CITATION: Chu v. Parwell Investments Inc. et al, 2019 ONSC 700
COURT FILE NO.: CV-18-604410-CP
CV-18-605178-CP
DATE: 20190215

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

CLEMENT CHU, NAHOM ABADI and IDA FABRIGA-CHU

Plaintiffs

and

PARWELL INVESTMENTS INC., BLEEMAN HOLDINGS LIMITED, 650 PARLIAMENT RESIDENCES LIMITED, 650 PARLIAMENT (LHB) INVESTMENTS LIMITED, ELECTRICAL SAFETY AUTHORITY, GREATWISE DEVELOPMENTS CORPORATION and 77 HOWARD (LHB) INVESTMENTS LIMITED

Defendants

AND BETWEEN:

YULIA TOMASH

Plaintiff

and

650 PARLIAMENT RESIDENCES LIMITED a.k.a. 650 PARLIAMENT RESIDENCES INC., 650 PARLIAMENT (LHB) INVESTMENTS LIMITED, PARWELL INVESTMENTS INC., BLEEMAN HOLDINGS LTD., and WELLESLEY/PARLIAMENT SQUARE LIMITED

Defendants

Proceedings under the *Class Proceedings Act, 1992*

BEFORE: Justice Edward P. Belobaba

COUNSEL: *Theodore P. Charney* of Charney Lawyers and *Sharon Strosberg* of Strosberg Sasso Sutts LLP for the plaintiffs in the Chu Action, CV-18-604410-CP

Vadim Kats and Zachary Silverberg of Landy Marr Kats LLP for the plaintiff in the Tomash Action, CV-18-605178-CP

Bruce Thomas and David S. Young for all defendants in both actions, other than the Electrical Safety Authority in the Chu Action

HEARD: January 24, 2019

CARRIAGE MOTION

[1] On August 21, 2018, a six-alarm electrical fire severely damaged two high-rise residential towers at 650 Parliament Street, Toronto. Hundreds of tenants were displaced, almost all sustaining personal property and related losses and, in some cases, physical injuries.

[2] Two class actions quickly materialized: *Chu* filed by the Strosberg/Charney combination ("SC") and *Tomash* filed by Landy Marr Kats ("LMK"). I encouraged SC and LMK to work together and avoid a carriage motion. I did so because both SC and LMK are experienced class action counsel. Both have filed viable statements of claim with plausible parties and causes of action. They have each shown an impressive level of commitment and present comparable levels of preparation. It would therefore be difficult to find a differentiating factor on these bases that would justify the carriage decision and the selection of one firm over the other.

[3] Unfortunately, SC and LMK rejected the idea of working together. I am therefore obliged to decide which of them should be granted carriage of this proposed class action and whether the *Chu* or the *Tomash* action should be stayed.

[4] For the reasons set out below, I award carriage to SC. The *Chu* action may proceed and the *Tomash* action is stayed. The determining factor is the fees arrangement.

The net recovery for class members if the class action succeeds will be significantly larger if SC is awarded carriage than would be the case if LMK was awarded carriage.

Analysis

[5] The applicable law is not in dispute. As I noted in *Mancinelli v Barrick Gold*,[1] the court's objective in deciding carriage of competing class proceedings is to make the selection that is in the best interests of the class, while being fair to the defendants and consistent with the overall objectives of the *Class Proceedings Act, 1992*.[2] The objectives of a class proceeding are access to justice, behaviour modification and judicial economy for the parties and for the administration of justice.[3]

[6] The case law sets out some 13 factors that have thus far been considered by judges of this court in deciding carriage motions.[4] The list is non-exhaustive. A determinative factor in one case may have little or no significance in another. As the Court of Appeal noted in affirming my decision in *Mancinelli,* the issue is not which law firm "wins" on the most factors - it is not a "tick the boxes" approach. Rather, the court must search for the factor or factors that are determinative and in doing so, decide which carriage decision is in the best interests of the class.[5]

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[1] *Mancinelli v Barrick Gold*, 2014 ONSC 6516, 124 O.R. (3d) 145, at para. 8, affirmed, 2015 ONSC 2717, 126 O.R. (3d) 296 (Div. Ct.) and 2016 ONCA 571, 131 O.R. (3d) 497.

[2] S.O. 1992, c. 6; *Smith v. Sino-Forest*, 2012 ONSC 24, 34 C.P.C. (7th) 76, at para. 16, citing *Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd.* (2000), 4 C.P.C. (5th) 169 (Ont. S.C.), at para. 48; *Setterington v. Merck Frosst Canada Ltd.* (2006), 26 C.P.C. (6th) 173 (Ont. S.C.), at para. 13; *Sharma v. Timminco Ltd.* (2009), 99 O.R. (3d) 260 (S.C.), at para. 14; affirmed in *Mancinelli* (C.A.), at paras. 13-16.

[3] *Smith*, *supra*, note 2, at para. 16.

[4] *Mancinelli* (CA), *supra,* note 2, at paras. 14-16, referring with approval to *Vitapharm, Sharma, and Smith supra,* note 2. The 13 factors are: (i) the nature and scope of the causes of action advanced; (ii) the theories advanced by counsel as being supportive of the claims advanced; (iii) the state of each class action, including preparation; (iv) the number, size and extent of involvement of the proposed representative plaintiffs; (v) the relative priority of commencing the class actions; (vi) the resources and experience of counsel; (vii) the presence of any conflicts of interest; (viii) funding; (ix) definition of class membership; (x) definition of class period; (xi) joinder of defendants; (xii) the plaintiff and defendant correlation; and (xiii) prospects of certification.

[5] *Mancinelli* (CA), *supra,* note 2, at paras. 17 and 22.

[7] In *Mancinelli,* the Court of Appeal approved the use of a further factor – the fees arrangement:

> The proposed fee arrangement between class counsel and the representative plaintiff is a factor that vitally affects the interests of the class. While the fee is ultimately subject to the approval of the court, significant differences between the fee arrangements may be considered on a carriage motion.

[8] I can summarize and group the more relevant of the 14 factors as they apply in this case under five heads:

(i) The experience and resources of the competing firms;

(ii) The proposed plaintiffs and defendants;

(iii) The causes of action;

(iv) The state of preparation; and

(v) The fees arrangement.

[9] As I explain further below, the first four factors do not achieve a sufficiently significant differentiation between SC and LMK. It was only when I focus on the fifth factor and compare the fees arrangement - that is the net recovery to the class - that I can in good conscience decide the carriage motion in favour of SC.

The non-determinative factors

[10] ***The experience and resources of competing counsel.*** Both SC and LMK are experienced class action firms. Strictly speaking, the SC combination has more class actions under its belt and has more experience with fire/mass displacement cases, but neither point is determinative. LMK, in reputation and in the several appearances before me, has demonstrated more than enough expertise in class action work to prosecute this matter and do so with ample ability and resources.

[11] ***The proposed plaintiffs and defendants.*** Both firms have selected appropriate representative plaintiffs. Both firms have also sued the obvious defendants – the owners and landlord. The fact that SC has added three additional defendants – namely, two companies, closely connected to the owner-defendants that are also listed as "owners" in a recent redevelopment application and the Electrical Safety Authority that may or may not attract any liability - or the fact that LMK has added the property manager, is not a significantly differentiating factor. I cannot assess probable liabilities at this point on the

record before me and, in any event, further additions and deletions to the style of cause are likely as this matter proceeds.

[12] ***The causes of action.*** Both *Chu* and *Tomash* plead negligence, breach of contract and relief under the *Residential Tenancies Act, 2006*.[6] SC in *Chu* adds nuisance and makes a claim for dependants under the *Family Law Act*.[7] LMK adds a breach of privacy and a breach of fiduciary duty claim. Here again, both sides provide compelling rationales for the causes of action that they have selected. But, again, there is little here for any significant differentiation. In any event, as counsel well understand, the merits of the respective claims are not at issue on a carriage motion. As this court noted in *Setterington*,[8] the claim may be scrutinized for "glaring deficiencies" or to see whether it is "fanciful or frivolous".[9] Otherwise, it is inappropriate for the court to embark on an analysis of which claim is most likely to succeed.[10]

[13] ***The state of preparation.*** Both SC and LMK devoted a large part of their factum explaining in detail why they were, respectively, more advanced in their overall preparation, more committed to the best interests of the class, and for this reason alone should be selected as carriage counsel. I acknowledge that both firms have expended much energy preparing to take the case forward and in doing so have demonstrated a genuine commitment to the best interests of the class. Each side has created a dedicated website and/or class member registration system; publicized the proposed class action in numerous media reports (LMK) and town-hall meetings (SC); retained a liability expert; filed motions and expedited case conferences that successfully resolved urgent issues relating to relocation issues and housing expenses (LMK) and ambiguous releases (SC); filed a motion to obtain the Fire Marshall's Report (LMK) or contacted this office directly (SC); and both contacted a myriad of lay witnesses. LMK also started a GoFundMe page to solicit donations for the putative class and engaged with ACORN, a community organization. SC wrote to potential subrogation insurers and the OHIP subrogation unit to advise them about the proposed class action. LMK inquired about the

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[6] S.O. 2006, c. 17.

[7] R.S.O. 1990, c. F.3.

[8] *Settering*, *supra*, note 2.

[9] *Ibid.* at para. 19.

[10] *Mancinelli* (CA), *supra*, note 2, at para. 42.

defendant's insurance coverage and contacted numerous third parties for document production.

[14] In short, both SC and LMK are almost equally well-prepared to proceed with this class action. The "state of preparation" factor is not determinative.

[15] Indeed, none of the four factors discussed thus far provide a basis for significant differentiation. If pressed to do so, I would probably tilt the balance (slightly) towards SC in terms of their experience with mass displacement cases and (slightly) towards LMK in terms of their state of preparation and overall engagement with the class. But a slight tilt is not sufficiently determinative. And the other two factors, the parties selected and the causes of action, are at best neutral. That is why I must focus on the factor that truly differentiates SC and LMK and that is the fees arrangement.

The determinative factor

[16] ***The fees arrangement.*** The analysis here involves a comparison of what SC and LMK would charge the class in fees and other costs if they were to prevail as carriage counsel. The lower the legal and administrative costs, the higher the recovery for the class. The pricing comparison requires the court to consider and compare the fees and funding arrangements advanced by SC and LMK in their retainer agreements and any related funding agreements.

[17] Both SC and LMK are charging a percentage contingent fee. SC will charge a fee ranging from 15 to 33 percent based on when the action is settled or judicially decided. That is, SC will charge a 15 percent fee if the action is settled before the delivery of the motion record for certification; 20 percent if the action is settled after the delivery of said record; 25 percent if the action is settled after the commencement of a contested motion for certification or after a consent order is made certifying the class action; and 30 and 33 percent if the action goes into discoveries and trial.

[18] LMK will charge a straight 23 percent fee regardless of the stage of settlement or decision. LMK has also obtained indemnity funding from the Class Proceedings Fund to cover risks relating to disbursements and costs in return for the CPF getting a 10 percent share of any settlement or judgment.

[19] The Court of Appeal has acknowledged the importance of considering third-party funding expenses such as those provided by the CFP because the impact on overall class member recovery is self-evident:

> Funding is an important consideration because it goes to the issue of whether the class, or, as is usually the case, class counsel, will be able to

> withstand adverse costs awards as the action progresses, or in the event it does not succeed at certification, trial or other interlocutory steps such as leave or summary judgment. The terms of the funding agreement are also important, because the funder's fee is typically taken off the top of any settlement or judgment, thereby reducing the net available to the class.[11]

[20] How then do I compare SC's scaled contingency fee with LMK's fixed fee and any related third-party funding charges? In cases where the outcome is not reasonably predictable, this would be a challenge to be sure. Here, however, all counsel before me have agreed that an early settlement is not just likely but highly likely.

[21] Defence counsel (that is, counsel for the defendants' insurers) made clear at the hearing that liability will not be an issue. Whether the fire was caused by defects in the electrical system and "electrical arcing" (SC's expert) or because of a heavy rain-storm causing water to leak into the buildings' hydro vault (LMK's expert) there is no suggestion that any degree of liability can be imposed on the tenants. The focus in this action will be on the damage sustained and the appropriate damages payment for each of the displaced tenants. In other words, a contested certification motion is unlikely and an early settlement is almost guaranteed.

[22] Given this context, I can return to SC's fee scale and conclude that in all probability, the fee that will be triggered if SC prevails on carriage will be at the level of 15 to 25 percent – most likely 20 percent and at most 25 percent. On the other hand, LMK's fees and funding charge would be 23 percent in fees plus 10 percent in CPF funding for a total charge of 33 percent.[12] LMK has also retained another third party, National Fire Adjustment, to collect information from class members about their personal property loss claims for presentation to the claims' administrator. In return for this services, NFA would be paid from 6 to 10 percent of the overall recovery of the personal property loss.

[23] The problem with the NFA arrangement is two-fold: one, it duplicates the work of the claims' administrator (who will have be hired in any event to evaluate the claims and cut the cheques) and is thus a needless expense; and two, the case law does not permit the

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[11] *Mancinelli* (CA), *supra*, note 2, at para. 63.

[12] I pause here to note that on the facts herein, there is nothing laudatory in LMK's decision to apply for CPF indemnification as compared to SC's decision to self-fund their costs and disbursements in circumstances where the likelihood of an early settlement is high and the risk and financial impact of any non-recoverable costs is very low.

payment of contingency fees to non-lawyer service providers in these circumstances.[13] I will therefore ignore the additional fee that would be paid to the NFA. If I am wrong in this regard and the proposed contingency payment to the NFA is proper and binding, the additional NFA charge would add at least another 6 percent to the LMK charge, with the result that LMK's overall charge would be 39 percent or more.

[24] I am satisfied that a fair-minded comparison of the fees and funding factor results in the following objectively measurable differentiation: SC will charge at most 25 percent; LMK will charge at least 33 percent. This difference will have a significant multi-million-dollar impact on the actual damages that will be paid out to the class members.

[25] Assuming, for the sake of argument, an overall settlement amount in the range of $20 to $40 million (a plausible range of the damage claim totals posited by counsel) and taking the lower $20 million number for comparison purposes only, the difference in net recovery for class members is at minimum $1.6 million. If the $40 million number is used, the difference in net recovery will be $3.2 million. And if the action is settled without a contested certification motion (highly probable) and SC ends up charging only a 20 percent fee, the recovery available to the class members will increase by a further 5 percent or, respectively $2.4 million and $4.8 million more.

[26] In other words, depending on the final settlement amount, the SC fee arrangement could result in a net recovery for class members ranging from a low of $15 to $16 million (compared to LMK's $13.4 million) to a high of $30 to $32 million (compared to LMK's $26.8 million). The differences are in the millions of dollars. These are significant differences that inform and underscore my finding that the fees and funding arrangement is the most objectively determinative factor on this carriage motion and that on this basis SC must prevail as carriage counsel.

Disposition

[27] Carriage is awarded to SC. The *Chu* action shall proceed and the *Tomash* action is stayed. Order to go accordingly.

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[13] See the discussion in *Smith Estate v National Money Mart*, 2010 ONSC 1334, 94 C.P.C. (6th) 126, at paras. 83-87. Also see the decision on appeal, 2011 ONCA 233, 106 O.R. (3d) 37, at paras. 109-115.

[28] Costs are normally not awarded on carriage motions and none are awarded here.

Justice Edward P. Belobaba

Date: February 15, 2019