



**RAIKES J.**

- [1] Plaintiffs' counsel seek approval for an interim payment of legal fees and disbursements from monies recovered from a settlement with the Tokin defendants. Specifically, counsel seek approval of the following payments:
- a. A contingent legal fee of \$725,00 plus HST which is 25% of the settlement amount of \$2.9 million; and
  - b. A partial payment of \$225,000 plus applicable taxes on account of disbursements incurred to date.
- [2] Plaintiffs' counsel in this action are working cooperatively with two other firms in Quebec and British Columbia to prosecute three parallel class proceedings against the defendants.
- [3] The settlement with the Tokin defendants including the amount to be paid by the Tokin defendants is subject to approval by the three courts. Assuming the settlement with the Tokin defendants is approved, this motion for an interim payment of fees and disbursements is also conditional on approval by all three courts.
- [4] I need not repeat the background information concerning the nature and history of the action in this endorsement. They are set out in my decision approving the settlement with the Tokin defendants which was just released.

**Retainer Agreement**

- [5] Counsel was retained by the plaintiffs pursuant to a contingency fee agreement by which counsel is paid only in the event of success in the action. The agreement expressly provides for a contingency fee based on a percentage of any settlement achieved plus disbursements and applicable taxes. The maximum percentage payable is 30% of the value of the result obtained for the class in the event of success, subject to court approval.
- [6] Contingency agreements are expressly permitted in s. 33(1) of the *CPA Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("*CPA*").
- [7] The retainer agreement in the Ontario action meets the requirements in s. 32(1) of the *CPA* in that:
- a. It is in writing;
  - b. It states the terms under which fees and disbursements shall be paid;
  - c. It provides an estimate of the expected fee, whether contingent on success in the class proceeding or not; and

d. It states the method by which payment is to be made - a lump-sum percentage subject to approval of the court.

- [8] The retainer agreements define “success” to include settlement with any of the defendants that provides a benefit to some or all class members. The Tokin settlement satisfies the test for “success” in the retainer agreements.
- [9] Counsel have paid all necessary disbursements in accordance with the terms of the retainer agreement. To date, the firms have collectively incurred and carried approximately \$472,000 in disbursements.

#### **Interim Fee Awards**

- [10] No fee can be paid to class counsel absent court approval: *CPA s. 32(4)*. The court may grant an interim fee award on a partial settlement before the matter has reached its ultimate conclusion as against all named defendants: *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2752 at paras. 13 and 16.
- [11] In the exercise of the discretion to approve an interim fee paid to class counsel, the court may take account of unusual circumstances including,
- a. whether counsel would receive a substantial premium on an interim basis: *Mancinelli v. Royal Bank of Canada*, 2016 ONSC 6953, 2017 ONSC 2324 and 2018 ONSC 4206;
  - b. whether settlement recoveries by the class are contingent and may be reduced in future by, *inter alia*, a “most favoured nation” clause: *Eidoo v. Infineon Technologies AG*, 2013 ONSC 853 at paras. 21 and 23; and
  - c. whether very substantial recoveries have been achieved before construction of a distribution plan for the settlement funds: *Eidoo*, paras. 57 and 68.
- [12] In this case, there are no unusual circumstances. There is no premium to class counsel as class counsel’s docketed time to date exceeds the fee request. There is no favoured nation clause. There is no future event that will reduce the quantum of the settlement amount. It is premature to construct the distribution plan at this point.
- [13] Further, there are advantages to an interim fee award that arguably benefit the class:
- a. the advance of monies to counsel at this stage provides financial resources to continue the action;
  - b. the advance encourages counsel to push the litigation forward efficiently and effectively to settlement or other resolution; and
  - c. the payment is consistent with the terms of the retainer agreement and in keeping with the reasonable expectation of clients.

[14] I find that it is appropriate and reasonable to exercise my discretion to permit an interim fee approval including disbursements. I note that it is well-settled that class actions and the benefits they provide through access to justice depend largely on the willingness of class counsel to accept the risks of such litigation through contingency agreements. Interim fee awards encourage and thereby promote both the willingness to take on that risk and efficiency by class counsel in the prosecution of that litigation.

#### **Quantum of Interim Fees**

[15] In determining the reasonableness of class counsel fees, courts have traditionally considered the following factors:

- 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 fees; and
- j. the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.

(See *Osmun*, para. 23; *Abdulrahim v. Air France*, 2011 ONSC 512 at para. 8.)


[16] The assessment of reasonableness is substantially the same for interim fee requests as it is for fee requests on final settlements: *Airia Brands Inc. v. Air Canada*, 2015 ONSC 6367 at para. 10.

[17] Having regard to the above noted factors, I find as follows:

- a. The settlement provides both monetary and tactical benefits to the class through disclosure and cooperation by the Tokin defendants;
- b. It is impossible to quantify the tactical benefits at this stage;
- c. Counsel have taken on significant responsibility in the carriage of this litigation;

- d. The litigation itself carries significant risk including the risk that it will not be certified;
- e. Counsel have agreed to indemnify the plaintiffs against adverse costs awards which is a significant additional risk, given the number of defendants, the experience of counsel representing those defendants and the issues engaged in this litigation;
- f. The matters in issue are important to the plaintiffs and class members;
- g. The issues raised by the litigation are complex;
- h. The scope of the claim is broad;
- i. The representative plaintiffs support the fee approval request;
- j. The plaintiffs agreed to interim fee requests by the terms of the retainer agreement;
- k. There is an undoubted opportunity cost to plaintiffs' counsel although the full extent of same cannot be known at this point;
- l. The amounts requested are consistent with the terms of the retainer agreement; and
- m. The amounts requested are reasonable having regard to the benefits achieved, the benefits such an award will provide to ongoing carriage of the action and the percentages permitted in similar cases.

[18] Therefore, the amounts requested in para. 1 above are, in my view, fair and reasonable, and are hereby approved subject to approval in Quebec and British Columbia.

  
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Justice R. Raikes

## Schedule "A"

Counsel, for the Hitachi Defendants – Katherine Kay, Eliot Kolers and Mark Walli

Counsel, for the KEMET Defendants – Davit Akman and Denes Rothschild

Counsel, for the Fujitsu Defendants – J. Thomas Curry, Monique J. Jilesen and Paul-Erik Veel

Counsel, for the Nichicon Defendants – Dr. Neil Campbell, Jon Wypych, Joan Young and Sidney Elbaz

Counsel, for the Rubycon Defendants – W. Michael Osborne, Derek Ronde and Alexandra Murphy

ROHM Defendants – Paul Martin and Vera Toppings

Counsel, for the Panasonic and Sanyo Defendants – Emrys Davis, John Rook, Melanie Aitken and Ian Thompson

Counsel, for the Nippon Chemi-Con and United Chemi-Con Defendants – Gordon Capern, Michael Fenrick and Daniel Rosenbluth

Counsel, for the AVX Defendant – Eric Dufour, Pascale Cloutier and Brian Whitwham

Counsel, for the Matsuo Defendant – Adam Goodman, Craig Dennis and Chloe Snider

Counsel, for the Holystone Defendants – Donald Houston, Peter Leigh and Gillian Kerr

Counsel, for the NEC Tokin Defendants – Eric Hoaken and Ian Matthews

Counsel, for the Samsung Defendants – Litsa Kriaris and Robert Kwinter

Counsel, for the Elna Defendants – David T. Neave, Kevin Wright and Todd Shikaze

Representative Director of the Toshin Kogyo Defendant – Kenji Kasahara

FPCAP Electronics - Unrepresented