

CITATION: Zopf v. Burger, 2010 ONSC 30000
COURT FILE NO.: 08-CV-36618900CP
DATE: June 15, 2010

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

Robert Zopf

Plaintiff

- and -

Warren Burger, Joanne Currie, Bruce Wallis, Ross Lincoln, Gordon Taylor, Bob Elliott, Morris Willows, Mark Henry, Jim Duffy, Aurelio (Leo) Renzella, Paul Cowie and John Howie

Defendants

Proceeding under the *Class Proceedings Act, 1992*

COUNSEL:

L.C. Brown, A.A. Farrer, D. Merkur, and A. Halioua for the Plaintiff
N.G. Gilby and W.G. Simpson for individual claimants
H. Borlack and L. La Horey for certain defendants
S. W. Morris for directors of farm mutual corporations
F. Bownan for sales agents
B. Balogh for settling defendants

HEARING DATE: June 14, 2010

REASONS FOR DECISION

PERELL, J.

Introduction

[1] There are motions before the court for: (a) certification of an action against the directors of Farm Mutual Financial Services Inc. (“FMFS”) as a class proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c. 5; (b) approval of a settlement in that class action; (c) discontinuance of a related, already certified, class proceeding against FMFS; (d) an order specifying the manner of notice of the discontinuance and (e) approval of class counsel’s fee.

[2] An atypical element of the proposed settlement is that it includes a notional opt out. The settlement anticipates that certain class members will opt out of the class action but agree to participate and be bound by the settlement. The participants in the settlement will all be treated the same.

[3] In the action for which certification is sought, Robert Zopf, the proposed Representative Plaintiff, sues on behalf of himself and others who purchased FactorCorp Debentures from agents of FMFS, which was a registered mutual fund dealer and member of the Mutual Fund Dealers Association. For the most part, the proposed Class Members are farmers and retired farmers who bought the FactorCorp debentures with life savings.

[4] FactorCorp and FMFS both became bankrupt, and the proposed class members lost the value of their investment in the debentures.

[5] In this action Mr. Zopf sues the directors of FMFS in negligence. He alleges that they negligently, willfully, recklessly, or intentionally, breached their obligations to Class Members by: (a) failing to put in place safeguards to ensure that the FactorCorp debentures were sold only to accredited investors; and (b) forcing the mass redemption of the debentures without regard for the consequences of doing so.

[6] Before this proposed class action, Mr. Zopf had already brought a class action against FMFS, which I certified. See *Zopf v. Soberman Tassis Inc.*, [2009] O.J. No. 1104 (S.C.J.).

[7] When it became apparent that FMFS had negligible assets to satisfy any judgment, this action against the FMFS directors was commenced.

[8] While Mr. Zopf was commencing his various proceedings, other purchasers of the debentures commenced their own actions against FMFS, the FMFS directors, and others.

[9] The purpose of the motions for the court is to settle all these various proceedings.

[10] For the reasons that follow, I grant the relief sought.

Factual Background

[11] The factual background to the certification, settlement approval, discontinuance, and counsel fee approval motions is as follows.

[12] FactorCorp was an Ontario corporation registered as a Limited Market Dealer and subject to the governance of the Ontario Securities Commission. FMFS, an investment dealer, sold FactorCorp debentures.

[13] Between 2003 and mid-2007, FactorCorp raised approximately \$58 million by issuing 700 non-prospectus qualified debentures. FMFS sold 680 of these debentures.

[14] Some of FMFS's shareholders were farm mutual insurance companies, and FMFS sold FactorCorp debentures to the insureds of these mutual insurance companies. Many of the purchasers of debentures were farmers. However, under Ontario's securities law, the purchasers of the debentures were unaccredited investors who ought not to have been sold the debentures.

[15] In December 2006, the Board of Directors of FMFS passed a resolution that investors in FactorCorp should redeem their debentures. The class members were given this advice, and class members began to make repayment requests. These requests were in excess of 50% of the capital invested in FactorCorp's financial portfolio, and FactorCorp was unable to honour all of the redemption requests.

[16] On May 7, 2007, FactorCorp gave written notice to certain class members that it could not redeem the debentures.

[17] On July 7, 2007, the Ontario Securities Commission made an order to engage KPMG Inc. as monitor and to prohibit the redemption and sale of FactorCorp debentures. It is now known that approximately \$49 million worth of debentures were outstanding. Of these, approximately \$47 million of debentures had been sold by FMFS. Excluding defendants, the value of the outstanding debentures owed to class members was approximately \$36.5 million.

[18] On October 17, 2007, KPMG Inc. was appointed receiver and manager of the property and assets of FactorCorp. On March 25, 2008, KPMG Inc. was appointed as trustee in bankruptcy for FactorCorp.

[19] The Mutual Fund Dealers Association commenced disciplinary proceedings against FMFS. The hearing panel found that FMFS failed to meet the minimum standards for account supervision and failed to establish, implement, and maintain policies and procedures to adequately and effectively supervise the sale of the debentures to its clients.

[20] On June 24, 2008, Mr. Zopf commenced a proposed class proceeding against FMFS. On August 7, 2008, FMFS filed for bankruptcy and Soberman Tassis Inc. was appointed trustee in bankruptcy.

[21] On November 13, 2008, Mr. Zopf commenced an action, for which certification is now being sought, against the directors of FMFS. He pleads the Defendants breached their duty of care to class members. The Defendants, Warren Burger, Joanne Currie, Bruce Wallis, Ross Lincoln, Gordon Taylor, Bob Elliott, Morris Willows, Mark Henry, Jim Duffy, Aurelio (Leo) Renzella, Paul Cowie and Don Howie, were all directors of FMFS.

[22] On March 16, 2009, Mr. Zopf's action against FMFS was certified as a class proceeding. The class members of that action are similar if not the same as those proposed for the action against the directors.

[23] On April 21, 2009, the "Cameron Claim" was commenced. This was an action on behalf of 101 debenture holders against 90 individual and corporate defendants seeking

damages related to the sale and failed redemption of the debentures. Unlike Mr. Zopf's actions, the Cameron claim also sued certain mutual insurers who, as shareholders of FMFS, had allegedly promoted the sale of the debentures to their own insureds.

[24] Other actions were commenced. Lerner LLP, The Advocates LLP, Szemenyei Kirwin MacKenzie LLP and Doucet McBride issued nine separate actions on behalf of debenture holders.

[25] Most of the individual claimants opted out of the class action that had been certified against FMFS.

[26] Meanwhile, in the FMFS bankruptcy proceedings, on October 20, 2009, Justice Morawetz ruled that certain funds valued at approximately \$260 million did not form part of the Estate of the Bankrupt, FMFS.

[27] In November 2009, settlement negotiations began. Howard Borlack represented the directors and a group of farm mutual companies that were interested in attempting to negotiate a settlement. In the negotiations, class counsel represented Mr. Zopf and Nigel Gilby, who represented the majority of the individual claimants.

[28] The Defendants participating in the eventual settlement include all the insurers and potential insurers of FMFS, save and except for Lloyds, which apparently has a sound legal basis for denying coverage.

[29] A framework settlement agreement was reached in February 1, 2010, but negotiations continued. The agreement was finally signed on May 19, 2010.

[30] During the settlement negotiations, Class Counsel wrote to all known class members, seeking information about the amount of their claims and confirmation that they wished to pursue their claims as a member of the Class. Class Counsel eventually received some 196 signed responses from debenture holders.

[31] Class counsel believes that the settlement is fair, reasonable and in the best interests of the Class.

[32] After notice was provided to the proposed class members of the proposed settlement, there are no objectors.

[33] The proposed settlement involves the discontinuance of the FMFS class action. Soberman Tessis Inc. consents to the discontinuance of that action without costs.

[34] The highlights of the proposed settlement agreement are:

- Subject to a reserve fund, described below, the settlement sum is \$21,250,000 for all claims, costs, taxes, and disbursements.

- The Settlement Agreement resolves all litigation involving the sale of FactorCorp Debentures by FMFS and its agents, including claims and potential claims against parties other than the Settling Defendants.
- KPMG is to be appointed Administrator.
- The Administrator will hold the settlement amount in an interest bearing account and ultimately distribute monies to the class members.
- Class members expect to receive a net recovery of approximately 50% of their investment, in addition to a share of the FactorCorp bankruptcy distribution, which, however, is anticipated to be modest.
- The Settling Defendants will pay the costs of the Administrator for notice to the Class and for the administration of the settlement.
- The Settling Defendants will pay all legal fees both to Class Counsel and counsel for the Individual Claimants. In this regard, Class Counsel seeks approval of a fee of \$1,750,000, inclusive of disbursements plus GST of \$87,500.
- All FactorCorp Debenture holders, regardless of their representation, will receive an equal pro-rata share of the settlement, net of all legal fees.
- The following persons or entities are excluded from entitlements under the settlement: (a) Corporate shareholders of FMFS as well as Trillium Mutual Insurance Company which is affiliated with the farm mutuals and has agreed to be an excluded class member; (b) The directors and officers of FMFS; (c) the corporate sales agents for FMFS; and (d) the agents selling the debentures; and (e) persons other than those named on the FactorCorp debentures at the time of the FactorCorp bankruptcy who obtained their debentures after FactorCorp's bankruptcy from an Excluded Class Member.
- The settlement agreement contains an opt-out threshold based on the value of debentures. If the total of claims by opt-outs exceeds the threshold, the Settling Defendants may, in their discretion, terminate the Settlement Agreement.
- The settlement includes a Reserve Fund. It is the amount payable to the Settling Defendants in the event that Class Members opt-out of the settlement. The amount of the Fund is determined by multiplying the value of opting-out debenture holders' claims by the recovery percentage.
- If the opt-out threshold is exceeded, but the settlement is not terminated, then interest earned on the settlement amount will be used to augment the settling defendants' reserve fund.
- If the number of opt outs does not exceed the opt out threshold, the interest on the settlement amount will be added for distribution to the Settling Claimants.

- Individual claimants and Mr. Zopf will sign a release in favour of the Settling Defendants in a form acceptable to the Settling Defendants.

[35] There are approximately 380 class members. The sum necessary to pay them 50% of the amount they invested in debentures is no more than \$17,479,923.50, assuming there will be a 100% take-up by the known potential claimants and that none of these persons included in the potential claimant group are in fact excluded claimants.

[36] The Settlement Agreement contemplates that the majority of potential claimants in other actions have already opted-out of the FMFS action and will opt-out of this class action but will still participate in the settlement as “Individual Claimants Electing to Receive Compensation” (definition 8 in the Settlement Agreement). Of the sum of up to \$17,479,923.50 being paid by the Defendants for claims, the sum of \$6,466,393.00 is earmarked for the 131 claimants represented by these claimants. The balance, \$11,013,530.50, is for the remaining Class Members.

[37] Mr. Zopf and the Defendants consent to the relief being sought in the motions before the court.

[38] It is anticipated that some Class Members might elect to opt-out of the settlement for reasons related to the personal relationships with the Farm Mutual companies, which are, for the most part, funding the settlement. Under the Settlement Agreement, those Class Members will not be considered opt-outs in the traditional sense and their decision to opt-out and to not seek compensation will not count towards the opt-out threshold.

[39] Under the Settlement Agreement, the Administrator (KPMG) will: (a) verify the amount of investment by claimants; (b) calculate the recovery percentage; (c) co-ordinate the payment of compensation; (d) pay the compensation to settling claimants; (e) determine the number of opt-outs and calculate the amount of the Settling Defendants’ Reserve Fund, together with an interest; and (f) pay Class Claimants’ Counsel Fees and Individual Claimants’ Counsel of Record Fees.

[40] As already noted above, under the Settlement Agreement, Class Claimants’ counsel fees are to be paid. In addition, lawyers for other claimants are to be paid as follows: (a) Lerner LLP and Advocates LLP, \$1,951,863.80; (b) Doucet McBridge LLP, \$15,750.00; and (c) Szemenyei Kirwin MacKenzie LLP, \$69,300.00. These fees total \$2,036,913.80. The total amount proposed for Class Counsel Fees and Individual Claimants’ Counsel Fees, inclusive of all disbursements and taxes, is \$3,874,413.80.

[41] Mr. Zopf signed a retainer agreement with Class Counsel. It is a contingent fee agreement under which Class Counsel were to be paid 20% of the amount recovered in the class action, in addition to any contribution by the defendants towards legal costs and disbursements. Under the settlement, all fees and disbursements are to be paid by the settling defendants.

[42] As of June 7, 2010, Class Counsel have expended time valued at over \$600,000 and have incurred disbursements of over \$11,000. Class Counsel will expend further time

and incur further disbursements for the certification and approval hearing and time during the administration period of the settlement.

[43] Given that approximately \$11 million is expected to be received by the class members that Mr. Zopf represents, the class counsel fee is approximately 16.7% of the value of the compensation being paid to the Class Members. The fee represents a multiplier of approximately 2.5 of counsel's time.

Certification

[44] Where certification is sought for the purposes of settlement, all the criteria for certification still must be met: *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (S.C.J.) at para. 22. However, compliance with the certification criteria is not as strictly required because of the different circumstances associated with settlements: *Bellaire v. Daya*, [2007] O.J. No. 4819 (S.C.J.) at para. 16; *National Trust Co. v. Smallhorn*, [2007] O.J. No. 3825 (S.C.J.) at para. 8; *Nutech Brands Inc. v. Air Canada*, [2008] O.J. No. 1065 (S.C.J.) at para. 9.

[45] I am satisfied that for settlement purposes, the criterion for certification have been satisfied. In particular: (a) the pleadings disclose a cause of action; (b) there is an identifiable class of two or more persons who will be represented by the representative plaintiffs; (c) the claims of the class raise common issues of fact or law; (d) a class proceeding is the preferable procedure; and (e) Mr. Zopf is a suitable representative plaintiffs with adequate Class Counsel.

[46] For the purposes of certification, the class is defined as follows:

Ontario investor clients of the bankrupt, Farm Mutual Financial Services Inc. ("FMFS"), who purchased Debentures in FactorCorp Financial Inc. and/or its affiliate FactorCorp Inc. (together referred to as "FactorCorp") from agents of FMFS and continue to own the *Debentures* as of the date of this Order. For clarity, the Class includes both accredited investor purchasers and unaccredited investor purchasers but expressly excludes the following Excluded Class Members:

- (a) The corporate Shareholders of FMFS, including Trillium Mutual Insurance Company, as set out in Schedule "A" of the Settlement Agreement;
- (b) Directors and officers of FMFS named in ongoing litigation, as set out in Schedule "A" of the Settlement Agreement;
- (c) Corporate Sales Agents for FMFS, as set out in Schedule "A" of the Settlement Agreement;
- (d) Agents employed by the Corporate Sales Agents for FMFS, as set out in Schedule "A" of the Settlement Agreement; and,

(e) Persons other than those named on the FactorCorp Debentures at the time of the FactorCorp bankruptcy that obtained the FactorCorp Debentures after FactorCorp's bankruptcy from any of the above.

[47] The common issues are as follows:

- (1) Did the Defendants owe a duty to all or some of the Class Members and, if so, what is the scope of such duty?
- (2) Were the Defendants in breach of their duty and/or negligent regarding the sale and/or redemption of the Debentures? and,
- (3) If liability rests with the Defendants, then what is the measure of damages and/or special damages payable to all or some of the Class Members?

Settlement Approval

[48] 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.

[49] 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.

[50] When considering the approval of negotiated settlements, the court may consider, among other things: likelihood of recovery or likelihood of success; amount and nature of discovery, evidence or investigation; settlement terms and conditions; recommendation and experience of counsel; future expense and likely duration of litigation and risk; recommendation of neutral parties, if any; number of objectors and nature of objections; the presence of good faith, arms length bargaining and the absence of collusion; the degree and nature of communications by counsel and the representative plaintiffs with class members during the litigation; and 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; *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.

[51] It appears to me that the settlement in this case was the product of hard bargaining by competent and committed negotiators who performed diligent investigations and who realistically took into account the substantive and strategic strengths and weaknesses of their cases and also the financial circumstances and exigencies of the parties. Although the class members and the other debenture purchasers who are participating in the settlement will not be made whole, they will have access to justice and a significant recovery.

[52] I find that the Settlement Agreement is fair, reasonable, adequate, and in the best interests of the Class.

Discontinuance

[53] Practically speaking, the settlement of the action against the directors means that the action against FMFS is redundant and has also been settled. In the circumstances, it is in the best interests of class members that the FMFS action be discontinued.

[54] It is appropriate that notice of the discontinuance of the action against FMFS be provided to the class through the notice of certification and settlement approval of the action against the directors.

Approval of Counsel Fee

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

[56] 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 lawyer 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.

[57] 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.

[58] 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.

[59] Factors relevant in assessing the reasonableness of the fees of class counsel include: (a) the factual and legal complexities of the matters deal 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.

[60] I approve the counsel fee. Put simply, I believe that the lawyers have earned their fee. The fee is fair and reasonable compensation in all the circumstances.

Conclusion

[61] Orders shall issue in accordance with these Reasons for Decision. I signed those orders at the conclusion of the hearing of the motions, with these formal Reasons for Decision to follow.

Perell, J.

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