CITATION: French v. Investia Financial, 2013 ONSC
BARRIE COURT FILE NOS.: 10-0690 and 11-0234
DATE: 20130816

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	
George French Plaintiff	Alan A. Farrer, L. Craig Brown and Darcy R. Merkur, for the Plaintiff
– and –	
Investia Financial Services Incorporated, Money Concepts (Barrie), Diamond Tree Capital Inc., David Karas and Financial Victory Associates Inc. Defendants	David Di Paolo and Nicole Westlake, for the Defendant, Investia Financial Services Incorporated Roger Horst, for the Defendants, David Karas, James Stephenson, Diamond Tree Capital Inc., and Financial Victory Associates Inc Michael Comartin, for the Objectors, Lawrence Edgar, Kimberlee Edgar and Alison Marshall
AND BETWEEN:	
Bruce Smith and Edith Irene Smith Plaintiff	Darcy R. Merkur, for the Plaintiff
– and –	
Investia Financial Services Incorporated and James Stephenson Defendants	David Di Paolo and Nicole Westlake, for the Defendant, Investia Financial Services Incorporated Roger Horst, for the Defendant, James Stephenson
	HEARD: June 7, 2013

REASONS FOR DECISION

EDWARDS J.

Overview

[1] It has been said many times by others in the past that the most important person in the courtroom to whom a judge's reasons should be directed is not the successful party but rather the party that leaves as the loser. It is vitally important that anyone who is aggrieved knows why their case has not found favour with the court. Thus, in a situation where a class action settlement is before the court for approval, everyone – not the majority, nor even virtually the entirety of the class, must know they have been treated fairly. Even a few objectors must know that the settlement is fair and reasonable and that they have been given a fair opportunity to be heard. This case demonstrates the importance of due process that is so fundamental to a class action and to our system of justice.

The Issue

[2] In a class action lawsuit, the court is required to give its approval to any settlement between the parties. It is clear that the court must be satisfied that the quantum of the settlement is fair, reasonable, and in the best interest of the class as a whole. In its deliberations on the issue of fairness and reasonableness, the court must not only consider the adequacy of the settlement from a quantum perspective but also whether the distribution of the settlement funds is fair and reasonable amongst the class members. It is therefore possible for the court to be satisfied that the quantum is fair and reasonable but that the method of distribution is not. This court must consider both quantum and method of distribution from the perspective of whether the settlement is fair and reasonable.

The Facts

[3] The underlying facts to these two actions have been reviewed extensively in the Reasons of Shaughnessy J. certifying the class action, see *French and Karas et al. v. Smith and Stephenson et al.* 2012 ONSC 1150. I do not propose to review the facts in detail. Essentially, the allegations made by the plaintiffs relate to so-called investment advice provided by David Karas ("Karas") and James Stephenson ("Stephenson") to clients of Money Concepts (Barrie) ("MCB") to borrow money to invest in mutual funds and/or segregated funds (the "Leveraging Scheme"). As noted by Shaughnessy J. at para. 12 of his Reasons, it is alleged that Karas and Stephenson recommended the Leveraging Scheme systemically and that MCB arranged the loans for clients. Utilizing this borrowed money, clients of MCB invested money that they effectively did not have thereby increasing the assets under management by Investia Financial Services Incorporated ("Investia") and, as such, generated fees for Karas, Stephenson, and Investia.

[4] Procedurally, the plaintiffs were successful before Shaughnessy J. in certifying the proceedings as a class action, pursuant to section 5(1) under the *Class Proceedings Act*, 1992. The decision of Shaughnessy J. was released on February 17, 2012. While the decision of Shaughnessy J. certified the class, it is worth noting, as it relates to the question of the plaintiffs' damages, Shaughnessy J. at para. 67 stated:

> The evidence shows that the quantification of the harm suffered by investors is an individual and not a common issue. The evidence shows that the calculation of harm is the summation of the investors individual harms. It was not suggested by the plaintiffs that, in the circumstances of this case, it would be possible to use statistical sampling as provided for under section 23 of the CPA.

[5] As such, Shaughnessy J. agreed with the position of the defendants and found that the assessment of the class members' damages would require individual assessment for each potential class member. Shaughnessy J. therefore refused to certify damages as a common issue, but did certify for determination whether the defendants' conduct warranted an award of punitive damages.

[6] Subsequent to the release of the decision of Shaughnessy J., the defendants served a motion seeking leave to appeal, which ultimately came on for hearing on June 15, 2012 and was adjourned to a later date.

[7] During the time leading up to the certification motion before Shaughnessy J. and again during the leave to appeal process, the parties entered into settlement discussions utilizing the services of private mediators.

[8] The first mediation took place on November 15 and 16, 2011 with Joel Wiesenfeld, a noted senior securities litigation lawyer with the law firm of Torys LLP. At this mediation, Mr. Wiesenfeld, after hearing submissions from counsel and after lengthy caucuses, indicated that he had considered the merits of the claim and the prospects of a successful certification order. He submitted a mediator's proposal with his own assessment of the claims and proposed a figure of $6 million for claims, plus partial indemnity fees. There was no indication that the defendants would be prepared to settle on that basis and the mediation failed.

[9] The certification motion then proceeded before Shaughnessy J. on December 12, 13, and 14, 2011 and again on February 13, 2012. With the release of the decision of Shaughnessy J. and the motion seeking leave to appeal, the parties then agreed to try and resolve the plaintiffs' claims utilizing the services of Mr. George Adams, who is a former Superior Court justice with considerable experience both as a trial judge and mediator dealing with difficult commercial and financial matters.

[10] After a three day mediation and an exchange of offers, the defendants presented what ultimately became the agreed upon settlement of $10 million, all in, broken down as to $8,200,000 for claims, $1,500,000 inclusive of HST for counsel fee, $100,000 for disbursements, and $200,000 for administration expenses.

[11] As part of the approval process, the court is also called upon to approve the legal fees that are proposed to be charged to the class members. In addition to the partial indemnity fees of $1,500,000 to be paid by the defendants as part of the agreed upon terms of settlement (which amount includes HST of approximately $173,000) class counsel are seeking approval of solicitor-client fees to be paid by the class inclusive of disbursements of $1,230,000, plus HST of

approximately $160,000). As such, the total amount of fees that are sought to be approved by class counsel is approximately $2,890,000, plus disbursements.

[12] The counsel fee of approximately $2,557,000 exclusive of HST, represents approximately thirty-one per cent of the damage recovery of $8,200,000 that is being paid for the claims by the defendants. If the proposed legal fees are approved by this court, there will be a net amount available for distribution to the class of approximately $6,810,000 (the "Net Proceeds"), plus any interest earned on the funds since the date of settlement, which at the present time stands at approximately $65,000.

[13] The terms of settlement were reduced to writing pursuant to minutes of settlement that were executed on October 25, 2012. It was contemplated with the execution of the two-page minutes of settlement (the "Minutes") that the parties would have to sign further documentation to give effect to the Minutes. In that regard, an eight-page settlement agreement (the "Settlement Agreement") was executed by counsel for the various parties on March 5, 2013.

[14] Amongst the terms set forth in the Settlement Agreement was a provision with respect to the administration of the settlement. Of particular concern to this court is paragraph 4(h) which provides:

> Quantifying the Claimants Actual Compensation Amount – the Administrator will quantify the Claimants Unadjusted Claim Total Amount along with the estimated Resolution Adjustment Factor and will advise Validated Class Members of their anticipated Claimants Actual Compensation Amount (***along with the Challenge process*** and will thereafter make a final decision on any such challenges). The Administrator will assemble a chart summarizing the Claimants Actual Compensation Amount for all claimants and will provide it to Class Counsel. (my emphasis added)

[15] The Settlement Agreement provided for various definitions. Amongst those definitions was a definition of the word "challenge". In that regard, the Settlement Agreement defined "challenge" as follows:

> Challenge – refers to the process as determined by the administrator for claimants to seek a reconsideration of any decision made by the administrator requiring the claimant to submit additional documents to the administrator by a fixed deadline (as determined by the administrator) for consideration and for final determination by the administrator.

[16] While the issue of a challenge process did not occupy a position of prominence within the Settlement Agreement, it is quite clear to this court, and fundamental to the ultimate determination of whether or not the settlement is fair and reasonable, that any potential class member have an opportunity to "challenge" the ultimate amount that the administrator determined was to be awarded from the Net Proceeds to any potential class member.

Fundamentally, this court will ultimately have to determine whether or not those who objected to the settlement were afforded an opportunity to present a "challenge", in accordance with provisions of the Settlement Agreement.

The Method of Calculating a Class Member's Share of Net Proceeds

[17] As set forth in the affidavit of Darcy Merkur (the "Merkur Affidavit") filed on the motion before this court, it is noted that based on the claimant's loss calculation set forth in Investia's database, there were approximately 756 eligible class members who would be receiving a net return of approximately twenty-four per cent of their losses. The calculation of these losses was based on the earlier of the date that an eligible class member removed their portfolio from MCB and the date that the MCB branch closed in 2010.

[18] In addition to the basic amount that each claimant would be entitled to, the Merkur Affidavit goes on to note that various claimants identified loans which had not been administered by Investia and these individuals would be paid a top up of fifteen per cent on their loss calculation. The fifteen per cent top up calculation was the best means to estimate losses associated with these particular loans having regard to an analysis done by class counsel and the distinct legal issues in relation to these particular loans. The Merkur Affidavit goes on to indicate that this global approach to compensation for losses related to loans not administered by Investia avoided "the enormous and impractical task of gathering data and calculating individual losses associated with those loans".

[19] It will be recalled that in the Reasons of Shaughnessy J. certifying the class action, he had found that the assessment of the class members damages would require individual assessment for each potential class member. This finding of Shaughnessy J. turned out to be prophetic, given the following comments set forth in the factum of class counsel as it relates to the method set forth above determined by class counsel to be the best method of calculating the claimants entitlement:

> The alternative to this approach would involve an individual assessment process requiring the collection of supporting documents from class members and third parties in relation to these loans, and then the determination of issues relating to a crystallization date, interest paid, capital losses, etc. for close to 1,000 claimants, all subject to very significant litigation and quantification discounts. The costs associated with this individual assessment process would approach or possibly exceed the value of the losses claimed. After accounting for the topped up losses for segregated funds and home equity loans, the total of the net losses increases accordingly, and so the percentage of recovery for each eligible class member will be approximately twenty-one per cent of this adjusted loss.

The Objectors

[20] Prior to this matter being heard by this court, class counsel received various written objections from various disgruntled investors involved with one or other or all of the defendants. In total, forty-three written objections were received by class counsel which were broken down into four categories: Late Claims; Net Positives; Quantification/Settlement Amount; and Excluded Claimants. Of these various objectors, the court heard from eight individuals and Mr. Michael Comartin who appeared on behalf of Lawrence Edger, Kimberlee Edger, and Alison Marshall.

[21] Dealing first of all with the five individuals who fall within the category of Late Claims, the order of Shaughnessy J., dated November 21, 2012, set forth the claims process which required that notice be given to potential class members. The process required that class members wishing to be eligible for compensation under the proposed settlement would have to submit a claim form to the administrator on or before February 28, 2013. The Merkur Affidavit notes that the deadline for the filing of a claim was "widely publicized" and that in addition, persons who were included in the records of Investia who were clients of Karas or Stephenson were notified directly in writing by the administrator.

[22] It is noted that well over 700 individuals submitted claims within the deadline of February 28, 2013. Five individuals failed to meet this deadline. Having viewed the written submissions of the five objectors who filed late claims, I am satisfied that there are no exceptional circumstances that would justify extending the time period to allow their inclusion.

[23] A second category of objectors have been described as individuals whose claims resulted in a net positive. As noted in the factum from class counsel, the essence of the claims advanced in this class action lawsuit is that persons lost money on account of the Leveraging Scheme. Clients of Karas and Stephenson borrowed money to invest primarily in mutual funds. In order to determine the gain or loss of these clients, class counsel relied on information provided by Investia to calculate the gain or loss on the leveraged investments, as at the crystallization date. As such, it is submitted by class counsel that individuals who made money in the market (net of their borrowing cost) in relation to leveraged loans obtained through MCB/Investia would have no provable claim for damages.

[24] The position advanced by class counsel in this regard logically makes sense. However, a review of a number of the objectors who fall within the category of net positive raise fundamental issues with respect to the challenge process. In that regard, I use as an example correspondence from Bryon Cohen to class counsel, dated April 30, 2013, wherein Mr. Cohen states:

> The Reasons given for not having qualified losses "may relate to":
>
> (i) The information used to create the defendants' database; and/or
>
> (ii) The assumptions used to address losses associated with loans for which information is not available in the defendants' database; and/or

> (iii) The impact of the crystallization date – your losses were calculated as of a fixed date and that it may be that you suffered losses after that date.
>
> These Reasons are so vague that I do not have any ability to assess and to question the assumptions and reasoning behind these Reasons. Essentially, no reason is actually provided…
>
> I have no explanation as to how information was obtained and what information was used to set up the defendants' database.
>
> I do not know what assumptions were used to address losses associated with loans for which information is not available in the defendants' database. I was never given the opportunity of providing such information as is required to identify these losses, nor am I aware if Crawford has such information in whole or in part…
>
> I submit that there is a total lack of due process and openness. I recognize that the calculated compensations require court approval. However, I cannot imagine that the court will permit distribution to proceed when the due process rights of any of the class action participants have not been followed…

[25] Mr. Cohen is clearly challenging the process by which his claim has been denied by the administrator. The court therefore must question whether, in fact, a challenge process was in fact set up and whether or not the administrator has followed that challenge process in relation to the objectors who fall within the Net Positive category-or for that matter any other category.

[26] The largest group of objectors – 22 in number, fall within a category that can be loosely described as objectors who object to the quantum of the settlement amount that they would be receiving. Class counsel refers to only 13 class members objecting based on the quantum of the settlement. A review of the actual individuals, however, who filed written objections suggest that there were 22 named individuals who fall within that category.

[27] Many of the objectors who fall within the category of those who objected based on quantum, did so largely on the basis of the amount of money that they invested and the substantial losses that they have incurred with ongoing responsibilities for the leveraged loans they are still are responsible for.

[28] Representative of the sampling of the objectors who have objected on the basis of quantum, is the objection of Tracey Watt. Ms. Watt stands to receive, from the settlement, approximately $12,400. Ms. Watt's original loan was for $325,000 of which she still owes $225,000, plus a further $22,000 on her line of credit. Ms. Watt also lost $100,000 of her RRSP that she brought to MCB when she first signed up with Karas. When the investments went bad, Karas apparently cashed in Ms. Watt's RRSP to pay for the interest on the loans. Clearly, Ms. Watt has been left in a precarious financial position and, undoubtedly, feels that she is due more than the $12,400 presented to her by the administrator as her share of the settlement.

[29] In determining whether the settlement is fair and reasonable however, the court cannot focus in on whether the settlement is fair and reasonable from the perspective of each class member. Rather, the court must be satisfied that it is fair and reasonable for the entire class, taking into account all relevant factors which I will address further below.

[30] The final category of class members that were excluded and for which objections were received, are members of the Karas and Stephenson families who were seeking compensation under the settlement. Class counsel takes the position that these family members of the alleged wrongdoers ought not to benefit, especially at the expense of those class members who are not related to Karas or Stephenson.

[31] A review of the individual submissions from various family members of Karas and Stephenson would seem to make clear that each of these various family members, which included brothers, sisters, and parents suffered not only financial losses but also the obvious loss of confidence and trust in a direct family member i.e., Karas and Stephenson. While there may be very good reason in other class actions to exclude family members, where it can be established that a family member has suffered the same financial loss as any other class member, this court has good reason to doubt whether it is appropriate to exclude such individuals where those losses are as real as anyone else's. Subject to confirmation by the administrator that the various family members have, in fact, suffered financial losses like any other class member, this court considers the exclusion of family members in this case as an unreasonable exclusion, based simply on family relationship.

Reasonableness of the Settlement

[32] In determining whether the settlement of a class action is fair, reasonable, and in the best interest of those affected by it, the court may consider, among other things: (i) the likelihood of recovery or likelihood of success; (ii) the amount and nature of discovery evidence or investigation; (iii) settlement terms and conditions; (iv) the recommendation and experience of counsel; (v) the future expenses and likely duration of litigation and risk; (vi) recommendation of neutral parties; (vii) the number of objectors and the nature of objections; (viii) the presence of good faith, arm's length bargaining and the absence of collusion; (ix) the degree in nature of communication by counsel and the representative of parties with class members during litigation; and (x) information conveying to the court the dynamics of and the position taken by the parties during the negotiation, see *Dabbs v. Sun Life Assurance Company of Canada* (1998) 40 OR (3rd) 429 at pages 440 to 444, affirmed (1998) 41 OR (3rd) 97 (C.A.), leave to appeal SCC 1998 SCCA No. 372; and *Kidd v. Canada Life Assurance Co.* [2013] O..J. No. 1468.

[33] With the aforementioned factors in mind, I am satisfied that if this court were solely called upon to determine whether or not the quantum of the settlement was fair and reasonable, this court would conclude that the proposed terms of settlement are fair and reasonable. In coming to this conclusion, I have taken into account various factors as set forth below.

[34] While the action itself was certified by Shaughnessy J., it could not be said with any degree of certainty that the defendants would not have been successful in obtaining leave to appeal. If the leave to appeal had been granted, then of course, the defendants would have had the opportunity to reargue their position before the Divisional Court with the distinct possibility

that the order of Shaughnessy J. may, in fact, ultimately have been set aside. It is not for this court to make that decision but rather to note that the leave to appeal and possible appeal itself created not insignificant risk from the perspective that the action might ultimately have been decertified.

[35] Perhaps of even greater significance, in this court's determination with respect to the reasonableness of the settlement from a quantum perspective is the fact that even if the defendants had been unsuccessful in their leave application, there still remained the trial of common issues which could potentially have consumed many years in the future and significant costs. These individual issues identified in the certification order of Shaughnessy J. included such issues as limitation defences, contributory negligence, and damages. It is not just speculation to suggest that these individual defences, raised by the defendants, would have had the potential to eliminate recovery by some class members; the ultimate result being that some investors would have been facing the prospect of no recovery after time consuming and expensive litigation.

[36] This court has also taken into account in determining whether the settlement is reasonable from a quantum perspective, issues related to recovery. As with any insurance claim, the insurers who would ultimately be called upon to provide coverage in this case were apparently providing defences subject to a reservation of rights. Ultimately, there may have been significant issues relating to the ability of class members to recover on any judgment that might have issued had this matter proceeded further.

[37] While it is in no way ultimately determinative of the reasonableness and fairness of the settlement in a class action, this court under the circumstances of this case, should take into account the fact that the negotiation of the settlement was done with the assistance of two highly experienced mediators, culminating in the settlement before Mr. Adams. No one can suggest that a settlement in this matter was anything other than done at arm's length.

[38] I have also taken into account the fact that the settlement was achieved with the assistance of class counsel who have significant experience in class action matters. The recommendation of class counsel in this regard is something that the court accepts as being an important consideration in determining that the quantum of the settlement is fair and reasonable.

[39] While there were, in total, 43 objectors out of a total of 756 eligible class members, the number, or lack of numbers, should not be determinative of whether or not the proposed terms of settlement are fair and reasonable from the perspective of the class as a whole. Ultimately, it is the question of procedural fairness that gives this court the greatest concern and even one objector that raises an issue of procedural fairness, as it relates to the approval in a class action settlement, may be sufficient to derail the approval of a settlement where there may be as many as 750 class members who are content with the terms of settlement.

Procedural Fairness

[40] As previously noted, the Settlement Agreement contemplated a "challenge" process. The Settlement Agreement also provided that the administrator would quantify each claimant's unadjusted claim total and thereafter advise each validated class member with their anticipated

compensation amount. A claimant could object based on class inclusion, unidentified loan claims, or the quantification of their actual compensation amount. It would appear that the administrator only established a reconsideration process with respect to cases where there was an objection as to class inclusion, but not objections with respect to unidentified loan claims or the quantification of the actual compensation amount.

[41] The administrator, in the case of Lawrence Edgar,Kimberlee Edgar and Alison Marshall (the Edgars) initially sent letters dated March 18 and 19, 2013, which listed no process for reconsideration or the reconsideration deadline of March 27, 2013, which is the deadline that appears in a document entitled "Settlement Administration Guidelines".

[42] Subsequent to the receipt of the aforementioned letters, the Edgars then provided further documentation to the administrator in support of their losses. The response that the Edgars received, in response to the additional information provided to the administrator, came in the form of a letter dated April 29, 2013, advising the Edgars their only option was to object to the Settlement Agreement.

[43] Fundamentally, the Edgars take the position that the Settlement Agreement has not been complied with by the administrator given the absence of any formal "challenge" process, which is clearly contemplated by the Settlement Agreement.

[44] Looked at from the perspective of the Edgars' losses, this court can understand their concerns from the perspective of not only procedural fairness but also substantive fairness. The Edgars maintain that they borrowed in excess of $1 million to invest and suffered total losses, including interest of approximately $600,000. As such, the Edgars argue that they should be entitled to approximately $123,000 in compensation, utilizing the twenty-one per cent average net recovery described by class counsel in its motion material. Instead of receiving what they anticipated to be a twenty-one per cent net recovery, they actually were advised that they would only be receiving approximately $11,000 or less than one per cent.

[45] It is worthy observing from a review of what is described as the eligible claimant matrix setting forth the anticipated compensation amount for each eligible class member that no class member would be recovering an amount in excess of $100,000. In fact, there are very few eligible claimants who would receive amounts in excess of $30,000. The vast majority of the claimants would receive amounts less than $10,000. If the Edgars were only objecting based on the quantum of their proposed net recovery, this court would be unlikely to accept that an objection based solely on the quantum of recovery was an objection that should derail the settlement from the perspective of it being found fair and reasonable for the class as a whole.

[46] The evidence before this court, however, leads to the inevitable conclusion that there has been a failure on the part of the administrator to comply with the Settlement Agreement. That failure is because those involved in the implementation of the settlement, failed to comply with paragraph 4(h) of the Settlement Agreement providing for a "challenge" process. The Edgars, like other objectors who appeared before this court and whose written objections are filed within the brief of objections, have not been adequately informed with respect to how their losses were calculated, nor have they been given any recourse to correct any errors in Investia's internal database through a challenge process. The Edgars maintain that they provided the administrator

with information to properly assess their claim. To be advised by the administrator that their only option was to object to the Settlement Agreement was not an appropriate response. The appropriate response was to provide the Edgars and others with details of the challenge process and thereafter to be informed by the administrator as to the results of the challenge.

[47] While this court is satisfied that the Settlement Agreement and Minutes from a quantum perspective are fair and reasonable for the class as a whole, this court is not satisfied, in the absence of a meaningful challenge process contemplated by the Settlement Agreement, that the settlement is both procedurally and substantially fair and in the best interest of the class as a whole. If someone within the class is to receive an amount less than twenty-one per cent of their total loss, it is fundamental to the fairness of the settlement that that party fully understand the reasons why the quantum of their claim is less than the average proposed by class counsel and the administrator of twenty-one per cent.

[48] As Perrell J. has recently noted in *Kidd, supra*, the court does not have the choice of fixing or revising the settlement to make it fair, reasonable, or in the best interest of the class members. The court's only choices are to approve or not to approve the proposed settlement. Because of the failure to implement a transparent challenge process contemplated by the Settlement Agreement, I am not prepared at this time to approve the settlement. Rather than simply dismissing the motion seeking court approval, it is in my opinion more important that the motion be adjourned to allow class counsel and the administrator to implement a challenge process as contemplated by the Settlement Agreement that takes into account the concerns raised by the objectors and, in particular, the concerns raised by the Edgars. As I have already indicated, I am satisfied that from a quantum perspective, the proposed terms of settlement are fair and reasonable. With the implementation of an appropriate challenge process and adequate reasons provided to those who avail themselves of the challenge process, I am satisfied that it may ultimately be possible to then approve the Minutes and Settlement Agreement as being not only fair and reasonable from a quantum perspective but also fair and reasonable from a procedural perspective as well.

Class Counsel Fees

[49] While many of the objectors both in their written materials and in their oral presentation raised issues with respect to the quantum of class counsel fee, subject to the resolution of the procedural issue concerning the challenge process, I am satisfied that the class counsel fees claimed are fair and reasonable.

[50] This court fully understands the concerns raised by the various objectors that when viewed from the perspective of their total losses, it may be hard to rationalize class counsel being paid a total fee of approximately $2,900,000, inclusive of HST. The various class members have suffered significant financial losses which have left them in precarious financial circumstances and for many, circumstances at a stage in their life that they can ill afford.

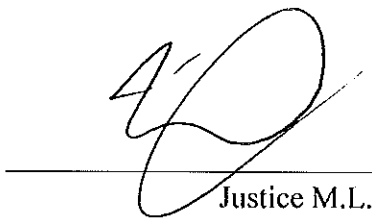
[51] In determining whether or not the legal fees to be charged by class counsel are fair and reasonable, Perrell J. has suggested the following factors as being issues that the court should consider: (a) the factual and legal complexities of the matters dealt with; (b) the risk undertaken, including 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 confidence 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; and (j) the opportunity of costs to class counsel in the expenditure of time in pursuit of the litigation and settlement, see *Smith v. National Money Mart*, 2010 ONSC 1334 at para. 25.

[52] In this case, class counsel entered into a contingency fee arrangement whereby they would be entitled to a contingency fee of thirty-three per cent of the total recovery. In this case, class counsel are seeking a counsel fee that will be approximately thirty-one per cent of the value of the amounts that will ultimately be paid out to class members, assuming the class action is ultimately approved by this court.

[53] This court is satisfied that when reviewing the various factors suggested by Perrell J. in *Smith Estate v. National Money Mart Co.* [1020] O.J. No. 874, particularly the fact that there was significant risk that there might have been no financial recovery whatsoever and, as such, no recovery under the contingency agreement, that the proposed fee sought by class counsel is fair and reasonable under the circumstances.

[54] In summary, this court is satisfied that the Minutes and Settlement Agreement, entered into between the parties, are fair and reasonable from a quantum perspective. This court, however, is not satisfied that the Settlement Agreement has been properly implemented given the absence of an appropriate challenge process, contemplated within the terms of the Settlement Agreement itself. The plaintiff's motion is therefore adjourned to allow the parties to properly implement the Settlement Agreement and to provide for an appropriate challenge process that will address the concerns raised by the various objectors and thereafter provide to the objectors the reasons why the objection has either been approved or turned down. The court will hear further submissions once the challenge process has been implemented. The basis for any objection to this court approving the proposed Minutes will be limited to objections based on procedural fairness and not quantum. The parties may speak to the trial co-ordinator concerning a return date.



Justice M.L. Edwards

Released: August 16, 2013