CITATION: David v. Loblaw, 2018 ONSC 6469
COURT FILE NO.: CV-17-586063-00CP
DATE: 20181029

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Marcy David and Brenda Brooks, Plaintiffs

– AND –

Loblaw Companies Limited, George Weston Limited, Weston Foods (Canada) Inc., Weston Bakeries Limited, Canada Bread Company, Limited, Grupo Bimbo, S.A.B. De C.V., Loblaw Companies Limited, Maple Leaf Foods Inc., Empire Company Limited, Sobeys Inc., Metro Inc., Wal-Mart Canada Corp., Wal-Mart Stores, Inc. and Giant Tiger Stores Limited, Defendants

BEFORE: E.M. Morgan J.

COUNSEL: *David Wingfield and Jay Strosberg,* for the Plaintiff, Marcy David

Sandra Forbes and Kristine Spence, for Wal-Mart Canada Corp.

Iris Fischer and Litsa Kriaris, for Canada Bread Company

Sinzana Hennig, for Sobeys Inc. and Empire Company Limited

Michael Brown and Danny Urquhart, for Metro Inc.

Derek Ricci and Chantelle Cseh, for Giant Tiger Stores Limited

Adam Hirsh, for Maple Leaf Foods Inc.

Davit Akman and Joshua Abaki, for George Weston Limited, Loblaw Companies Limited, Weston Foods (Canada) Inc., and Weston Bakeries Limited

Jonathan Lisus and Andrew Winton, for Bentham IMF Capital Ltd. and IMF Bentham Ltd.

HEARD: October 9, 2018

LITIGATION FUNDING APPROVAL

[1] In this proposed class action, the Plaintiffs allege that the Defendants conspired to defraud Canadian consumers with respect to the price of packaged bread. If they are correct, this would be what can only be described as a mass wrong; given that bread is a staple of the North American diet, the putative class is an extremely large one. Each class member, however, will likely have suffered a relatively small personal loss in comparison with the magnitude of the overall losses.

[2] It is in the nature of many such consumer claims that no one claimant has a large enough stake to bear the expense of hard-fought litigation. Here, counsel on both sides are expecting the Plaintiffs' attempt to quantify damages to be especially complex, and they have or are in the process of enlisting experts to assist in this task. Whatever else one can say about the Plaintiffs' claim at this stage, there is little doubt that it will be rather expensive. Plaintiffs' counsel estimates that it will take several millions of dollars of disbursements to pursue the action through to trial.

[3] Counsel for the Plaintiffs argues that this feature of the claim brings it within two of the important policy objectives of class actions. It is argued that the proceeding will foster access to justice for a wide swath of Canadian consumers, and that it will support deterrence against Defendants who might not otherwise face claims by individual consumers: *Western Canadian Shopping Centres v Dutton*, [2001] 2 SCR 534, at paras 28-29.

[4] I make no comment on the merits of those arguments here. They will doubtless be argued at a certification hearing some months down the road. I merely set out the background in order to illustrate why the request for funding approval has arisen. Given the discrepancy between, on one hand, the very large size of the claim and the expense of bringing it, and, on the other hand, the small size of a consumer purchase of packaged bread, the Plaintiffs have had to turn to third party funding in order to finance their action. Moreover, they have had to turn to the private financing market, as the expected magnitude of the funding needed is beyond the scope of the Class Proceedings Fund ("CPF") in Ontario.

[5] Plaintiffs' counsel also submits that the projected cost of the proceeding, and the potential exposure of any plaintiff to adverse costs rulings, makes the action a particularly risky one for the named Plaintiffs. The risks of putting oneself forward as representative Plaintiff here certainly overwhelm the potential rewards for the individual Plaintiff.

[6] This imbalance of risk and reward could possibly act as a deterrent to access to justice: *Bayens v Kinross Gold Corporation*, 2013 ONSC 4974, at para 21. As Strathy J. (as he then was) put it in *Dugal v Manulife Financial Corp*., 2011 ONSC 1785, at para 28, "The grim reality is that no person in their right mind would accept the role of representative plaintiff if he or she were at risk of losing everything they own…no rational person would risk an adverse costs award of several million dollars or even several tens of thousand dollars."

[7] The Plaintiffs move for an Order approving the litigation funding that they have arranged with Bentham IMF Capital Limited ("Bentham Canada") and its Australian parent corporation, IMF Bentham Limited ("Bentham Australia") (collectively "Bentham"). While this kind of arrangement may once have been regarded as unique, that is no longer the case. Perell J. observed in *Kinross*, at para 34, that "courts in Ontario have come to accept and have approved the use of third party funders." Under the circumstances, I am satisfied that some form of funding agreement is necessary for this litigation to proceed and to facilitate access to justice: *Houle v St. Jude Medical*, 2017 ONSC 5129, at para 75.

[8] The Plaintiffs and their counsel have entered into a Litigation Funding Agreement with Bentham, dated August 30, 2018 (the "Agreement"). Bentham Australia is a substantial financial entity whose financial statements are a matter of record. It has a market capitalization of $539 million, insurance policy coverage of $30 million, a net cash position of $160 million, a net asset

position of $367 million. Moreover, it is a reporting issuer, and so any changes to its financial position are a matter of public record.

[9] For present purposes, the salient features of the Agreement are that Bentham will (a) pay disbursements incurred by class counsel up to a prescribed maximum after which class counsel will fund the disbursements; (b) pay any court ordered costs on behalf of the Plaintiffs up to a prescribed maximum after which class counsel will be responsible for court ordered costs; (c) provide security for costs of one or more Defendant if required by the court to do so, which security will take the form of an undertaking. In return, Bentham will be reimbursed for all payments advanced and will receive a return of 10% out of the litigation proceeds after deduction of disbursements, lawyers' fees and taxes, and administrative expenses.

[10] Bentham's 10% return is capped under the Agreement. In the event of settlement or judgment in favor of the Plaintiffs, Bentham will receive a maximum of (a) $30 million if proceeds are received prior to certification; (b) $45 million if proceeds are received after certification but before 60 days prior to the first scheduled start date of trial; and (c) $60 million if proceeds are received on or after 60 days before the first scheduled start date of trial.

[11] The Plaintiff, Marcy David, makes it clear in her supporting affidavit that the Plaintiffs received independent legal advice from a class actions lawyer prior to executing the Agreement.

[12] As my colleague, Glustein J., observed in *Marriott v General Motors of Canada Company*, 2018 ONSC 2535, at para 8, "It is settled law that funding agreements are an acceptable way to promote access to justice." A list of factors that must be satisfied if a litigation funding agreement is to be approved by the court was set out in *Kinross,* at para 41 [citations omitted]:

> • Third party funding agreements are not categorically illegal on the grounds of champerty or maintenance, but a particular third party funding agreement might be illegal as champertous or on some other basis.
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> • Plaintiffs must obtain court approval in order to enter into a third party funding agreement.
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> • A third party funding agreement must be promptly disclosed to the court, and the agreement cannot come into force without court approval. Third party funding of a class proceeding must be transparent, and it must be reviewed in order to ensure that there are no abuses or interference with the administration of justice. The third party agreement is itself not a privileged document.
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> • The court has the jurisdiction to make an approval order binding on the class pre-certification of the class.
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> • To be approved, the third party agreement must not compromise or impair the lawyer and client relationship and the lawyer's duties of loyalty and confidentiality or impair the lawyer's professional judgment and carriage of the litigation on behalf of the representative plaintiff or the class members.

> • To be approved, the third party funding agreement must not diminish the representative plaintiff's rights to instruct and control the litigation.
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> • Before approving a third party funding agreement, the court must be satisfied that the representative plaintiff will not become indifferent in giving instructions to Class Counsel in the best interests of the class members…
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> • Before approving a third party agreement, the court must be satisfied that the agreement is necessary in order to provide the plaintiff and the class members' access to justice.
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> • In seeking approval for a third party funding agreement, it is not necessary to have first applied to the Class Proceedings Fund for funding. If, however, approval from the Fund is sought and refused, nothing can be taken from the fact that the Class Proceedings Fund was not prepared to provide litigation funding.
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> • Before approving a third party agreement, the court must be satisfied that the agreement is fair and reasonable to the class. The court must be satisfied that the access to justice facilitated by the third party funding agreement remains substantively meaningful and that the representative plaintiff has not agreed to over-compensate the third party funder for assuming the risks of an adverse costs award…
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> • To be approved, the third party funding agreement must contain a term that the third party funder is bound by the deemed undertaking and is also bound to keep confidential any confidential or privileged information.
>
> • It is an acceptable term of a third party funding agreement to require the third party funder to pay into court security for the defendant's costs...

[13] In *General Motors*, at para 9(xii), the court found a litigation funding agreement to be "fair and reasonable" where "the commission in the Funding Agreement is less than the 10% premium applied by the CPF and is capped at a fixed amount, unlike the CPF." The same can be said here, where the Agreement hits the 10% target and places caps on a sliding scale depending on the stage where a settlement is reached.

[14] Furthermore, several important features are present in the Agreement which add layers of fairness to the class: the claimants have sole right to direct proceedings and instruct counsel, termination of the Agreement is only with leave of the court (and if before certification the consent of class counsel is also required), Bentham will pay the costs up to the termination date (including costs of a motion to approve termination), and any assignment must be on notice to all parties and requires approval of court.

[15] As indicated above, the Plaintiffs have received independent legal advice. The terms of the Agreement were disclosed to the Defendants with limited redactions, and the Agreement has been fully disclosed to the court. Bentham has attorned to the jurisdiction of the court, has agreed to comply with all orders made by the court, and has confirmed that the provision to it of any documents or information relating to the action is not intended as a waiver of privilege. The

Plaintiffs continue to control their own litigation, and Bentham is obliged to respect the deemed undertaking rule and the law of privilege. Bentham Australia is amply capitalized, and also has insurance as a backstop to its obligations under the Agreement.

[16] The Defendants for the most part raise no objection to third party funding by the Plaintiffs or to most of the terms of the Agreement. The one exception to this is the clause in which Bentham will satisfy any Order of security for costs with an undertaking made to the Defendants. Counsel for the Defendants object to the undertaking as a means of satisfying a security for costs Order, which they characterize as unprecedented and unfair to the Defendants. They point out that the cap on Bentham's funding obligation under the Agreement has been redacted, and so they do not know whether any undertaking given by Bentham will be sufficient.

[17] In addition, Defendants' counsel express concern that Bentham Australia is the company with assets, not Bentham Canada. They are worried that they may end up having to chase a foreign entity to its home jurisdiction in order to enforce any Order of this court.

[18] This latter objection does not amount to a serious obstacle. Bentham Australia has attorned to this court's jurisdiction and has waived any jurisdictional defences. In any case, Australia is a jurisdiction with a legal system as similar as any to that of Ontario, and there should be no problem seeking enforcement of an Ontario court order in the Australian courts. And while Australia may be geographically far away, counsel for Bentham has assured the court that enforcement proceedings would likely be unnecessary as his client was prepared to adhere to all Orders of this court as if both its Australian parent and its Canadian subsidiary were physically present in this province.

[19] As for the first objection – that the Defendants are not in a position to assess the strength of Bentham's undertaking because they have only seen a redacted version of the Agreement – in some circumstances that might indeed represent a valid concern. Here, however, I have had the opportunity to review the unredacted version of the Agreement and am satisfied that Bentham's obligation to fund the litigation is sufficient to cover any likely costs award.

[20] As was pointed out in *General Motors*, at n. 1, redacting the copy of the Agreement disclosed to Defendants' counsel but providing the court with an unredacted copy is an appropriate way to proceed. Otherwise, "knowledge of the precise terms of the financing and the indemnity provisions would provide [Defendants] with tactical advantages in how the litigation would be prosecuted or settled": *Berg v Canadian Hockey League*, 2016 ONSC 4466, at para 15.

[21] The solution is for the Court, but not the opposing side, to be made aware of the upper limits of the funding obligation. The Plaintiffs are permitted to serve and file their Motion Record with the terms relating to the maximum amount of litigation funding that Bentham will provide under the Agreement redacted, and to file with the Court an unredacted copy of the Agreement which will be kept under seal.

[22] This is not the first case to consider whether an "undertaking is a practical and desirable way to address the issue for security for costs": *Printing Circles Inc. v Compass Group Canada Ltd.* (2007), 88 OR (3d) 685, at para 19 (SCJ). The Divisional Court in *Borrelli v Chan*, 2017 ONSC 1815, at para 50, characterized the question of whether to accept an undertaking as security

for costs as a discretionary one. It went on, at para 51, to observe that, "Courts have accepted undertakings from non-residents with foreign assets (see *SolarBlue LLC v. Aus,* 2013 ONSC 7638 (CanLII) at para. 22, *Telesis Technologies Inc. v. Sure Controls Systems Inc.,* 2010 ONSC 5288 (CanLII) at paras. 61-67) and the appellant has pointed to no legal or statutory authority which indicates that doing so constitutes an error in principle." While there is no motion for security for costs presently before me, I see no reason to withhold approval of the Agreement on the basis that it proposes a form of security that is in any case within the scope of discretion of a judge hearing such a motion.

[23] Under the circumstances, given the nature of the case and the fair and reasonable terms of the Agreement – which include Bentham's capitalization, its attornment to Ontario jurisdiction, and the scope of its obligation under the Agreement to pay the Plaintiffs' costs – I conclude that the Agreement is in the best interests of the Plaintiffs and putative class. It meets the legal standards applicable to third party litigation funding agreements. This includes approval of the undertaking to the Defendants in the form contained in Schedule "C" of the Agreement as a means of satisfying any Order requiring the Plaintiffs to post security for costs.

[24] The Agreement is hereby approved.

Morgan J.

Date: October 29, 2018