, the obligation to be competent and to render competent services requires that the opinion be based on sufficient information. In the case of a second opinion, such information may include facts that can be obtained only through consultation with the first legal practitioner involved. The lawyer should advise the client accordingly, and if necessary consult the first legal practitioner unless the client instructs otherwise.
…

Unrepresented Persons

7.2-9 When a lawyer deals on a client's behalf with an unrepresented person, the lawyer shall:

(a) [FLSC - not in use]

(b) take care to see that the unrepresented person is not proceeding under the impression that their interests will be protected by the lawyer; and

(c) take care to see that the unrepresented person understands that the lawyer is acting exclusively in the interests of the client and accordingly their comments may be partisan.

Commentary

[1] If an unrepresented person requests the lawyer to advise or act in the matter, the lawyer should be governed by the considerations outlined in these rules about joint retainers.

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Schedule "B" – Excerpts from the *Class Proceedings Act, 1992*

Notice of certification

17. (1) Notice of certification of a class proceeding shall be given by the representative party to the class members in accordance with this section.

Court may dispense with notice

(2) The court may dispense with notice if, having regard to the factors set out in subsection (3), the court considers it appropriate to do so.

Order respecting notice

(3) The court shall make an order setting out when and by what means notice shall be given under this section and in so doing shall have regard to,

(a) the cost of giving notice;

(b) the nature of the relief sought;

(c) the size of the individual claims of the class members;

(d) the number of class members;

(e) the places of residence of class members; and

(f) any other relevant matter.

Idem

(4) The court may order that notice be given,

(a) personally or by mail;

(b) by posting, advertising, publishing or leafleting;

(c) by individual notice to a sample group within the class; or

(d) by any means or combination of means that the court considers appropriate.

Idem

(5) The court may order that notice be given to different class members by different means.

Contents of notice

(6) Notice under this section shall, unless the court orders otherwise,

(a) describe the proceeding, including the names and addresses of the representative parties and the relief sought;

(b) state the manner by which and time within which class members may opt out of the proceeding;

(c) describe the possible financial consequences of the proceeding to class members;

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(d) summarize any agreements between representative parties and their solicitors respecting fees and disbursements;

(e) describe any counterclaim being asserted by or against the class, including the relief sought in the counterclaim;

(f) state that the judgment, whether favourable or not, will bind all class members who do not opt out of the proceeding;

(g) describe the right of any class member to participate in the proceeding;

(h) give an address to which class members may direct inquiries about the proceeding; and

(i) give any other information the court considers appropriate.

Solicitations of contributions

(7) With leave of the court, notice under this section may include a solicitation of contributions from class members to assist in paying solicitor's fees and disbursements.

Notice where individual participation is required

18. (1) When the court determines common issues in favour of a class and considers that the participation of individual class members is required to determine individual issues, the representative party shall give notice to those members in accordance with this section.

Idem

(2) Subsections 17 (3) to (5) apply with necessary modifications to notice given under this section.

Contents of notice

(3) Notice under this section shall,

(a) state that common issues have been determined in favour of the class;

(b) state that class members may be entitled to individual relief;

(c) describe the steps to be taken to establish an individual claim;

(d) state that failure on the part of a class member to take those steps will result in the member not being entitled to assert an individual claim except with leave of the court;

(e) give an address to which class members may direct inquiries about the proceeding; and

(f) give any other information that the court considers appropriate.

Notice to protect interests of affected persons

19. (1) At any time in a class proceeding, the court may order any party to give such notice as it considers necessary to protect the interests of any class member or party or to ensure the fair conduct of the proceeding.

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Idem

(2) Subsections 17 (3) to (5) apply with necessary modifications to notice given under this section.

Approval of notice by the court

20. A notice under section 17, 18 or 19 shall be approved by the court before it is given.

Delivery of notice

21. The court may order a party to deliver, by whatever means are available to the party, the notice required to be given by another party under section 17, 18 or 19, where that is more practical.

C*osts of notice*

22. (1) The court may make any order it considers appropriate as to the costs of any notice under section 17, 18 or 19, including an order apportioning costs among parties.

Idem

(2) In making an order under subsection (1), the court may have regard to the different interests of a subclass.

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COURT FILE NO.: CV-14-512447CP
DATE: 20151130

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ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

ETIENNE DE MUELENAERE

Plaintiff

– and –

GREAT GULF HOMES LIMITED, GREAT GULF (JARVIS-CHARLES) LTD., and JARVIS-CHARLES G.P. INC.

Defendants

REASONS FOR DECISION

PERELL J.

Released: November 30, 2015