

CITATION: Lavier v. MyTravel Canada Holidays Inc., 2011 ONSC 1222

COURT FILE NO.: 05-CV-300187CP

DATE: February 23, 2011

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

Suzanne Lavier

Plaintiff

- and -

MyTravel Canada Holidays Inc. and MyTravel Group PLC

Defendants

COUNSEL:

Joel P. Rochon and Sakie Tambakos for the Plaintiff

Sally Gomery for the Defendant

HEARING DATE: February 23, 2011

PERELL, J.

REASONS FOR DECISION

A. Introduction and Overview

[1] On consent, this action was certified as a class proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6. See *Lavier v. MyTravel Canada Holidays Inc.*, 2010 ONSC 6823.

[2] The representative plaintiff now moves for approval of the settlement pursuant to s. 29 of the Act and for approval of Class Counsel's fees and disbursements.

B. Factual Background

[3] On November 14, 2005, the Representative Plaintiff, Suzanne Lavier, commenced a proposed class action alleging that the defendants MyTravel Canada Holidays Inc. and MyTravel Group PLC, breached a duty of care and contractual obligations by knowingly sending travellers to the Riu Resorts in Puerto Plata, Dominican Republic, despite an outbreak of norovirus at the resorts. It was alleged that many of the travellers became ill in the course of what was supposed to be a holiday. It was also alleged that the Defendants' negligence extended over many months.

[4] The motion for certification of the action was robustly contested, and the Defendants have never admitted that they did anything wrong.

[5] On the merits of the negligence action, the Defendants delivered defences, and it was anticipated that action in negligence would be vigorously defended and complicated by difficult problems of causation and about whether the Defendants' negligence, if any, persisted throughout the period alleged by the Class Members. The Class Members also confronted difficult problems of proof of their individual damage claims.

[6] On July 10, 2008, I decided that with some adjustments, all but one of the five criteria for certification had been or could be satisfied. I concluded, however, that the preferable procedure criterion was not satisfied, and I did not certify the action. See *Lavier v. MyTravel Canada Holidays Inc.*, [2008] O.J. No. 2753 (S.C.J.).

[7] The Divisional Court disagreed with my judgment, and it concluded that the preferable procedure criterion had been satisfied. See *Lavier v. MyTravel Canada Holidays Inc.*, [2009] O.J. No. 1314 (Div. Ct.).

[8] Following the Divisional Court's decision, the parties engaged in adversarial settlement negotiations that culminated in the signing of a Settlement Agreement on October 22, 2010.

[9] The settlement involved a consent certification, which was granted. The settlement scheme also involved giving notice of the certification of the action, with a right to opt-out, combined with notice of the proposed settlement and an opportunity to submit advance claims.

[10] The notice was published on December 18, 2010, in major newspapers in Ontario and throughout Canada. An e-mail notice campaign to travel agents was carried out on December 20 and 22, 2010. Class Members who had provided addresses were sent a copy of the notice and a claims package by e-mail and by regular mail.

[11] Only three Class Members opted-out of the class action. As of February 16, 2011, 50 advance claims were delivered by Class Members. No Class Members objected to the settlement or to the fee request of Class Counsel.

[12] Class Counsel, who are very experienced with respect to class action litigation, as well as knowledgeable with respect to mass personal injury claims, recommend the settlement.

[13] Class Counsel's opinion is that the settlement is fair, reasonable, and in the best interests of Class Members. It is the opinion of Class Counsel that the settlement provides benefits not available given the individually non-recoverable claims of Class Members, the risk of the negligence claim not being successful, and delays in proceeding to a contested trial and any appeals.

[14] Ms. Lavier has been actively and productively involved throughout the course of the proceedings. She too is satisfied that the settlement is fair, reasonable, and in the best interests of Class Members in all the circumstances.

[15] As of February 17, 2011, Class Counsel had devoted 872 hours of lawyers' time in prosecuting the action. The value of the time is \$456,377.50, exclusive of taxes. It is estimated that the completion of the settlement will involve additional work valued at between \$40,000 to \$60,000.

[16] The amount allocated under the settlement agreement for payment of Class Counsel's Fee represents a multiplier of approximately 1.2 and a percentage of 21% of the total value of the settlement if fully taken up.

C. Highlights of the Settlement

[17] The highlights of the settlement are as follows:

- MyTravel will create a settlement fund of \$2.25 million.
- In addition, MyTravel agrees to pay an initial counsel fee of \$600,000 which is inclusive of disbursements and applicable taxes.
- Class Members who suffered physical symptoms consistent with norovirus will receive payments of up to \$2,500 depending upon the length of the illness and whether there is medical documentation supporting the claim.
- There are three levels of general damage payments; namely: \$650 for level 1, \$1,250 for level 2, and \$2,500 for level 3. The levels are consistent with general damages awards in comparable Canadian negligence cases.
- Level 3 claimants may request arbitration for more serious cases that resulted in medical treatment and loss of income. The claims protocol stipulates that "the amount payable to an eligible claimant in arbitration shall be based on legal principles in relation to quantum determination applicable in the jurisdiction in which the eligible claimant resides."
- There is a cap of \$800,000 for level 1 and 2 claims ensuring that funds are available for any more serious claims.
- Class Members who provided care to a class member who suffered symptoms consistent with norovirus will receive \$250.
- Class Members who received medical treatment may request arbitration for their claims including loss of income claims.
- The settlement fund will be used to pay claims of public health insurers.
- The settlement fund will be used to pay administrative costs.

- Once the claims process has concluded, if there are surplus funds, Class Counsel may apply to the court for additional fees. MyTravel Canada reserves the right to oppose the payment of additional fees.
- If, following the full payment of: (a) all eligible claims; (b) administration costs; (c) claims of public health insurers; and (d) additional counsel fees, any residue in the settlement fund shall be returned to MyTravel.
- Each class member who does not opt-out will be deemed to have completely and unconditionally released the Defendants from all further claims there are, were or may have been asserted in the action.

[18] Based on Class Counsel's experience in other cases about take-up rates and given its understanding of the numbers of Class Members who suffered from the norovirus, Class Counsel anticipates that all claims as well as the claims of public health insurers will be paid without *pro rata* decreases.

D. Settlement Approval

[19] 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*, [1998] O.J. No. 1598 (Gen. Div.) at para. 9; *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) at paras. 68-73.

[20] In determining whether to approve a settlement, the court, without making findings of facts on the merits of the litigation, examines the fairness and reasonableness of the proposed settlement and whether it is in the best interests of the class as a whole having regard to the claims and defences in the litigation and any objections raised to the settlement: *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (S.C.J.) at para. 10.

[21] When considering the approval of negotiated settlements, the court may consider, among other things: (a) the likelihood of recovery or likelihood of success; (b) the amount and nature of discovery, evidence or investigation; (c) settlement terms and conditions; (d) recommendation and experience of counsel; (e) future expenses and likely duration of litigation and risk; (f) recommendation of neutral parties; (g) if any, the number of objectors and nature of objections; (h) the presence of good faith, arms-length bargaining and the absence of collusion; (i) the degree and nature of communications by counsel and the representative parties with Class Members during the litigation; and (j) information conveying to the court the dynamics of and the positions taken by the parties during the negotiation: *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.) at 440-44, aff'd (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. refused Oct. 22, 1998, [1998] S.C.C.A. No. 372; *Parsons v. The Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) at paras. 71-72; *Frohlinger v. Nortel Networks Corp.*, [2007] O.J. No. 148 (S.C.J.) at para. 8; *Kelman v. Goodyear Tire and Rubber Co.*, [2005] O.J. No. 175 (S.C.J.) at paras. 12-13; *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.* (2005), 74 O.R. (3d) 758

(S.C.J.) at para. 117; *Sutherland v. Boots Pharmaceutical plc*, [2002] O.J. No. 1361 (S.C.J.) at para. 10.

[22] In my opinion, the major factor commending the settlement as fair and reasonable is the litigation risk, which I regard as considerable. As counsel expressed it in paragraph 3 of their factum:

In particular, there is a risk that the plaintiff would not be able to establish liability against MyTravel Canada, or that liability might only be established over a smaller time frame than the class period. Beyond litigation risk concerns, the delay that would have accomplished protracted litigation also supports the reasonableness of the Settlement.

[23] In my opinion, Class Counsel has understated the litigation risk of these proceedings on the merits. The likelihood of recovery and the quantification of any recovery posed substantial litigation risks for Class Members.

[24] Other factors strongly favoring the settlement as fair and reasonable are; (a) the recommendation and experience of counsel; (b) the recommendation of Ms. Lavier; (c) likely duration of litigation; (d) the absence of objectors; (e) the presence of good faith, arms-length intense bargaining; and (f) the absence of collusion; (g) and adequate settlement funds assuming a high take up rate.

[25] Less favourable to the settlement are: (a) the terms of the settlement that do not permit surplus funds from the level 3 claims to be applied to level 1 and 2 claims and *vice versa*; (b) the terms of the settlement agreement that provide for the residue to be returned to MyTravel Canada; (c) the possibility that the take up will be low and the residue corresponding high; and (d) the optics that there is a disincentive for Class Counsel to increase the take-up rate because the residue is subject to Class Counsel's claim for additional fees.

[26] Balancing these factors favoring and not favoring the settlement, I am satisfied that the settlement is in the best interests of the Class Members.

[27] Class Counsel has made considerable efforts to provide access to justice for the Class Members and there is no reason to think that they will not vigorously encourage Class Members to take the opportunity of making claims and benefiting from the settlement. The fact that Class Counsel may come back for additional fees is regulated by the reality that Class Counsel will have to show that those fees are merited by a reasonable take-up of the settlement and by MyTravel Canada's right to object to additional fees being paid.

[28] A final assessment of the quality of the settlement will depend upon the degree of take-up but the settlement already provides adequate tangible benefits and, in my view, is in the best interests of Class Members

[29] Accordingly, I approve the settlement.

E. Approval of Counsel Fee

[30] I turn now to the matter of the approval of the counsel fee.

[31] The fairness and reasonableness of the fee awarded in respect of class proceedings is to be determined in light of the risk undertaken by the lawyers in conducting the litigation and the degree of success or result achieved: *Serwaczek v. Medical Engineering Corp.*, [1996] O.J. No. 3038 (Gen. Div.); *Parsons v. Canadian Red Cross Society* (2000), 49 O.R. (3d) 281 (S.C.J.); *Smith v. National Money Mart*, [2010] O.J. No. 873 (S.C.J) at paras. 19-20.

[32] Where the fee arrangements are a part of the settlement, the court must decide whether the fee arrangements are fair and reasonable, and this means that counsel are entitled to a fair fee which 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 Members as a whole: *Smith v. National Money Mart, supra*, at para. 22.

[33] Fair and reasonable compensation must be sufficient to provide a real economic incentive to lawyers to take on a class proceeding and to do it well: *Smith v. National Money Mart, supra*, at para. 23.

[34] Factors relevant in assessing the reasonableness of the fees of Class Counsel include: (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: *Smith v. National Money Mart, supra*, at paras. 19-20.

[35] With the same comments that I expressed above, I am satisfied that it is appropriate to approve the Class Counsel's fee for this class action. Class Counsel have earned their fee to date and will have to justify any additional fees including demonstrating that there was a reasonable take-up of the benefits of the settlement.

F. Conclusion

[36] I grant the ancillary relief requested.

[37] Order accordingly.

Perell, J.

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