CITATION: Barwin v. IKO 2017 ONSC 3520
COURT FILE NO.: CV - 09-00005758-CP
DATE: 20170608

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
KEVIN BARWIN	Linda Visser, for the Plaintiff
Plaintiff	
- and -	
IKO INDUSTRIES LTD, CANROOF CORPORATION INC. AND I.G. MACHINE & FIBERS LTD.	S. Gordon McKee & Jill Lawrie, for the Defendants
Defendants	
	HEARD: May 9, 2017

APPROVAL OF CLASS ACTION SETTLEMENT

Baltman J.

Introduction

[1] This nationally certified class action alleges that the Defendants manufactured and sold organic roofing shingles that are defective and prone to

premature failing. For a subclass of residents in five provinces, this action also advances claims based on the respective provincial consumer protection acts.

[2] Related class proceedings have been commenced in Quebec and Alberta. The litigation is being pursued on a national basis in Ontario.

[3] Parallel class actions are underway in the United States. The litigation there is proceeding slowly and has involved numerous motions and appeals. The outcome there remains uncertain.

[4] The Canadian action was commenced in December 2009 and certified by me in June 2012, following a vigorously contested motion. Leave to appeal the certification decision was denied in June 2013. After prolonged discoveries and negotiations the parties reached a settlement in principle on May 28, 2016. Over subsequent months they negotiated the specific terms of the settlement, and executed an agreement on January 13, 2017.

[5] The Defendants have agreed to pay an all-inclusive sum of $7.5 million to settle this action. They will also provide information collected through their warranty process to the Claims Administrator to help with the administration of settlement claims. The Plaintiff seeks approval of the proposed settlement and class counsel seek approval of their fees, disbursements and taxes.

[6] I conducted the approval hearing on May 9th, 2017. The motion was supported by the Defendants and by Mr. Barwin, the representative plaintiff. Two representatives from RicePoint Administration Inc., the proposed administrator, also attended. Ten individuals raised objections, of whom five attended the hearing. The details of their objections are set out below.

[7] After reviewing the evidence and hearing the submissions of counsel, I reserved my decision on both the settlement and fees. For the reasons that follow, I have now approved the proposed settlement and fee plan.

[8] At various points in these reasons some of the submissions made by Class Counsel in their factum have been adopted and repeated, in whole or in part.

Factual Background

[9] It is estimated that up to 5 million homes in Canada are covered with IKO's organic shingles. IKO stopped selling organic asphalt shingles in 2008 and there are no companies in the industry still making organic asphalt shingles; fibreglass shingles are now the preferred technology, believed to result in longer lasting and better performing shingles.

[10] The plaintiff in this action alleged that the defendants provided negligently designed and manufactured shingles that, under normal conditions, fail prematurely. He claimed that he had to replace IKO shingles in order to avoid water penetration into the interior of his home. He asserted a claim under the warranty but was dissatisfied by IKO's refusal to cover the costs of labour.

[11] Over the 30 years that IKO has been supplying shingles it has provided a warranty for manufacturing defects resulting in leaks. Approximately 1% of homeowners with IKO shingles - i.e. 50,000 people - have made a claim pursuant to the warranty. The warranty has two stages: an initial "iron clad" period (from 1-5 years, depending on the shingle and year of manufacture) during which IKO will pay for both the replacement shingles and the costs of labour to repair or replace them; thereafter, IKO will pay a pro-rated amount of the current value of the singles, with no contribution toward labour costs[1]. Under both scenarios, IKO only pays in respect of the shingles that are currently failing. If the homeowner acts proactively in replacing the entire roof, s/he bears the additional costs.

[1] Until 1997, IKO also provided prorated labour.

[12] In order to obtain warranty benefits, a claimant must first release IKO from any and all claims. From 2006 onward the release expressly states that it is made without any admission of liability.

[13] IKO administers a claims process for homeowners who have complaints about IKO shingles. When contacted by a claimant, IKO asks for proof of purchase to ensure the shingles complained of are actually IKO shingles. The homeowner is also asked to provide some limited information about the condition of his or her shingles. Although the warranty is expressly limited to defects that result in water leaks, the majority of claims do not involve a leaking roof, and a number relate to issues that are expressly excluded in the warranties (such as variations in colour).

[14] The undisputed evidence is that IKO will accept coverage under the limited warranty if the warranty claim discloses a valid problem with the shingles and there is no obvious non-manufacturing cause for shingle failure. In many cases where homeowners have not established that there was a manufacturing defect resulting in a leak, IKO offers these homeowners various forms and amounts of compensation in full and final settlement of their claims relating to the shingles at issue. Compensation can include replacement shingles, cash settlements, cash to pay for the labour to replace the shingles, as well as unique offers based on individual facts.

[15] In my ruling dated July 9, 2010, I stipulated that any release provided to a homeowner must notify him/her of the pending class action – for both materials and labour – and that if s/he accepts the compensation offered, s/he may give up the right to participate in the lawsuit. The homeowner was further invited to seek legal advice and given the toll free number for plaintiff's counsel.

The Settlement Terms

[16] Based on sales and warranty information, plaintiff's counsel estimate that there will be 8,000-9,000 claims. The settlement provides for a settlement fund, net of legal fees and expenses, of approximately 4.72 million dollars, to be distributed through two rounds of payments and a possible third payment, as follows:

(a) An initial round of payments shortly after the settlement becomes effective;

(b) A final payment after the completion of the claims period (December 31, 2023); and

(c) To the extent that monies remain after the final payment, a "residual" payment will be made.

[17] The initial payment fund and final payment fund will be distributed proportionally based on the claim value of the individual Class Member's claim as against the claim value of all approved claims. The exact amount to be paid to any individual Class member will depend on the number of claims filed and the value of the claims, and will therefore not be known until the end of the claims process.

[18] The "claim value" will be based on the number of points assigned to the claim, subject to the maximum amounts for "released" claims and Interior Damage claims. Generally speaking, the number of points reflects whether the Class Member received warranty benefits and/or experienced qualifying damage. Qualifying damage includes water leakage, cracked shingles, or granular loss.

[19] The dollar value of each point will be calculated by dividing the available funds by the number of points. If the dollar value per point in the final payment exceeds the dollar value of each point in the initial payment fund, the excess will

be allocated to a residual payment fund for distribution to all eligible Class Members. The chart appended as Addendum #1 sets out the point allocation.

[20] In sum, the exact amount payable to individual class members will depend on the number, nature and size of the claims filed. Importantly, many of the class members will have had use of their shingles for a number of years. Moreover, the premise underlying the settlement is that warranty benefits and settlement benefits supplement each other. As 70 per cent of the anticipated claims are by individuals who have already received compensation under the warranty plan, the majority of the payments will likely be relatively modest, i.e. in the range of several hundred dollars.

Eligibility Requirements

[21] Broadly speaking, the settlement is designed to capture Class Members with stronger legal claims and larger uncompensated losses. Of particular importance are the following requirements:

(a) The claimant received an IKO Offer/Release or a Canadian court found s/he was entitled to warranty benefits. The requirement for an approved warranty claim serves to filter out claims that are not meritorious or adequately documented[2][3].

(b) The person falls within any of the following scenarios:

i. The person received an IKO Offer/Release before May 28/2016 (when a settlement in principle was achieved), did not receive warranty benefits and does not have qualifying damage;

[2] The uncontroverted evidence is that approximately 80% of warranty claims are approved by IKO.
[3] In limited circumstances, a person can apply for settlement benefits even if her/his warranty claim was denied; in that case, the person must satisfy the Claims Administrator that the denial was improper and the other eligibility criteria have been met.

ii. The person received an IKO Offer/Release before May 28, 2016, may or may not have received warranty benefits, but has qualifying damage;

iii. The person received an IKO Offer/Release on or after May 28, 2016 and has qualifying damage.

Claims Process

[22] Class members can file claims in English or French. They will be encouraged to do so online but hardcopy claim forms will be available. It is expected that the vast majority of claims can be processed through a relatively brief and straightforward claim form.

[23] As part of the settlement claims process, IKO must provide information about any warranty payments made and what they were based upon.

Law relating to Approval of a Settlement

[24] Under s. 29 of the *CPA* the court must approve a class action settlement. To approve a settlement of a class proceeding, the court must find that in all the circumstances the settlement is fair, reasonable, and in the best interests of those affected by it, taking into account the claims and defences in the litigation and any objections to the settlement: *Osmun v. Cadbury Adams Canada Inc.* 2010 ONSC 2643, at paras. 31-34; *Dabbs v. Sun Life Assurance*, [1998] O.J. No. 1598 (Gen.Div. at para. 9, aff'd (1998) 41 O.R. (3d) 97 (C.A.); *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (S.C.) at para. 10.

[25] A settlement does not have to be perfect or treat everybody equally. Nor is it necessary for the settlement to meet the demands of each class member. It need only fall within a zone of reasonableness: *Parsons*, para. 70; *Dabbs,* para. 11; *Frohlinger v. Nortel Networks Corp.,* [2007] O.J. No. 148 (S.C.) at para. 8.

[26] The parties proposing the settlement bear the onus of satisfying the court that it ought to be approved. In determining whether to approve a settlement, the court may take into account factors such as:

a) the likelihood of recovery or success;

b) the amount and nature of discovery, evidence or investigation;

c) the proposed settlement terms and conditions;

d) the future expense and likely duration of litigation;

e) the recommendation of neutral parties, if any;

f) the number of objectors and nature of objections;

g) the presence of good faith, arms length bargaining and the absence of collusion;

h) the degree and nature of communications by counsel and the representative plaintiffs with class members during the litigation;

i) the recommendation and experience of counsel.

[27] The factors listed above are "guidelines rather than rigid criteria." In any particular case, some criteria may not be satisfied or some may be given more weight than others: see *Ford v. F. Hoffman-LaRoche Ltd.* (2005), 74 O.R. (3d) 758 (S.C.) at para. 117; *Frohlinger,* para. 8; *Parsons*, para. 73.

[28] There is a strong initial presumption of fairness when a settlement is negotiated arms-length. Moreover, the court may give considerable weight to the recommendations of experienced counsel who have been involved in the litigation and are in a better position than the court or the class members to weigh the factors that bear on the reasonableness of a particular settlement:

Vitapharm Canada Ltd. v. F. Hoffman-LaRoche Ltd. (2005), 74 O.R. (3d) 758 (S.C.), paras., 113-114 and 142; *CSL Equity Investments Ltd. v. Valois*, [2007] O.J. No. 3932 (S.C.) at para. 5; *Kranjcec v. Ontario,* [2006] O.J. No. 3671 at para. 11.

[29] Before approving a settlement, the court must be assured that the class members will receive the promised benefits in a timely and efficient manner; moreover, the administrators of the settlement will be subject to the court's supervision and must be autonomous, independent, and neutral: *Baxter,* paras. 31-39.

[30] Importantly, the court cannot modify the terms of a proposed settlement. The court can only approve or reject the settlement. Therefore, before deciding to reject a settlement, the court should consider whether doing so will derail the negotiations to the point that no settlement can be achieved. This would undermine the public interest of resolving difficult and protracted litigation in order to avoid the expense and uncertainty of a trial: *Osmun v. Cadbury Adams Canada Inc*, 2010 ONSC 2643, para. 34.

[31] I will examine below what I regard as the most important factors supporting approval of the settlement in this case.

a. *Likelihood of Recovery or Success*

[32] Both the affidavit evidence and the history of this case to date demonstrate that absent a court approved settlement, the action involved substantial risks. These included:

- Whether a duty of care exists: the Defendants pleaded that any alleged failure or defect in IKO shingles did not create a real and substantial danger to persons or property (as stipulated in *Winnipeg Condominium*

Corporation No. 36 v. Bird Construction Co., [1995] 1 SCR 85, paras. 35-43). Although I previously held that the cause of action requirement was met for certification purposes, the Defendants would likely raise this issue again at trial;

- Whether the standard of care was breached, i.e. were IKO's shingles defective? IKO's evidence in this action and the parallel U.S. litigation indicated that IKO's product specifications exceeded industry standards and that IKO produced in accordance with its product specifications. Moreover, IKO's historical warranty claims rate was approximately 1%. Defendants would likely rely on the low warranty claims rate to argue there was no systemic defect or failure;

- There are causation defences: the Defendants assert there are many factors that affect the ability of roofing shingles to shed water, including installation, ventilation, quality of roof decking and weather conditions. The need for individual class members to establish causation after the common issues trial may impede their recovery, particularly as some members will not have sufficient documentation to establish causation;

- Limits on the Damage award: Labour is the most significant expenditure not covered by the warranty and can vary significantly based on the size of the building, the number of slopes, and the pitch of the roof. Moreover, any amount claimed would have to be reduced to account for the number of years the Class Member had use of the shingles and the litigation risks. Finally, class members might only be able to recover for those portions of the roof that appeared defective;

- Whether class members released their claims through the warranty process: Approximately 70% of warranty claimants signed the IKO

Offer/Release. They would have to prove either that the scope of the release does not cover the claims at issue in the class action or that the release should be void on the basis of unconscionability or some other grounds. Class members may not have evidence available to establish this;

- The relevance of the warranty period: One of the issues at trial would be whether the duration of the warranty is a representation that the shingles would provide protection for that specific period of time. IKO takes the position that it does not, and provided an expert opinion to that effect. The Canadian case law on this issue is very limited.

b. Amount and Nature of Discovery, Evidence or Investigation

[33] The Defendants produced approximately 127,000 documents. A costly and time consuming review would be necessary in order to properly prepare for trial. Moreover, the early class period occurred before email was commonly used in offices; therefore, some relevant information would not be captured by the documents.

[34] The class action relates to 32 brands of shingles sold over a 31-year period and manufactured in 6 different facilities. The design varied over time. Extensive testing and other investigation would be required to extrapolate the results to all IKO shingles. Even if the testing established the existence of defective shingles, it may reveal that only some brands were defective, or that the impugned shingles were defective for certain production years.

c. *Proposed Settlement Terms and Conditions*

[35] The specific terms of the settlement are set out above and in the chart appended to these reasons. There will be no cy-près fund; any monies remaining

after the final payment has been made will be distributed to the class members from the residual fund.

[36] As noted above, the eligibility criteria are designed to capture those class members with the greater uncompensated losses and stronger legal claims. In my view, the criteria are reasonable and properly take into account the litigation risk.

d. Future Expense and Likely Duration of Litigation

[37] One important factor driving this settlement is the prejudice arising from protracted litigation. Seven years have passed since the litigation was commenced. It will likely take several more years to complete the discovery process, the common issues trial (and any appeals), and then determine the individual issues.

[38] Courts have recognized that the practical value of an expedited recovery is an important factor for consideration. Aside from the legal and evidentiary risks, a settlement avoids the prospect of a case such as this one being litigated over many more years, including any potential appeals.

e. Degree and Nature of Communications with Class Members

[39] Notice of this hearing was mailed or emailed to 38,200 addresses. In addition, Class Counsel also posted the Settlement Agreement on the website, so that Class members were able to review the draft Judgment and Distribution Plan, if they so desired.

[40] The response has generally been positive. There were ten objections, which I describe more fully below. Finally, the representative Plaintiff and the plaintiffs in the parallel Alberta and Quebec actions support the Settlement Agreement.

f. Recommendation of Experienced Counsel

[41] Class Counsel have opined that the proposed settlement is fair, reasonable and in the best interests of the Class Members. The Class Counsel serving this file have extensive experience in class action litigation. They have explained to the court their rationale and I am satisfied that they have exercised sound judgment in analyzing this case. Their recommendation therefore deserves substantial regard when assessing the proposed settlement.

g. Administration of the Settlement Fund

[42] An independent third party Claims Administrator will be appointed to adjudicate settlement of the claims. The proposed Administrator is RicePoint Administration Inc. RicePoint has acted as claims administrator in many class actions and is able to provide services in English and French. The estimated total cost is between $110,000 and $130,000, plus disbursements. On that basis I am satisfied that the proposed system of administration is fair and efficient.

h. *Number of Objectors and Nature of Objections*

[43] As noted above, the class includes approximately 5 million homeowners. Only ten objectors have emerged, five of whom attended the approval hearing. One of the objectors, Dianne Gould, was represented by counsel, Mr. Howard Winkler, who asserted that although he was attending on behalf of Ms. Gould his submissions relate to "all class members".

[44] Having regard to the number of persons who received the Notice of Hearing (approximately 38,000), the percentage of objections is very small. However, I have considered each of the objections, including any written submissions and the oral arguments made during the approval hearing.

[45] The vast majority of the objections are from individuals whose actual or anticipated repair costs significantly exceed the amount they are likely to recover under this settlement. They cite, for example, that it will cost them over $10,000 to replace their entire roof; even after allowing for the fact that in most cases they have had use of the roof for many years, they believe they should receive at least half of the replacement cost from the settlement.

[46] Common to all these objections is the lack of recognition that a settlement is essentially a compromise. If the compromise here seems high that is because this particular case carries significant risks for the plaintiff. As I outlined above, there are real obstacles here in virtually every aspect of the litigation – liability, causation and damages. The defendant is a large, well-funded entity who is vigorously defending both the Canadian and U.S. litigation. Keeping in mind that the court has no power to amend the settlement terms, a refusal to approve settlement will mean that the litigation will continue. If a further agreement cannot be achieved, proceeding to a trial will entail several more years of litigation and huge expense, all for a very uncertain outcome. In sum, the plaintiff will be navigating a big ship through a narrow canal.

[47] Mr. Winkler argued that this lawsuit was a "misadventure" wherein plaintiff's counsel "bit off more than they now wish to chew". He asserted that plaintiff's counsel seek to end the litigation at the point where their proposed fees roughly equal the time they have docketed. He criticized their failure to pursue mediation, even suggesting that should have asked me to "order" mediation. Finally, he alleged they had conducted inadequate discovery and failed to provide any economic rationale for the individual settlements, many of which will be well below $1,000.

[48] I see no merit in these submissions. The parties negotiated over many years before reaching an agreement. The negotiations were at arm's length and

adversarial, and conducted by seasoned and capable advocates on both sides. Presumably counsel concluded, with good reason, that a formal mediation was not needed. Ordering them to attend mediation in those circumstances is a waste of time and money.

[49] Moreover, the record demonstrates that plaintiff's counsel have pursued this case with care and diligence, and sincerely believe that this settlement is in the best interests of the class. To the extent the fees they have incurred and will continue to incur have factored into the settlement, courts have repeatedly stated that the costs of litigation, while not a determining factor, are a proper consideration in assessing a settlement.

[50] The allegation of inadequate discovery is also unfounded. Plaintiff's counsel gathered and reviewed over 127,000 documents produced by IKO, arranged for an expert to test unused shingles that counsel collected from class members, and retained a company to conduct on-site inspections of approximately 80 properties with IKO shingles.

[51] As for the economics underlying the modest individual settlements, a large majority of the claimants have had the use of the impugned shingles for many years; Mr. Winkler's client (Dianne Gould) first noticed a problem with her shingles 15 years after installation. Moreover, many claimants have already received – or are eligible for - benefits under the warranty program. Any recovery in this action will supplement that.

[52] For the reasons I have set out above, I find the settlement is in the best interests of the class as a whole, and conclude that none of the objections provide a reason to refuse the proposed settlement.

Fee Approval

[53] Class counsel seek legal fees of $1,876,077.80, plus disbursements of $336,289.20 and applicable taxes.

[54] As a general rule, Class Counsel's fees are to be fixed and approved on the basis of whether they are "fair and reasonable" in all of the circumstances. That assessment typically includes the following factors:

- the factual and legal complexities of the matters dealt with;
- the risks undertaken, including the risk that the matter might not be certified;
- the degree of responsibility assumed and the skill and competence demonstrated by class counsel;
- the monetary value of the matters in issue;
- the results achieved;
- the importance of the matter to the class members and to the public;
- the ability of the class to pay;
- the expectations of the class as to the amount of the fees; and
- the opportunity costs to class counsel in the expenditure of time in pursuit of the litigation and settlement.

[55] See *Vitapharm,* para. 67; *Parsons*, paras. 16-17; *Wilson v. Servier Canada Inc.,* [2005] O.J. No. 1039 (S.C.) at para. 74.

[56] This action was begun in December 2009. Since that time, the case has been actively litigated and vigorously defended. The parties have appeared in

court on approximately 20 occasions for various case conferences and motions, including a contested certification motion, leave to appeal certification, and a motion relating to the effectiveness of the IKO Offer/Release. In addition, pursuant to a discovery protocol plan, the parties' experts attended to photograph and examine the shingles.

[57] Beyond the litigation steps set out above, Class Counsel invested considerable time investigating the claims in issue (see paragraph 50 above), and in responding to class member inquiries, which to date number "tens of thousands"; since May 2012 the law firm has had a law clerk whose primary responsibility was to respond to class member inquiries.

[58] The litigation also involved both legal and factual risks, including whether a valid cause of action exists in negligence; whether a widespread or systematic defect can be established; whether individual class members can establish causation; and whether class members who signed the IKO Offer/Release released their claims under the class action. Moreover, success on a class wide basis was important because given the amounts in issue, it would not have been economical for the persons affected to pursue individual actions.

[59] The plaintiffs entered into a retainer agreement that contemplated the payment of 25 per cent of the recovery, plus applicable taxes and disbursements. The proposed fees of $1,876,077.80 are consistent with that amount, and are below the time counsel actually docketed ($2,014,256.50). The fees are also consistent with amounts awarded by courts in other class actions: a fee of 25 per cent is "a reasonably standard fee agreement in class proceedings litigation": *Helm v. Toronto Hydro-Electric System Ltd.*, 2012 ONSC 2602, para. 22.

[60] As the proposed fees accord with that level, are supported by the representative plaintiff, and fairly reflect the factors listed above, I conclude that the fee should be approved, with one caveat: there shall be a holdback of

$75,000, to be paid out after any residual distribution of the funds has been approved by the court.

[61] Finally, I agree with counsel that an honorarium of $5,000 should be paid to Mr. Barwin, the representative plaintiff. The uncontested evidence is that he invested significant time and energy attending meetings and hearings, and in being cross-examined on his affidavit.

Conclusion

[62] For the reasons set out above, I approve the proposed settlement and fees, and have issued a judgment reflecting those terms.

Baltman J.

Released: June 8, 2017

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APPROVAL OF CLASS ACTION SETTLEMENT

Baltman J.

Released: June 8, 2017

ADDENDUM #1

Categorization of Class Members	Point Value	Explanatory Notes
Category 1 Class Members who received an IKO Offer/Release dated before May 28, 2016, did not receive warranty benefits, and do not have Qualifying Damage.	15 points per Approved Bundle	Claims are discounted to reflect that the Class Member did not experience Qualifying Damage.
Category 2 Class Members who received an IKO Offer/Release dated before May 28, 2016, did not receive warranty benefits, and have Qualifying Damage.	40 points per Approved Bundle	
Category 3 Class Members who received an IKO Offer/Release dated before May 28, 2016, received warranty benefits and have Qualifying Damage.	2.5 points per Approved Bundle, to a maximum of $100 per Eligible Settlement Claimant, to an aggregate maximum of $250,000	Claims are discounted to reflect the additional litigation risks associated with these claims.
Category 4 Class Members who received an IKO Offer/Release dated on or after May 28, 2016 and have Qualifying Damage.	25 points per Approved Bundle	The lower claim value relative to category 2 reflects that category 4 Class Members can receive warranty benefits in addition to their Settlement Benefits.
Interior Damage Available for Category 2 and 4 only	Any additional Claim Value will be determined by assigning one-half (½) point for every $1.00 in repair or replacement costs in connection with Interior Damage to a maximum of $500 per Eligible Settlement Claimant, and an aggregate maximum of $50,000 from each of the initial payment fund and final payment fund.	