CITATION: Smith Estate v. National Money Mart Company, 2011 ONCA 233
DATE: 20110328
DOCKET: C51893

COURT OF APPEAL FOR ONTARIO

Moldaver, Armstrong, and Juriansz JJ.A.

BETWEEN

Kenneth Smith, as Estate Trustee of the Last Will and Testament of Margaret Smith, deceased, and Ronald Oriet

Plaintiffs (Appellants)

and

Sutts, Strosberg LLP, Heenan Blaikie LLP, Paliare Roland Rothstein Rosenberg LLP and Koskie Minsky LLP

Appellants

and

National Money Mart Company and Dollar Financial Group, Inc.

Defendants (Respondents)

Terrence J. O'Sullivan and James Renihan, for the appellants

Chris Hubbard, for Money Mart (not participating in appeal)

Mahmud Jamal and Jason MacLean, for Dollar Financial Group, Inc. (not participating in appeal)

Heard: October 25, 2010

On appeal from the order of Justice Paul M. Perell of the Superior Court of Justice dated March 3, 2010, with reasons reported at (2010), 94 C.P.C. (6^{th}) 126.

Juriansz J.A.:

[1] This is an appeal from the order of Perell J. fixing the appellants' counsel fees in this class proceeding. The appellants are four law firms that acted as class counsel in this class proceeding.

[2] By order dated March 3, 2010, Perell J. varied the certification order by expanding the class definition, approved the settlement of the class action, allowed the representative plaintiff compensation of $3,000 to be paid out of class counsel fees, and fixed class counsel fees in the amount of $14.5 million, being $12,806,074.94 for fees, $640,303.75 for GST and $1,053,621.31 for disbursements including GST. The disbursements included the fees of certain consultants and other counsel retained by class counsel that the appellants had requested be treated as contingency fees.

[3] The class definition was expanded to add a group of payday loan borrowers who entered into transactions between the publication of the original certification order and December 15, 2009. The date December 15, 2009, is significant. As of that date, because of legislative changes, it could no longer be alleged that the transactions contravened the *Criminal Code*'s provisions prohibiting criminal rates of interest.

[4] Before Perell J., class counsel sought approval of a counsel fee of $27.5 million. On appeal, they seek a fee of $20 million. They also seek, as they did before Perell J., to have fees, disbursements and taxes of other counsel – who had provided their services on a contingency basis – treated as a component of the class counsel base fee rather than as

disbursements, to have the fees of consultants – who had also provided their services on a contingency basis – increased by the multiplier the court awarded to class counsel, and to have the compensation paid to the representative plaintiff paid out of the class fund rather than out of class counsel fees.

[5] For the reasons that follow, I would allow the appeal in part. I would vary the motion judge's order so that the fees of the representative plaintiff are paid out of the class fund. I would dismiss the remainder of the appeal.

[6] I add the observation that in a case such as this, the motion judge should give serious consideration to the appointment of *amicus curiae* or a guardian of the settlement fund on the hearing of counsel's application for approval of their fees.

Background

[7] In this class proceeding, the plaintiffs alleged that they were charged a criminal rate of interest by the defendants for small loans with a due date for repayment connected to their payday. The issue in the action was whether the various charges, i.e. a finance charge, a cash checking fee and an item fee, should be characterized as interest under the *Criminal Code*'s provisions prohibiting criminal rates of interest.

[8] The class action was strenuously resisted. There were many interlocutory proceedings. According to the motion judge's count, there were 39 orders, 12 endorsements, and four judgments. There was one leave application to the Divisional Court, four appeals to the Court of Appeal, and three leave applications to the Supreme

Court of Canada. The issues litigated included whether the order for service of the claim, *ex juris*, on the defendant Dollar Financial Group, Inc. was valid, whether the loan agreements required the plaintiffs to mediate or arbitrate their disputes, whether the defendants' franchisees should be added as defendants, and whether the plaintiffs were entitled to partial summary judgment.

[9] The trial began on April 27, 2009, and proceeded for 17 days. It was established that during the class period, class members had paid cheque cashing fees and interest totalling $224,791,507. Money Mart counterclaimed for the class members' indebtedness from payday loans that were in default. The amount of that indebtedness was ultimately calculated to be $56,388,071 at the time of the motion.

[10] Following a mid-trial mediation, the parties agreed to a settlement on the following terms:

i. The defendants would pay $27.5 million to the settlement class;

ii. the defendants would forgive the class members' indebtedness to them, in the amount of $56,388,071;

iii. the defendants would make available fully transferable transaction credits in the amount of $30 million to reduce the cost of using the defendants' services in the future, to be allocated among those class members who were not indebted to Money Mart;

iv. the defendants would pay to the Class Proceedings Fund the sum of $3 million, in annual instalments of 10% of the transaction credits as

they are used, and 10% of the unused transaction credits after the expiration date; and

v. the defendants would pay the costs of administering the settlement, in the amount of $2 million.

[11] At the motion, class counsel asserted the value of the settlement was in the range of $120 million. The time value of the hours docketed by class counsel was $9,750,024.

Issues

[12] The appellants resist the characterization of the appeal as primarily involving a claim for higher fees. Rather, they say that the appeal raises important issues about access to justice, since it concerns the legal principles that govern the determination of fair fees for class counsel. The fees awarded must not only provide adequate compensation to class counsel but must also provide a suitable incentive to skilled lawyers to take on complex and expensive class proceedings, all without unreasonably diminishing the fund available for distribution to the class. The appellants say that contingency fees should be available to firms who provide essential but non-legal services to the class and that it is important that class counsel be able to retain, on a contingency basis, the expert services necessary to effectively assert the class' claim. Finally, they say that as a matter of principle, a representative plaintiff's compensation should be paid out of the fund and not out of class counsel fees.

[13] I summarize the appellants' arguments as follows:

i. The motion judge erred by failing to apply the base fee/multiplier approach provided for in s. 33(7);

ii. the motion judge erred by failing to allow class counsel fees in an amount that was fair and reasonable;

iii. the motion judge erred by refusing to treat the fees payable to the consultants, Price Waterhouse Cooper ("PWC") and Mr. Anand, in accordance with the contingency basis on which class counsel had retained them;

iv. the motion judge erred by refusing to consider the fees of Fraser, Milner, Casgrain LLP ("FMC") and Prof. Krishna as class counsel fees because the court had not appointed them as part of the class counsel group; and

v. the motion judge erred by ordering that the representative plaintiff's compensation be paid from class counsel fees.

[14] There is another matter worth discussing though, strictly speaking, it is not a legal issue raised by the appeal. During oral argument, the court raised with counsel the difficulties that stem from the fact that class counsel fees are determined in a non-adversarial forum. Counsel for the appellants frankly acknowledged the difficulties and suggested that it would be useful to the profession for this court to discuss the issue. I begin with that discussion.

The non-adversarial forum

[15] Our system of justice is based on the basic tenet that the court will be able to reach the most informed, considered, impartial and wise decision after presiding over the

confrontation between opposing parties, in which each side can identify issues, lead evidence, cite law, discuss policy considerations, and seek to undermine the position of the other. Motions for the approval of settlements and class counsel fees in class proceeding depart from this basic tenet as a matter of routine. They usually proceed unopposed in large part because individual class members often have too small a stake to be compelled to participate.

[16] The motion judge was troubled by what he described at one point as the "*ex parte*" nature of the hearing before him and included a lengthy comment about it in his reasons, a comment that is worth reading. The comment emphatically observes that it is "well known" that the court is placed in a difficult position in determining whether a settlement and class counsel fees should be approved without "the dynamics of the adversary system where opposing views are heard".

[17] Winkler J. in *McCarthy v. Canadian Red Cross Society* (2001), 8 C.P.C. (5th) 349 (Ont. S.C.) also compared unopposed motions in class action to *ex parte* proceedings. After referring to authorities that highlighted that "there is no situation more fraught with potential injustice and abuse of the Court's powers than application[s] for an ex parte injunction", he stated that counsel in unopposed motions in class proceedings are under a special duty to make full and frank disclosure, just as in *ex parte* proceedings. He stated,

> By comparison, a class proceeding by its very nature involves the issuance of orders or judgments that affect persons who are not before the Court. These absent class members are dependent on the Court to protect their

> interests. In order to do so, the Court must have all of the available information that has some bearing on the issues, whether favourable or unfavourable to the moving party. It is the obligation of counsel to provide that information in a manner that is consonant with the duty to make full and frank disclosure. Moreover, that information must be provided in a manner that is not misleading or even potentially misleading. In most class proceedings, voluminous records develop as a consequence of the complexity of the litigation. The Court is not equipped, nor should it be required, to engage in a forensic investigation into the material or to mine the record to inform itself. Counsel must direct the Court to all relevant information that would impact on the Court's determination. This is especially important where the motion is for the approval of settlement agreements, class counsel fees or consent certifications for the purpose of settlement.

[18] In one respect, counsel's duty to make full and frank disclosure is more significant in unopposed class action motions than in *ex parte* motions. An order obtained *ex parte* is very often brought back before the court by an interested party not present at the *ex parte* hearing. This does not happen with orders approving counsel fees in class proceedings. This court recently found that a class member lacks standing to appeal an order approving class counsel fees: *Lawrence v. Atlas Cold Storage Holdings Inc.* (2009), 311 D.L.R. (4th) 323 (Ont. C.A.).

[19] On appeal, counsel for the appellants summed up the court's concern well. The process, he said, places the court in the position of adversary and adjudicator at the same time; the court must test the case being put to it, while impartially adjudicating it. He suggested this was "perhaps a flaw in the legislation".

[20] Nothing in the legislation, however, discourages the court from exercising its inherent jurisdiction to ensure the proceedings before it are fair or resorting to its authority under rule 13.02 to appoint an *amicus*. In fact, counsel for the appellants advised that now some judges of the Superior Court appoint *amicus* to present an opposing view in such motions. As well, "monitors" have been appointed in several Ontario cases. In the United States, it is not uncommon for the courts to appoint a *guardian ad litem* for the settlement fund.

[21] An uncontested motion for fees also places counsel in an awkward position. Lawyers are expected to be zealous but personally disinterested advocates of their clients' positions. On an uncontested motion for fees, the lawyer represents the class whose interest is in maintaining the maximum settlement amount possible for distribution among class members. The lawyer, on the other hand, seeks fees that will diminish the amount of the settlement available for distribution. The lawyer's interests appear to be pitted against those of the client. In appropriate cases, class counsel may, on their own initiative, seek to reduce the awkwardness of this position by arranging for independent counsel to advise the representative plaintiff in relation to class counsel's application for fees. Class counsel have taken this action in at least one reported Canadian case.

[22] I discuss each of these strategies briefly.

Amicus

[23] The court has jurisdiction to appoint an *amicus* to preserve the fairness of the proceedings before it. In Ontario, though, there is no judicial discussion of the appointment of *amicus* in the context of class action proceedings. Commentators, however, have pointed out the benefits of allowing *amicus* to assist the court in the approval of settlements and class counsel fees, which are often dealt with together. The motion judge cited Prof. Garry Watson, who, in his paper "Settlement Approval – The Most Difficult and Problematic Area of Class Action Practice" prepared for the NJI Conference on Class Actions in April 2008, argued that "judges should give serious thought to precipitating an adversarial hearing by appointing counsel to advise the court and oppose the settlement if appropriate".

[24] Another significant paper is "Caught In a Trap – Ethical Considerations for the Plaintiff's Lawyer in Class Proceedings" authored by Winkler C.J.O. and Sharon D. Matthews, presented at the 5th Annual Symposium on Class Actions April 11, 2008 and available online at «http://www.ontariocourts.on.ca/coa/en/ps/speeches/caught.htm». The authors note the effect of the absence of an adversary in these situations and suggest the use of *amicus*:

> Depending on the terms of the settlement, the defendant may not have standing on the fee approval and in such cases there will be no effective adversary to assist the court on either settlement or fee approvals. Class counsel may find themselves in a conflict in supporting settlement approvals. ... It may be appropriate to appoint *amicus curiae* to assist

> courts in understanding the merits of the settlement generally and as it relates to fees in particular.

[25] The only Canadian case that actually discusses the appointment of an *amicus* in the context of approving a class settlement or class counsel fees seems to be *Killough v. Canadian Red Cross Society* (2001), 85 B.C.L.R. (3d) 233 (S.C.). K.J. Smith J. of the B.C. Supreme Court cautioned against too quickly resorting to the appointment of an *amicus* in motions to approve class counsel fees:

> In my opinion, there is merit in [the] submission that *amicus curiae* should not be appointed as a matter of course in these matters. It may be that, in a particular case, the class-action judge will consider that *amicus* would be helpful, but to make such an order in the absence of some special circumstances warranting it would be to add an unnecessary layer of complexity and expense to the fee-approval process.

[26] He found the appointment of an *amicus* was premature because it appeared the court would have the benefit of an independent perspective. Class counsel had retained separate independent counsel to advise the representative plaintiff as to the fairness and reasonableness of the proposed fees and class counsel had undertaken to file independent counsel's opinion with the court. Moreover, the Public Guardian and Trustee had sought standing to take a position and that application had not yet been dealt with. When the matter eventually came on for hearing, see *Killough v. Canadian Red Cross Society* (2001), 91 B.C.L.R. (3d) 309 at para. 40 (S.C.), K.J. Smith J. declined to give the Public Guardian formal standing, but did allow the Public Guardian to participate in the hearing:

> Counsel have an inherent conflict of interest on applications for approval of their own fees and disbursements. While

> those of us who are trained in the workings of the legal system understand that counsel put aside their own self-interest in such matters, as they are ethically bound to do, decisions that take into account the objective, perhaps adversarial, submissions of other interested parties will generally better withstand scrutiny. Accordingly, if the Public Guardian and Trustee wishes to address the Court on behalf of legally incapable persons in the class, it is my view that the Court should hear those submissions.

Monitors

[27] Monitors have been appointed in a number of Ontario class actions. The published reasons do not always make clear the role assigned to the monitor. For example, in *Baxter v. Canada* (2006), 83 O.R. (3d) 481 (S.C.) and *Frohlinger v. Nortel Networks* (2007), 40 C.P.C. (6th) 62 (Ont. S.C.), court-appointed monitors are included in the list of those appearing before the court, but no mention of them is made in the reasons. Both of these cases involved a motion for the approval of class counsel fees as well as other issues.

[28] Monitors can assist the court by analyzing the volumes of information that may be filed on approval motions. For example, on a fee approval motion, a monitor could be assigned to review in detail the dockets of counsel with a view to understanding the fees charged in respect of each step in the litigation, identifying duplicated effort and instances in which a greater number of hours than reasonably necessary has been expended.

Guardian ad litem

[29] American jurisprudence, as one would expect, is more mature given the much longer experience with class proceedings in the United States. American courts do appoint *amicus*: see e.g. *Zucker v. Franklin*, 374 F.3d 221(3d Cir. 2004); *Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 518 (1st Cir. 1991). However, the predominant American approach appears to be the appointment of a *guardian ad litem* for the settlement fund.

[30] The landmark case seems to be the 1976 decision *Miller v. Mackey International Inc*., 70 F.R.D. 533 (S.D. Fla. 1976). The court considered a class counsel fee application to be analogous to litigation between a guardian and a ward. The substantive interests of the members of the class are at stake because the benefits they receive are reduced by the compensation sought by counsel representing the class. Therefore, over the strenuous objections of class counsel, the court appointed a *guardian ad litem* for the members of the class saying, "The appointment of a *guardian ad litem* is appropriate where there is litigation between a Guardian and Ward – herein, the attorneys for the class and the class." Since the guardian is charged with the protection of the fund for the class, his fee was to be charged against the fund. The court observed:

> [T]his procedure both achieves protection for the members of the class and enables the trial judge to remain in an impartial position. Counsel for the class strenuously objected to the appointment of a guardian ad litem and asserted that the court should conduct cross examination of the witnesses testifying for plaintiff's counsel. However,

> that contravenes the court's traditional role, tending to cast the court into an advocate's role.

[31] The legislation in the United States is more mature as well. The Class Action Fairness Act of 2005, 28 U.S.C. (2005), which brings most large class actions within the jurisdiction of the federal courts, specifically authorizes judges to have the value of "coupon settlements" assessed by an independent expert before approval: see §1712(d).

Independent counsel

[32] Class counsel may consider going beyond their strict duty to make full and frank disclosure on an unopposed motion for fees and retain separate counsel to provide independent advice to the representative plaintiff regarding the fairness and reasonableness of the fees class counsel is seeking. Class counsel took this step in *Killough*.

[33] It seems to me that counsel who bring and proceed with a motion without ensuring that an independent perspective is put forward have little cause for complaint if the court departs from the passive role it traditionally plays by raising new issues, dealing with arguments not advanced and actively challenging the uncontradicted evidence. A court, though, should not appear confrontational. The line between a sceptical and confrontational approach may be difficult to navigate for a court that bears the full responsibility for testing the merits of the position put forward by counsel in order to fulfill its responsibility to protect members of the class. Courts should not be reticent in resorting to one of the strategies discussed above when they consider that confrontation

of counsel's unopposed position would be helpful and reasonably warranted in the circumstances. Such resort is, of course, discretionary. Appointment of *amicus* or a guardian is neither necessary nor desirable in every case.

Application to this case

[34] A glance at the major features of the case placed before the motion judge might suggest it was appropriate for the court to consider exercising its discretion to appoint a guardian for the fund or an *amicus* or monitor. Nonmonetary items figured prominently in the settlement. Class counsel was seeking fees of $27.5 million. The fees class counsel sought would exhaust all the cash in the settlement fund, leaving only the nonmonetary benefits for distribution to the class members. While the record was huge, an accounting firm reviewed much of the voluminous documentation produced by the defendants. The hourly rates charged by counsel were substantial; they were described by the motion judge as "not bargain-basement". The total time value of class counsel's docketed hours was $9,750,024. Class counsel was comprised of four law firms, raising the possibility of duplication of effort in becoming familiar with this very large file and dealing with it. Class counsel had not placed before the court any independent evidence of the value of the various components of the settlement.

[35] No doubt, the motion judge faced a difficult task.

[36] In our adversarial system, in which the case is prepared by the parties, the court should not be expected to scrutinize in detail a massive set of counsel's dockets for duplicative or excessive hours. Winkler J.'s comments in *McCarthy* are worth repeating:

"The Court is not equipped, nor should it be required, to engage in a forensic investigation into the material or to mine the record to inform itself". A court must also guard against appearing confrontational by embarking on a cross examination of counsel about the dockets or on matters such as whether they perform work at other than the "usual" rates indicated in the fee agreement, and if so, at what rate and for what type of client.

[37] The motion judge, after underscoring that "the tasks are difficult and made more difficult by the adversarial void", considered that he was "up to the task" and proceeded. However, the adversarial void did affect his reasoning and the way he dealt with the case. The motion judge did not resolve the fundamental question whether a court under the CPA could allow a premium for service providers engaged by class counsel on a contingency basis. He declined to deal with that question on "what is essentially an *ex parte* motion where the voices against any change are not being heard". He added that the matter "should be attended to by the Legislature and not as an exercise of law reform on an uncontested fee approval motion."

[38] The motion judge should not have felt inhibited from seeking the assistance he considered necessary to address the question. He could have appointed *amicus* and invited intervention from interested groups, such as the Law Society in regard to the interpretation of its Rules of Professional Conduct.

[39] Before leaving this topic I add the observation that the adversarial void also affects the case on appeal. The appellant decides what issues will be raised on appeal and what material will be included in the Appeal Book. There is no respondent to raise additional issues or to focus the court's attention on different material in the exhibit books. In crafting the appeal, the appellant is able to attack some findings of the court below and leave others undisturbed. For example, here the applications for approval of the settlement and determination of counsel fees were brought before the court in one motion; the motion judge dealt with both matters at one hearing, and he rendered one set of intertwined reasons. In those intertwined reasons, he expressly stated, at paras. 95, 104 and 113,[1] that his approval of counsel fees in the amount of $14.5 million was one of the factors on which his approval of the settlement was based. Yet, this appeal seeks to modify the motion judge's order only in respect of fees divorced from his approval of the settlement.

[40] This court, no less than the motion court, had the discretion to appoint an *amicus* or guardian to articulate opposition to the appeal. In hindsight, the appointment of *amicus* or guardian may have been of great assistance in this appeal. The analysis upon which this appeal turns was not raised in the appellants' material and did not come up at the appeal hearing. After the hearing, the court found it necessary to seek the appellants' written submissions on further issues.

[1] There is an error in the paragraph numbering in the reasons released by the motion judge. I refer to the corrected paragraph numbering in the Quicklaw version of his reasons.

[41] With that preface, I turn to the issues raised by the appellants.

Quantum of Fees

[42] The appellants advance two arguments regarding the quantum of fees assessed by the motion judge.

[43] First, at the appeal they argued that the motion judge was bound to use the analytical framework of s. 33(7) of the CPA in assessing what would be an appropriate counsel fee and that he erred in law by failing to do so. In their supplementary factum filed after hearing, they argue that a motion judge determining fees under s. 32(4) must apply the analytical framework of s. 33(7) in a case in which counsel seek a premium by the application of a multiplier.

[44] Second, in their supplementary factum they argue that any mode of analysis should result in the approval of fees that are fair and reasonable. Here, they submit, the counsel fee that the motion judge approved was not fair or reasonable.

Sections 32 and 33 of the CPA

[45] In advancing their initial argument, the appellants presumed that the motion judge was bound to apply the two-step analysis of s. 33(7). Under s. 33(7), the court must first determine the number of hours worked and the hourly rate to be allowed in order to calculate a "base fee". Second, the court must determine the appropriate multiplier to be applied to the base fee in order to arrive at fair and reasonable compensation to class counsel for the risk they have assumed in representing the class on a contingency basis.

[46] The appellants contend that the two steps of s. 33(7) are distinct and must be separately applied. In determining the base fee the court may consider a number of factors including the time expended by class counsel, the legal complexity of the action, the importance of the matter to the client, class counsel's skill, the results achieved and the ability of the client to pay. By contrast, they say, the court may consider only two factors – the degree of risk undertaken and the degree of success achieved – in determining the multiplier to be applied to the base fee.

[47] The appellants argue that the motion judge conflated the first and second steps. Because he failed to distinguish between the two steps, they say, he considered factors relevant to the base fee in determining the multiplier to be applied to the base fee. They submit that he improperly weighed all the factors in one stage and, as a result, the class counsel fee he approved was lower than was warranted.

[48] In setting out the analysis the motion judge should have carried out, the appellants begin by submitting that the motion judge found that their base fee was reasonable. Although he made no express finding on that point, they say it is clear he approved their hourly rates and all the hours they recorded in their dockets. Using a base of $10,327,525.20 for fees and GST, they calculate that the "premium" the motion judge allowed amounts to a multiplier of only 1.29. Fees in the amount of $20 million, which they request on appeal, would amount to a multiplier of 1.78. They say that 1.78 is a modest multiplier in the circumstances.

[49] I note in passing that the appellants' calculations are not in accordance with the CPA. Section 33(3) defines the base fee as "the result of multiplying the total number of hours worked by an hourly rate". Under the statutory definition, the GST does not get multiplied. If the GST included the appellants' calculations is excluded, the premium granted by the motion judge would amount to 1.48, and fees of $20 million would represent a multiplier of 2.05.

[50] As noted, the appellants presumed that s. 33(7) of the CPA governs the determination of counsel fees in this case. I set out s. 33(7) in the context of the section as a whole:

> 33. (1) Despite the Solicitors Act and An Act Respecting Champerty, being chapter 327 of Revised Statutes of Ontario, 1897, a solicitor and a representative party may enter into a written agreement providing for payment of fees and disbursements only in the event of success in a class proceeding. 1992, c. 6, s. 33 (1).
>
> Interpretation: success in a proceeding
>
> (2) For the purpose of subsection (1), success in a class proceeding includes,
>
> > (a) a judgment on common issues in favour of some or all class members; and
> >
> > (b) a settlement that benefits one or more class members. 1992, c. 6, s. 33 (2).
>
> Definitions
>
> (3) For the purposes of subsections (4) to (7),
>
> "base fee" means the result of multiplying the total number of hours worked by an hourly rate; ("honoraries de base")

“multiplier” means a multiple to be applied to a base fee. (“multiplicateur”) 1992, c. 6, s. 33 (3).

Agreements to increase fees by a multiplier

(4) An agreement under subsection (1) may permit the solicitor to make a motion to the court to have his or her fees increased by a multiplier. 1992, c. 6, s. 33 (4).

Motion to increase fee by a multiplier

(5) A motion under subsection (4) shall be heard by a judge who has,

> (a) given judgment on common issues in favour of some or all class members; or
>
> (b) approved a settlement that benefits any class member. 1992, c. 6, s. 33 (5).

Idem

(6) Where the judge referred to in subsection (5) is unavailable for any reason, the regional senior judge shall assign another judge of the court for the purpose. 1992, c. 6, s. 33 (6).

Idem

(7) On the motion of a solicitor who has entered into an agreement under subsection (4), the court,

> (a) shall determine the amount of the solicitor’s base fee;
>
> (b) may apply a multiplier to the base fee that results in fair and reasonable compensation to the solicitor for the risk incurred in undertaking and continuing the proceeding under an agreement for payment only in the event of success; and
>
> (c) shall determine the amount of disbursements to which the solicitor is entitled, including interest calculated on the disbursements

> incurred, as totalled at the end of each six-month period following the date of the agreement. 1992, c. 6, s. 33 (7).
>
> Idem
>
> (8) In making a determination under clause (7) (a), the court shall allow only a reasonable fee. 1992, c. 6, s. 33 (8).
>
> Idem
>
> (9) In making a determination under clause (7) (b), the court may consider the manner in which the solicitor conducted the proceeding. 1992, c. 6, s. 33 (9).

[51] It is readily apparent that the motion judge did not proceed in the manner contemplated by s 33(7). He made no express finding of counsel's "base fee" under s. 33(7)(a). He made no determination of the "multiplier" to be applied to the base fee under s. 33(7)(b). Instead, the motion judge considered a number of factors, including counsel's rates and the hours they docketed. Instead of applying a multiplier, he indicated he was allowing counsel a "premium" and concluded that a counsel fee in the amount of $14.5 million was fair and reasonable.

[52] While I agree that the motion judge did not apply the analysis contemplated by s. 33, I do not agree that he erred. The determination of counsel fees, on the facts of this case, is not governed by s. 33(7) of the CPA, but by s. 32(4). Section 32 provides:

> Fees and disbursements
>
> 32. (1) An agreement respecting fees and disbursements between a solicitor and a representative party shall be in writing and shall,

> (a) state the terms under which fees and disbursements shall be paid;
>
> (b) give an estimate of the expected fee, whether contingent on success in the class proceeding or not; and
>
> (c) state the method by which payment is to be made, whether by lump sum, salary or otherwise. 1992, c. 6, s. 32 (1).
>
> Court to approve agreements
>
> (2) An agreement respecting fees and disbursements between a solicitor and a representative party is not enforceable unless approved by the court, on the motion of the solicitor. 1992, c. 6, s. 32 (2).
>
> Priority of amounts owed under approved agreement
>
> (3) Amounts owing under an enforceable agreement are a first charge on any settlement funds or monetary award. 1992, c. 6, s. 32 (3).
>
> Determination of fees where agreement not approved
>
> (4) If an agreement is not approved by the court, the court may,
>
> > (a) determine the amount owing to the solicitor in respect of fees and disbursements;
> >
> > (b) direct a reference under the rules of court to determine the amount owing; or
> >
> > (c) direct that the amount owing be determined in any other manner. 1992, c. 6, s. 32 (4).

[53] Section 32 is mandatory and generally applies to all fee agreements. Its own terms leave no doubt that it applies to contingency fee agreements as well. Section 32(1) requires that all fee agreements meet certain formal requirements. All fee agreements

must be in writing and must state the terms under which fees and disbursements are to be paid, must provide an estimate of the expected fee, and must state the method of payment. Section 32(2) provides that fee agreements in class proceedings are *prima facie* unenforceable. They are only enforceable after being approved by the court. Section 32(3) provides that amounts owing under an enforceable agreement, i.e. one that is approved by the court, are a first charge on any settlement monies or monetary award. Finally, "if an agreement is not approved by the court", s. 32(4) gives the court the authority to determine class counsel fees or to direct the manner in which class counsel fees are to be determined or calculated.

[54] The court's authority to determine class counsel fees under s. 32(4) is distinct from its authority to determine class counsel fees under s. 33(7). The court's authority to determine fees under s. 32(4) arises "if an agreement is not approved by the court". The court's authority to determine fees under s. 33(7) arises "on the motion of the solicitor who has entered into an agreement under [s. 33(4)]".

[55] In their supplementary factum, the appellants contend that it should make no difference which one of these sections apply, as both should lead to the same result – the approval of fees that are fair and reasonable. What is clear is that the mode of analysis open to the court under the two sections is different. The court's authority under s. 32(4) is far more expansive than its authority under s. 33(7). Section 33(7) provides only for the base fee/multiplier approach, whereas s. 32(4) provides the court with broad discretion to set the fee, direct a reference or direct the fee be determined "in any other manner".

[56] The relationship between ss. 32 and 33 has been the subject of previous judicial comment. Winkler J., in *Crown Bay Hotel Limited Partnership v. Zürich Indemnity Co. of Canada* (1998), 40 O.R. (3d) 83 (C.J. (Gen. Div.)), observed that "[T]he scheme of the CPA seems to envisage that sections 32 and 33 operate independently of one another. Hence the duplicate provisions for court approval." In *Crown Bay Hotel*, Winkler J. concluded that the court had authority under s. 32(4) to approve a contingent counsel fee based on a percentage of the recovery, rather than on a base fee/multiplier as contemplated by s. 33(7).

[57] In an earlier case, *Nantais v. Telectronics propriety (Canada) Ltd.* (1996), 28 O.R. (3d) 523 (C.J. (Gen. Div.)), Brockenshire J. commented that the arrangement of sections 32 and 33 was "somewhat confusing". He suggested that "it would have been clearer if s. 33(1) and (2) had come first, followed by s. 32 and then followed by s. 33(4) through (9)." That is because sections 33(1) and (2) apply generally to make it clear that a contingency fee agreement is permitted by the CPA, despite the provisions of the *Solicitors Act*, R.S.O. 1990, c. S.15 and *An Act Respecting Champerty*, R.S.O. 1897, C. 327. Section 32(3) also applies generally. Sections 33(3) through (9), in Brockenshire J.'s view, apply in cases in which there is "an arrangement under which hourly rates are quoted, with a provision for applying to the court after the fact, for an increase in such hourly rate, based on the risk incurred in undertaking the case under an agreement to be paid only if successful."

[58] In *Crown Bay Hotel*, Winkler J. quoted and approved of Brockenshire J.'s comments in *Nantais*.

[59] Cullity J. in *Garland v. Enbridge Gas Distribution Inc.* (2006), 56 C.P.C. (6th) 357 (Ont. S.C.) at para. 16 said:

> Section 32 is concerned with fee agreements – contingent or otherwise – in general. Section 33 is confined to a particular type of contingent fee agreement: one that contemplates, and permits, the solicitor to make a motion to the court to have his or her fees increased by a multiplier. The jurisdiction under this section appears to be premised and conditioned on the existence of such an agreement.

[60] I agree with these earlier decisions. The court's jurisdiction to determine class counsel fees under s. 33(7) is premised and conditioned on the existence of a fee agreement providing for payment of fees and disbursements only in the event of success and which permits class counsel to make a motion to the court to have his or her fees increased by a multiplier. To spell this out, I observe that the court's jurisdiction under s. 33(7) is brought into play by a motion of a solicitor "who has entered into an agreement under subsection (4)". An agreement under s. 33(4) is one that permits counsel to make a motion to the court to have his or her fees increased by a multiplier.

[61] Illustrative of a fee agreement to which s. 33(7) applies is the fee agreement that was before this court in *Gagne v. Silcorp Ltd.* (1998), 41 O.R. (3d) 417 (C.A.). *Gagne* is the main authority on which the appellants relied in this appeal. In *Gagne*, Goudge J.A. provided the following description of the fee agreement:

> As required by the Act, the appellant solicitors executed a written agreement with the representative plaintiff respecting their fees and disbursements. It provided that the payment of any legal fees was contingent on the class action being concluded successfully as defined by the Act. It also provided that the base fee would be the product of the hours worked by the solicitors and their usual hourly rates. In addition, it set out that the solicitors could seek court approval for a multiplier to be applied to that base fee. Finally, the agreement described two examples of how this might work.... [Emphasis added.]

[62] In the case on appeal, the agreement is quite different. Paragraph 9 of the agreement provides:

> In the event of Success in the Action, and in addition to any costs paid by the Defendants to the Solicitor, the Solicitor shall be paid and shall receive the aggregate of the following in accordance with paragraph 8:
>
> (a) an amount equal to any disbursements not paid by the Defendant(s) as costs, plus applicable taxes plus interest thereon in accordance with s. 33(7)(c) of the Act;
>
> plus
>
> (b) the greater of:
>
> (i) one-third of the Recovery; or
>
> (ii) the Base Fee increased by a multiplier of four;
>
> less
>
> (iii) the fee portion of any costs paid to the Solicitor in accordance with paragraph 8;
>
> plus
>
> (iv) applicable taxes.

[63] This paragraph, which is the agreement regarding class counsel fees, does not provide that counsel may bring a motion to have the court increase the base fee by a multiplier. Rather, if paragraph 9 were given effect, counsel fees may not even be premised on the base fee/multiplier approach, but on one third of the recovery.

[64] Nowhere else in the agreement is it stipulated that class counsel is permitted to bring a motion to have their fees increased by a multiplier. Recital D of the agreement merely states that "[t]he Act provides, among other things, that a Fee Agreement: … (d) may permit a solicitor to be paid by having a Base Fee increased by a multiplier or as a percentage of the Recovery". While this is accurate as a general statement, it does not bring the fee agreement under s. 33(4) of the CPA. It does not, as a matter of contract, "permit the solicitor to make a motion to the court to have his or her fees increased by a multiplier".

[65] The distinction is not merely technical. Class members may understand the phrase "[t]he Act ... may permit a solicitor to be paid ... a base fee increased by a multiplier" to mean that such fees are payable if specified in the fee agreement. On the other hand, an agreement that precisely complies with s. 33(4) of the CPA can leave no doubt in the mind of class members that the size of the multiplier and the fees themselves rest completely within the discretion of the court. It is a matter of emphasis. A fee agreement that simply states that "the Act provides that a Fee Agreement may permit a solicitor to be paid by having a Base Fee increased by a multiplier" does not emphasize that the court

must, in every case, approve both the base fee and the multiplier before the fee agreement is enforceable.

[66] The agreement in this case does make clear the court must approve it. Paragraph 4 of the fee agreement states, "This agreement requires Court approval. If this agreement is approved by the Court, it shall bind the Solicitor, the Client, and all members of the Class who do not opt out of the Action". Paragraph 4 speaks to the fee agreement as a whole. No provision of the agreement, however, expressly indicates that the court must determine what fees will be allowed to counsel.

[67] It is interesting to note the difference between paragraph 8, which deals with costs paid by the defendants, and paragraph 9 which deals with counsel fees. Paragraph 8 expressly provides that counsel's entitlement to costs payable to the client is specifically subject to the approval of the court. Paragraph 9 sets out precisely how counsel fees are to be calculated, but unlike paragraph 8, does not state that counsel fees are subject to the approval of the court.

[68] I conclude that the fee agreement in this case does not satisfy the requirements of s. 33(4). It does not permit counsel to apply to the court for a multiplier but instead stipulates how counsel fees are to be calculated. The agreement for the fees stipulated would become enforceable only if it were approved by the court under s. 32(2). If the agreement was not approved then, under s. 32(4), the court could determine the amount owing to counsel.

[69] In this case, the motion judge did not expressly state that he was disapproving the fee agreement. Section 32(4), however, does not require that a fee agreement be expressly disapproved before it applies. Section 32(4) applies whenever there is no approval of the fee agreement. This is made clear by the opening words of s. 32(4), which clearly state that the court's authority to determine the amount owing to class counsel in respect of fees and disbursements under that subsection arises "if an agreement is not approved by the court". Cullity J. put it well in *Martin v. Barrett*, [2008] O.J. No. 3813 (S.C.), at para. 35: "If the court withholds approval, it then has a discretion to determine the fee pursuant to section 32(4)(a)."

[70] There can be no doubt the motion judge withheld approval of the fee agreement in this case. Had he approved it, it would be enforceable and the fees owing under paragraph 9 would be a first charge on the settlement fund by virtue of s. 32(3) of the CPA. By assessing fees in a different amount, the motion judge made evident he was not approving the fee agreement. Section 32(3) makes apparent that a substantive as well as a formal review of the fee agreement is necessary for court approval. The current practice of some trial courts to approve the fee agreement simply upon being satisfied that it contains the formal requirements of s. 32(1) ignores the effect of s. 32(3). The motion judge in this case followed the correct approach by withholding approval of the fee agreement.

[71] Because the fee agreement in this case was not approved and because it does not meet the requirements of s. 33(4), I conclude that class counsel were not entitled to

invoke the application of s. 33(7). Rather, counsel's fees in this case fell to be determined under s. 32(4).

[72] I do not accept the contention advanced in the appellants' supplementary factum that, even if s. 32(4) applies, the court must apply the analytical framework of s. 33(7) when counsel who have taken the case on a contingency basis apply for a multiplier. The wording of s. 32(4) is clear. The court has broad authority to itself determine the "the amount owing to the solicitor in respect of fees", or even to direct that the amount owing be determined "in any other manner". *Gagne*, the only Court of Appeal authority on which the appellants rely for this argument, was a s. 33(7) case. The proper view is that the court acting under s. 32(4)(a) has the authority to determine the fees owing to the solicitor after considering and weighing all relevant factors. It is within the court's discretion to test the reasonableness of the quantum of a lump sum fee by looking at the result as a multiplier, as Cumming J. suggested in *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117 (S.C.). It is, however, a matter of discretion.

[73] I conclude that the motion judge was not bound to apply the base fee/multiplier analysis provided for in s. 33(7) of the CPA. He committed no error in exercising his authority under s. 32(4) of the CPA to determine class counsel fees without determining the amount of the appellants' base fee and applying a multiplier to it.

[74] Before leaving this issue I add that it is not apparent to me that, before the motion judge, class counsel pressed the application of the base fee/multiplier analysis, which they now allege he erred in failing to apply. The notices to the class members and the notice of motion filed with the motion court are more consonant with the application of s. 32(4) than with s. 33(7) of the CPA.

[75] The notice of certification, drafted and advertised by class counsel, advised the class members that the agreement "which must be approved by the court to be effective, provides for a contingency fee of at least one-third of the amount recovered in the class action." The notice of the approval hearing stated that "[c]lass counsel will ask the court to approve their fee agreement with the plaintiffs and award $27.5 million in cash in full payment of the plaintiffs' obligations to class counsel." Neither indicates that counsel would apply to the court for the application of a multiplier to their base fee.

[76] Paragraph 1(d) of the notice of motion sought an order "approving the agreements as to fees, disbursements and taxes between [the representative plaintiffs] and Harvey T. Strosberg ('Agreements')". Paragraph 1(e) sought an order "fixing the amount of class counsel's fees at $27.5 million". The notice of motion refers generally to both ss. 32 and 33, but does not seek to have counsel's base fees increased by a multiplier, as contemplated by s. 33(7). Nowhere in the notice of motion is there a reference to either the base fee or a multiplier. The supporting affidavits filed on the motion do not refer to a multiplier.

[77] Finally, the motion judge made no reference to any argument by the appellants that he was bound to apply the base fee/multiplier analysis, as would be expected had the argument been advanced. He only referred to the position in the appellants' notice of motion and notices to the plaintiff class that they were seeking a specific dollar amount – namely $27.5 million.

[78] I would not give effect to this ground of appeal. Before moving on, I caution that these reasons should not be taken to indicate acceptance of the appellants' submissions on how s. 33(7) should be interpreted and applied.

Reasonableness of class counsel fees

[79] I turn then to the second leg of the appellants' argument, that, irrespective of the mode of analysis used, the quantum of fees allowed by the motion judge was too low. The appellants submit that the amount of $14.5 million is inadequate to achieve the policy objective of providing incentives for lawyers to undertake complex and protracted class actions, and that the amount is not fair and reasonable compensation given the work they performed, the risk they undertook and the success they achieved.

[80] At para. 24 of his reasons, the motion judge set out the general principles that apply to the assessment of class counsel fees:

> 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.

[81] There can be no quarrel that these factors are relevant in assessing the reasonableness of class counsel fees. These factors have been applied in a number of cases, including those cited by the motion judge.

[82] The motion judge found that the class proceeding dealt with matters of high factual and legal complexity, had a substantial monetary value, was important to the class, and that class counsel performed with competence and admirable skill. The motion judge also considered that class counsel had assumed a high risk in taking on the class proceeding and he recognized that that risk should be rewarded. He also attached weight to the fact that "Class Counsel's compensation must be sufficient to provide a real economic incentive to lawyers to take on a class proceeding and to do it well".

[83] The motion judge, however, refused to accept class counsel's contention that they deserved fees in the amount of $27.5 million for achieving a settlement worth $120 million because, in his view, the settlement was not worth $120 million. The motion judge seemed taken aback by class counsel's insistence that the settlement had a value of $120 million as he "would have thought it obvious that the settlement in the case at bar, which involves cash, coupons, and releases, is not worth $120 million". He repeated that the settlement was not worth $120 million "for the purposes of the contingency fee

agreement". He described the result as "adequate or satisfactory" and said it was "to spin a silk purse from a sow's ear to suggest that the result was excellent." He added that an objecting class member "was right in expressing disappointment about the settlement".

[84] The motion judge had a solid foundation for finding that the settlement did not have a value of $120 million. To begin with, the motion judge did not regard the transaction credits as having a benefit to the class members equal to their face value. He was sceptical that there would be much take-up and stated his view that the most likely beneficiaries would not be class members but future Money Mart customers. The implication that class counsel do not earn a premium in fees by obtaining benefits for persons outside the class is sound.

[85] The motion judge also observed that the transaction credits could be viewed "as a business promotion scheme under which Money Mart discounts its price and makes less profit from a profitable transaction" but "obtains business it would otherwise not have obtained". He also drew attention to the fact that the settlement provided that a maximum of five dollars in transaction credits could be used per transaction. This meant that class members would have to enter into a number of further transactions with Money Mart repeatedly in order to exhaust their transaction credits.

[86] The motion judge was not impressed with class counsel's argument that the transaction credits should be considered to have marketable value because Money Mart's competitors would likely honour the transaction credits. That competitors would find

acceptance of the transaction credits attractive confirmed that credits were a business promotion scheme for more payday loans, in the motion judge's mind.

[87] The motion judge, in making the point that the transaction credits were not equivalent to cash, surmised that class counsel would likely not accept an assignment of $27.5 million worth of transaction credits as payment of their fees. In my view, this was a fair inference based on class counsel's position that the entire cash remnant of $27.5 million should be devoted to paying their fees rather than them taking a share of the "marketable" transaction credits. The motion judge concluded that it was "hard to paint [the transaction credits] as a success for the mission of this class proceeding."

[88] The motion judge also substantially discounted the value of the debt forgiveness component of the settlement. He considered that payday loans were uneconomical to recover given their small value and the expense of collecting them. The evidence indicated that much of the debt forgiveness component of the settlement released debts that were already written off or reserved in Money Mart's financial records.

[89] The motion judge did recognize that the $30.5 million in cash that the settlement provided was solid value, though he observed it "should be present-valued because it is being paid in instalments over approximately two and a half years and there is no interest until the payments are due".

[90] These matters provided an abundant basis for the motion judge's finding that the settlement was not worth $120 million. The appellants' arguments at the appeal hearing

and in their written submissions were all premised on the settlement being worth $120 million. However, they did not establish that the motion judge made any error in arriving at the clear finding of fact that it was not. The appellants complain that the motion judge made no finding as to what the settlement was worth. The record before the motion judge, compiled by the appellants, provided a poor basis for doing so. There was no independent expert opinion on the value of the transaction credits or the debt reduction.

[91] Besides finding that the settlement was worth less than the appellants contended, another important factor in the motion judge's approval of the settlement was the $13 million in cash that would become available for distribution to the class upon class counsel fees being fixed in the amount of $14.5 million instead of the $27.5 million that the appellants sought.

[92] Placing importance on providing fair and reasonable compensation to counsel and providing incentives to lawyers to undertake class actions, as the motion judge noted, does not mean that the court should "ignore the other factors that are relevant to the determination of a reasonable fee." In this light, it was an important aspect of the motion judge's analysis that the settlement he approved provide some cash for distribution among the class members. The motion judge stressed that the settlement he was approving was one in which "Class Counsel's fee does not take up all the cash portion of the settlement".

[93] The motion judge found that "[h]aving regard to all the factors, an all-inclusive award of $14.5 million is a reasonable fee in the circumstances of this case." He concluded that $14.5 million was "ample compensation and a reasonable fee" and there was "no necessity to award more having regard to the success achieved and the risk taken".

[94] The appellants submit that the motion judge made errors in his analysis of specific issues. I agree he may have overstated one or two things, but this does not undermine his central reasoning and the conclusion that he reached.

[95] For example, the appellants submit that the motion judge's comment that the settlement failed to achieve behaviour modification is unreasonable because the section of the *Criminal Code* prohibiting criminal rates of interest was amended in May 2007 to exempt from its application small short-term loans in provinces that enact legislation to regulate the payday loan industry. At the time of the hearing before the motion judge, British Columbia, Manitoba, New Brunswick, Nova Scotia, Prince Edward Island, Saskatchewan and Ontario had introduced such legislation. The provisions of Ontario's *Payday Loans Act, 2008*, S.O. 2008, c. 9, which regulate the cost of payday loans borrowing, came into force on December 15, 2009. The appellants make the point that it was impossible for the settlement to achieve "behaviour modification" because the new legislation legalized the defendants' business practices. The motion judge erred, they say, by minimizing the success they achieved on the basis that the settlement did not accomplish "behaviour modification".

[96] The motion judge could have explained more clearly why he commented that "there was not a peep about behaviour modification" during the settlement approval motion. As I understand his reasons, the point he was making is that the settlement, by providing coupons for the defendants' services, provided support for the payday loan industry and hence diminished the degree of success achieved. The settlement did not sever the business relationship between the defendants and the class members who receive transaction credits under the settlement but rather continued that business relationship. I gather this because, after observing there was no behaviour modification, the motion judge said,

> [B]ut for the members of the Transaction Credit group, if they are to obtain a benefit under this settlement it is by abandoning the original purposes of this class action, which was to enjoin, not encourage, payday loans pricing policies. Once again, it is hard to paint this as a success for the mission of this class proceeding.

[97] I have no doubt that the motion judge did not expect that a settlement or judgment could have resulted in the modification of the defendants' business practices. The motion judge was aware of the new legislation. He set out the evolution of the legislative changes and noted the irony that the defendant's charge for the representative plaintiff's loan was now apparently legal in Ontario and that, indeed, Money Mart could even charge him an additional two dollars. The motion judge could have meant nothing more than that there was no "behaviour modification" as far as these members of the class were concerned

because the scheme of the settlement destined them to continue to borrow payday loans from the defendants on essentially the same, albeit now unquestionably legal, terms.

[98] In any event, I do not see the motion judge's comment about the lack of behaviour modification as the foundation for his conclusion that the value of the settlement was much less than the claimed $120 million.

[99] The appellants also take strenuous and justified umbrage to the motion judge's description of the settlement as the self-serving design of class counsel. The motion judge said,

> With respect to the factor of the class' ability to pay, the settlement has been structured in a way that the class is able to pay Class Counsel's fee, but that is the self-serving design of Class Counsel, and as I have already explained, the class would not have been able to pay the contingency fee if Class Counsel had been able to enforce the contingency fee agreement based on its own self-serving evaluation of the value of the settlement.

[100] I agree with the appellants that a court ought not to attribute self-interest to counsel in the absence of a proper evidentiary basis. There was, in this case, no evidentiary basis for the modifier "self-serving". Regrettably, the risk of such an overstatement is increased in a non-adversarial motion brought by class counsel that requires the court to depart from its traditional neutrality and take on an active role to protect the interests of the class. In fulfilling that active role, the motion judge could allude to the fact that the settlement was structured to provide for a cash payment of $27.5 million and that class counsel was seeking approval of fees in the amount of $27.5

million, and highlight that this would leave the class members only with transaction credits and debt forgiveness. His use of the modifier "self-serving" in making that observation was unfortunate.

[101] None of the isolated comments that the appellants objected to provide any reason to interfere with the motion judge's exercise of discretion in setting class counsel fees.

[102] The motion judge's determination was discretionary. The appellants have not established any basis for interfering with his determination that $14.5 million was a fair and reasonable fee for class counsel in this case.

The fees of PWC and Mr. Anand

[103] Class counsel retained PWC and Mr. Anand to perform certain work on the basis that they would only be paid if and when the action was successful and then on the same basis as class counsel. For example, PWC agreed to the following:

> We understand that our fees will be payable on a contingency basis. We will accumulate our hours. In the event that your action is successful when you achieve either a settlement or an award from the court, our fees will be payable on a pro rata basis with payment of your own fees and the fees of other members of your team. To this end, our usual fees for time incurred would attract the same multiplier applied to usual hourly rates as the multiplier applied to each of your team's members.
>
> Our expenses incurred will also be on a contingency basis. They will be paid, pro rata, with the disbursements of the members of your team from any proceeds received before distribution of any fees to the team members.

> In the event that your action does not result in a settlement or an award from the court, no amount will be payable to us on account of fees for time incurred or expenses.

[104] The motion judge decided that the fees of PWC and Mr. Anand would be treated as disbursements of class counsel. The appellants submit that the motion judge erred by failing to approve PWC and Mr. Anand's fees in an amount consistent with the contingency basis on which they were retained. The time value, taxes and disbursements for the work of PWC amounted to $835,629.03; those of Mr. Anand amounted to $16,800. Though the motion judge treated these amounts as disbursements incurred by class counsel, class counsel say they remain contractually obligated to pay these service providers on the basis on which they were retained.

[105] By way of relief, the appellants seek an order that a premium be added to the fees of PWC and Mr. Anand in proportion to the premium added to the fees of the appellants. The unstated premise of this request seems to be that treating the consultants' fees as contingency fees would enlarge the aggregate quantum of fees allowed. I do not agree that this would necessarily be so.

[106] Insofar as the premium granted depends on the risk undertaken in a contingency case, the issue is the quantum of that risk, not the number of risk-takers who have shared it. It is illogical that the total amount of the premium allowed for a given total risk should be higher because there are more risk-takers. For example, the premium allowed should not increase because class counsel in this case was comprised of four law firms. Thus, if the premium allowed to class counsel is predicated on the risk of counsel's fees and

disbursements, granting service providers a contingency premium should result in a redistribution of the premium rather than an enlargement of the premium. After all, the risk undertaken by class counsel is diminished by the amount of risk the service providers undertake when they are retained on a contingency basis. If the CPA permits the court to allow contingency premiums to service providers, the appellants, to obtain an increase in the total premium allowed, would have to demonstrate that the motion judge did not base his determination of the premium on the total risk of undertaking the case, including the disbursements for the services of PWC and Mr. Anand.

[107] As I mentioned earlier, the motion judge considered it unwise to determine the general question whether the CPA could be interpreted to permit contingency fee arrangements with service providers on what was "essentially an *ex parte* motion where the voices against any change are not being heard". He decided to treat the accounts of PWC and Mr. Anand as disbursements in this case because he was troubled by the appellants' contention for four reasons. First, as non-lawyers, the service providers could not be appointed class counsel. Second, the CPA does not envisage contingency fee agreements with anyone other than properly appointed class counsel. He pointed out that s. 32(2) of the CPA refers to an agreement respecting fees and disbursements "between a solicitor and a representative party". Third, it was not clear that the arrangement complied with the Law Society's Rules of Professional Conduct. Rule 2.08(8)(a), for example, provides that a lawyer shall not "directly or indirectly share, split, or divide his or her fees with any person who is not a licensee". And fourth, the arrangement with the

non-lawyers might well be champertous. The motion judge pointed out that *An Act Respecting Champerty* was still in effect.

[108] I agree that the appellants placed before him a fundamental question with far-reaching implications for the future of class actions, and that it is usually desirable to hear the perspectives of all the interests that might be affected before deciding such questions.

[109] While that may be generally so, in my view the answer to the far-reaching question raised in this case is straightforward. The CPA does not contemplate contingency fee arrangements with persons other than class counsel and does not give the court the jurisdiction to allow a service provider a premium on its fees.

[110] Section 33(1) allows a contingency agreement "between a solicitor and a representative party". Section 32(1) requires all agreements between a solicitor and a representative party, including contingency agreements, to meet certain formal requirements. Section 32(2) interferes with freedom of contract by providing that all agreements between a solicitor and a representative party are unenforceable unless approved by the court. If contingency agreements with service providers are allowed under the CPA as the appellants contend, I find it odd that the Act does not set out formal requirements for such agreements or make them unenforceable unless approved by the court.

[111] Section 33(7), which the appellants wish to have applied in this case, could not be clearer. Read in context, s. 33(3)'s definition of "base fee" clearly refers to the hours

worked by counsel multiplied by counsel's hourly rates. The only multiplier that the court has jurisdiction to grant under s. 33(7)(b) is one that results in a fair and reasonable compensation to the solicitor for the risk undertaken. Under s. 33(7)(c) the court has jurisdiction to determine the amount of disbursements, but these are disbursements "to which the solicitor is entitled". The text of s. 33 is not concerned with fair and reasonable compensation to others for risk incurred in undertaking work on the action on a contingency basis.

[112] Section 32(4) may not be as rigidly structured, but still provides the court with authority to determine the amount owing to the solicitor in respect of fees and disbursements. As the appellants argue in their supplementary submissions, the application of the two sections should theoretically lead to roughly the same result – fair and reasonable compensation for class counsel. I do not read the broader more general authority granted to the court by s. 32(4) as extending to allow a premium to service providers in order to achieve fair and reasonable compensation for them for the risk undertaken in the provision of their services.

[113] The grammatical and ordinary sense of ss. 32 and 33, read in the context of the entire statute and considered in light of its purpose, leads me to conclude that the legislature did not intend to grant the court jurisdiction to allow service providers a premium for providing their services on a contingency basis. The legislature's intent was to authorize the court to allow class counsel a premium or multiplier for the risk incurred by investing their time and underwriting disbursements, if they take on the case on a

contingency basis. The representative plaintiff's selection of counsel who is prepared and able to carry the case on a contingency basis is relevant to the court's determination whether the plan for the proceeding sets out a workable method of advancing the proceeding on behalf of the class.

[114] As I find the text of the current legislation to be clear, I do not find it necessary to deal with the other legal and policy arguments advanced by the appellant. Suffice it to say I agree with the motion judge that what the appellants seek "would amount to a fundamental change to the design of the Act". The policy issues are not confined to access to justice considerations, the only one identified by the appellants. For example, the broad proposition the appellants assert, that contingency agreements with service providers should be allowed, would apply to expert witnesses and others whose work products are tendered in evidence. This could give rise to concerns about the quality and reliability of the work product.

[115] I might add, I do not anticipate that this decision will have the dire impact on access to justice that the appellants assert. In the almost 20 years the CPA has been in effect, a great number of class actions have proceeded without the court allowing premiums to service providers.

The fees of FMC and Prof. Krishna

[116] Class counsel also retained FMC and Prof. Krishna to perform certain specialized discrete tasks. The total time value of the work they performed was $32,002.96 and

$10,237.50, respectively. Class counsel's agreements with them are not in the record, but the motion judge found that they too were retained by class counsel on a contingency basis. Class counsel requested that the multiplier or premium the motion judge granted to class counsel also be applied to the fees of FMC and Prof. Krishna. The motion judge refused this request and treated their fees as disbursements incurred by class counsel. On appeal, the appellants ask that the order of the motion judge be varied to treat Prof. Krishna and FMC as part of class counsel, and that a premium be added to their fees in proportion to the premium added to the fees of the appellants.

[117] Different considerations apply to the work of FMC and Prof. Krishna because they are lawyers. The same concerns of fee splitting and champerty do not arise in relation to lawyers who have actually worked on the client's file.

[118] The appellants' position is that FMC and Prof. Krishna became part of the class counsel team and their fees should be treated as class counsel fees. They say that the motion judge refused to recognize them as class counsel on the erroneous belief that court approval was necessary for any change in the plaintiff's representation. The motion judge did note that the litigation plan that the representative plaintiff had approved by the court defined class counsel to be the four law firms Sutts, Strosberg, Paliare Roland, Koskie, Minksy, and David Stratas of Heenan, Blaikie.

[119] The appellants rely on this court's decision in *Fantl v. Transamerica Life Canada* (2009), 95 O.R. (3d) 767 (C.A.) to submit that no court approval was required to enlarge

the class counsel group to include FMC and Prof. Krishna. *Fantl* merits closer examination. In *Fantl*, the law firm acting for the representative plaintiff in a class action split up and its former members disputed who should continue as class counsel. The narrow issue was whether the representative plaintiff could choose to retain one of the successor firms and serve a notice of change of solicitors without court approval. Winkler C.J.O. writing for this court said that he did not view it "as necessary for the plaintiff to seek and obtain approval of the court for every decision involving the selection or change of counsel." Yet he immediately added, "However, I am of the view that the case management judge charged with responsibility for the supervision of the proceeding should be immediately and directly notified of such a change."

[120] *Fantl* is of little assistance to the appellants in this case.

[121] First, in this case there is no indication the representative plaintiff made a decision to change the makeup of the class counsel team indicated in the litigation plan. In *Fantl* what was in issue was the client's choice of new counsel. Winkler C.J.O. said at para. 44 of *Fantl* that "[t]he representative plaintiff in a class action lawsuit is a genuine plaintiff, who chooses, retains and instructs counsel and to whom counsel report." I can see no indication in the record that the representative plaintiff made or participated in any decision to retain FMC and Prof. Krishna as class counsel in this action. While counsel may require assistance and may incur disbursements on the clients' behalf, clients decide who are their counsel.

[122] Second, if there was a change in the composition of class counsel, the court was never immediately and directly notified of the change as *Fantl* indicates is required.

[123] Moreover, the record does not indicate that Prof. Krishna or FMC were intended to have a solicitor-client relationship with the representative plaintiff. It is not clear to me in what sense FMC and Prof. Krishna are said to be class counsel except for the purpose of being entitled to the same premium allowed to class counsel. I briefly review the relevant portions of the record.

[124] The affidavit of Patricia A. Speight, sworn February 1, 2010, in support of the motion under the heading "Class Counsel" states that "[t]he four law firms acting on behalf of the Class are SS [Sutts, Strosberg], Heenans [Heenan Blaikie], PR [Paliare Roland Rosenberg Rothstein] and KM [Koskie, Minksy]." It adds that other lawyers from other firms "assisted class counsel as required".

[125] The affidavit goes on to describe the role fulfilled by each of Sutts, Strosberg, Heenan Blaikie, Paliare Roland and Koskie, Minksy, but does not mention Prof. Krishna or FMC in this section. The motion material includes costs briefs for Sutts, Strosberg, Heenan Blaikie, Paliare Roland and Koskie, Minksy setting out the supporting details for their fees and disbursements. The motion material before the motion judge did not contain costs briefs for FMC and Prof. Krishna. Without details of their rates and hours worked, it was not possible to treat their fees as class counsel fees under the CPA.

[126] In a later section of Ms. Speight's main affidavit under the heading "Class Counsel Obtained Advice From Others" the affidavit sets out that "class counsel expanded the counsel group to include Professor Vern Krishna who is an expert in international taxation". In the same paragraph, it indicates that a U.S. insolvency firm was also retained and that Prof. Krishna and the U.S. counsel had "reviewed and approved the parts of this affidavit stating their information, opinions and beliefs." The affidavit does not mention FMC.

[127] The details of FMC's retainer are set out in the supplementary affidavit of Ms. Speight sworn February 11, 2010:

> Money Mart had entered into a settlement agreement with counsel in an Alberta payday class action at the time that the Ontario action was structured as a national class. A class member, resident in Alberta, retained SS to file an objection to the proposed Alberta settlement. Mr. Strosberg attended in Alberta and met with plaintiffs' counsel in the Alberta action. As a result of this meeting, Alberta counsel did not proceed to tender the settlement to the Alberta court for approval. Money Mart then sued the objector and sought damages against him and plaintiffs' counsel in Alberta.… [Class counsel] arranged for Fraser Milner to act on behalf of the objecting class member … with the responsibility of defending the action for the objector….

[128] The material indicates that class counsel used FMC and Prof. Krishna as consultants to perform discrete, specialized tasks. FMC was retained on a different action to represent an individual other than the representative plaintiff in this case. Prof. Krishna's work product seems to have been treated like that of an expert witness on international taxation issues.

[129] The appellants claim that paragraph 5(d) of the retainer agreement allowed them to include FMC and Prof. Krishna in the class counsel group. I disagree. Paragraph 5(d) authorizes the Solicitor to:

> use such persons or resources from the firms Paliare Roland LLP, Koskie Minsky LLP, Heenan Blaikie LLP and any other firm as the Solicitor deems necessary and their services shall be deemed to be provided as members of the Solicitor's law firm.

[130] I do not read the paragraph as purporting to allow class counsel to unilaterally establish a solicitor-client relationship on behalf of the representative plaintiff with any person or resource "used" by class counsel. If the paragraph does intend to do so, it would be unacceptable as it is inconsistent with Winkler C.J.O.'s observation in *Fantl* that the representative plaintiff is a genuine plaintiff, who chooses, retains and instructs counsel and to whom counsel report. Whatever the import of this paragraph, to the extent it deals with fees, it is part of the fee agreement that was not approved and is not enforceable.

[131] The appeal, which is brought on behalf of class counsel, indicates the appellants are the four law firms Sutts, Strosberg, Heenan Blaikie, Paliare Roland and Koskie, Minksy. Prof. Krishna and FMC are not included as part of class counsel for the purposes of this appeal.

[132] The motion judge had the general discretion to determine the allowable fees and disbursements in this case. As the material before him did not show that the

representative plaintiff made or was even aware of any change in the composition of counsel representing him, or that FMC and Prof. Krishna functioned in a solicitor-client relationship with him, I see no error in his treatment of the fees of FMC and Prof. Krishna as disbursements rather than as part of class counsel's base fee.

Compensation for the representative plaintiff

[133] The motion judge agreed that the representative plaintiff's "contribution to the class action exceeded that which is normally expected of a representative plaintiff" and granted him compensation in the amount of $3,000 as requested by class counsel. However, without discussion, he ordered that the representative plaintiff's compensation be paid out of class counsel fees. The appellant argues that the motion judge erred by not ordering the representative plaintiff's compensation to be paid out of the settlement fund.

[134] In advancing this argument, class counsel relied upon the decision of Sharpe J. in *Windisman v. Toronto College Park Ltd.* (1996), 3 C.P.C. (4th) 369 (C.J. (Gen. Div.)). Counsel did not draw the court's attention to the more recent decisions of Cullity J. in *Garland v. Enbridge Gas Distribution Inc.* (2006), 56 C.P.C. (6th) 357 (Ont. S.C.) and *McCutcheon v. Cash Store Inc.*, [2008] O.J. No. 5241 (S.C.), and Cumming J. in *Walker v. Union Gas Ltd.* (2009), 74 C.P.C. (6th) 366 (Ont. S.C.). It seems that the most that can be said is that judges of the Superior Court have different approaches with respect to the payment of the representative plaintiff's fees. This court has never dealt with the issue.

[135] I take the view that as a general matter the representative plaintiff's fee should be paid out of the settlement fund and not out of class counsel fees. Class counsel fees are predicated on the work that class counsel have done for the class. Allocating a part of that fee to a layperson, especially a representative plaintiff, raises the spectre of fee splitting, a concern the motion judge expressed at an earlier point in his reasons.

[136] In the absence of any reason for providing otherwise, I conclude that the $3,000 compensation for the representative plaintiff should be paid out of the settlement fund. I would vary the motion judge's order accordingly.

Conclusion

[137] I would allow the appeal in part by varying para. 31 of the motion judge's order to provide that the compensation for the representative plaintiff be paid out of the settlement fund. I would dismiss the appeal in all other respects.

"R.G. Juriansz J.A."
"I agree M.J. Moldaver J.A."
"I agree R.P. Armstrong J.A."

RELEASED: March 28, 2011