CITATION: Brigaitis v. IQT, Ltd. c.o.b. as IQT Solutions, 2016 ONSC 6746
COURT FILE NO.: CV-11-432919CP
DATE: 20161028

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	
BOB BRIGAITIS and CINDY RUPERT Plaintiffs	*Theodore P. Charney* and *Tina Yang* for the Plaintiffs
– and –	
IQT, LTD. c.o.b. as IQT SOLUTIONS, IQT SOLUTIONS, IQT CANADA, LTD, JDA PARTNERS LLC, IQT, INC., ALEX MORTMAN, DAVID MORTMAN, JOHN FELLOWS, RENAE MARSHALL, and BRAD RICHARDS Defendants	*Jeffrey E. Goodman* for the Defendants IQT Canada Ltd., IQT Inc., JDA Partners LLC, Alex Mortman and David Mortman *Berkley D. Sells* for the Defendant John Fellows
Proceeding under the *Class Proceedings Act, 1992*	**HEARD**: October 28, 2016

PERELL, J.

REASONS FOR DECISION

1. Introduction

[1] Pursuant to s. 28 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, the Plaintiffs, Bob Brigaitis and Cindy Rupert move for approval of a proposed settlement in this certified class action, and for approval of Class Counsel's legal fees and disbursements.

2. Factual Background

[2] On July 15, 2011, IQT, Ltd. closed its call centre facility in Oshawa, Ontario, and terminated its approximately 500 Oshawa-based employees without any notice. IQT did not provide the employees with outstanding wages or vacation pay, termination pay in lieu of notice, or severance pay, as required by the *Employment Standards Act, 2000*, S.O. 2000, c. 41.

[3] Mr. Brigaitis and Ms. Rupert were operations managers at IQT, and on August 16, 2011, they commenced this action as a proposed class action.

[4] Mr. Brigaitis and Ms. Rupert signed a contingency fee retainer agreement providing that Class Counsel would receive fees of up to one-third of the recovery in the action, including

damages and interest and interim costs awards but excluding partial indemnity costs for the action, as well as disbursements and HST. There was no third party funding, and Class Counsel agreed to indemnify Mr. Brigaitis and Ms. Rupert against adverse costs awards.

[5] In the proposed class action, Mr. Brigaitis and Ms. Rupert advanced claims in breach of contract/wrongful dismissal, statutory claims under the *Employment Standards Act,* conspiracy, intentional interference with economic relations, negligence, and an oppression remedy against IQT, several of its related corporate entities, and its officers and directors.

[6] The proposed class action was immediately confronted with difficulties. Shortly after the proceedings were commenced, the Quebec Revenue Agency and the Quebec Ministry of Labour brought a motion in Quebec to have IQT put into bankruptcy. On December 20, 2011, the Superior Court of Justice of Quebec appointed a trustee in bankruptcy. All claims against IQT were stayed by operation of ss. 60.3(1) and 69(1) of the *Bankruptcy and Insolvency Act*, R.C.S. 1985, c. B-3.

[7] Mr. Brigaitis and Ms. Rupert persisted and carried forward with their claims against the officers and directors of IQT. The scope of damages were, however, narrowed by s. 81(3) of the *Employment Standards Act*, which provides that officers and directors are liable only for outstanding wages and vacation pay, but are not liable for breach of contract/wrongful dismissal, termination or severance pay.

[8] The problems also persisted. Defendant Renae Marshall declared personal bankruptcy, and the defendant Brad Richards was let out of the action, which left Alex and David Mortman and John Fellows as defendants. The Mortmans, however, were domiciled in New York and Mr. Fellows was domiciled in Texas, which meant that, even if these defendants were found personally liable, Mr. Brigaitis and Ms. Rupert would be required to engage in costly cross-border judgment enforcement procedures with no assurance that they would make any meaningful recovery.

[9] In May 2012, counsel for the Mortmans informed Class Counsel that a responsive policy existed. It was a policy issued by Executive Risk Indemnity Inc. with coverage up to $5 million. It was, however, not immediately known what coverage remained. In May 2013, Mr. Brigaitis and Ms. Rupert learned that approximately $250,000 USD remained on the policy.

[10] The amount available on the insurance policy had been depleted by the costs of litigation commenced by Wells Fargo Business Credit Canada ULC in the State of New York, which resulted in a judgment of over $17 million against the defendant David Mortman, as well as a tort action against Alex Mortman and John Fellows. Both actions were settled when the insurer contributed $3 million.

[11] Executive Risk Indemnity Inc. took the position that the policy had been depleted by the payments on behalf of insureds in accordance with the policy language and that numerous other terms and conditions of the policy applied to limit or preclude coverage for the class's claims. In these circumstances, Defence Counsel offered to settle the class action for the remaining policy limits. Mr. Brigaitis and Ms. Rupert declined the offer.

[12] In May 2014, Defence Counsel advised Mr. Brigaitis and Ms. Rupert that the remaining policy limits were actually $436,979.45 USD.

[13] Mr. Brigaitis and Ms. Rupert brought a motion for certification. The certification motion was hotly contested.

[14] The action was certified on January 2, 2014. See *Brigaitis v. IQT, Ltd. c.o.b. as IQT Solutions*, 2014 ONSC 7.

[15] The director John Fellows had been previously noted in default. In October 2014, Mr. Brigaitis and Ms. Rupert obtained a default judgment against Mr. Fellows. The judgment was for $4,077,446.55 USD plus adverse costs of $18,824.76.

[16] In June 2015, Mr. Brigaitis and Ms. Rupert issued a Notice of Garnishment listing the insurer as the garnishee. Executive Risk Indemnity Inc., however, returned a Garnishee Statement denying any obligation to pay.

[17] Mr. Fellows then brought a motion to set aside the default judgment on the basis that he had not been served and that he was not aware of the action.

[18] In 2016, Mr. Brigaitis and Ms. Rupert commenced proceedings against Executive Risk Indemnity Inc. directly. They asserted that the insurer had improperly depleted the policy limits. Mr. Brigaitis and Ms. Rupert commenced an action and then an application against the insurer returnable in July 2016.

[19] Meanwhile, Class Counsel retained experienced insurance law lawyers and obtained opinions on the merits of claims against Executive Risk Indemnity Inc. With respect to whether the insurer improperly prioritized payments under the policy, the opinion was that, under the laws of Ontario and Texas, the test is "first past the post", which roughly provides that an insurer is only required to pay out a policy to the first person who claims upon it by way of settlement or judgment. With respect to improperly depleting the policy, the test in both Ontario and Texas is that payment must be motivated by covered claims and that the payment amount must be reasonable in the circumstances.

[20] Class Counsel then engaged in settlement negotiations with the insurer and a proposed settlement was reached subject to court approval. The negotiations, which were intensive and adversarial, took place between November 19, 2015 and August 22, 2016.

3. The Terms and Value of the Settlement Agreement

[21] The essential terms of the settlement are as follows:

- Executive Risk Indemnity Inc. shall pay $1,332,303 USD, converted to $1,723,333.93 plus an additional $50,000.00 to pay for the costs of administering the settlement.
- The claims process has been designed to minimize the amount of work required to obtain payment, including not requiring Class Members to submit any additional documentation in most cases.
- Every Class Member who wishes to make a claim must fill out a Claim Form.

- The Administrator (Terida Systems Ltd.) will establish a website from which Class Members may access the Claim Form and information as to how to complete the form.

- For each Class Member who makes a claim, the Administrator will calculate the compensation by multiplying the claimant's average weekly wages by twelve. There is additional compensation for Class Members how were working at IQT for five years or more.

- To the extent that the Settlement Fund is insufficient to pay all claims, payments shall be pro-rated.

- Disputes about compensation may be appealed to an Arbitrator (Reva Devins).

- There is no reversion of funds to the defendants or the insurer.

- In exchange for the settlement amount, the class will provide the defendants and the insurer with a comprehensive release of all claims. Released claims include, but are not limited to: this action; the proceedings against the insurer; and the Default Judgment and Garnishment Order against Mr. Fellows.

- The action and the application against Executive Risk Indemnity Inc. shall be dismissed.

[22] The Government of Canada has a subrogated interest in any wages recovered by the Class Members who received up to $4,500 each in back pay and vacation pay under the *Wage Earner Protection Program* ("WEPPA"). The Government of Canada is not pursuing a subrogated claim and has informed Class Counsel that it will not oppose this motion or the proposed judgment. The vast majority of Class Members have been fully compensated for their outstanding back pay and vacation pay through WEPPA, and thus only have outstanding damages in tort equivalent to lost termination pay and, where applicable, severance pay.

[23] The Ontario Ministry of Labour consents to the judgment, including a release of all four Directors' Orders to Pay issued against the directors of IQT.

[24] The Ministry of Labour calculated the total termination pay owed to all Class Members as $2,449,661.89, and the total severance pay owed as $202,531, for a total of $2,652,192.89. The settlement amount of $1,773,333.93, all-inclusive, therefore provides for approximately 66% recovery for all of the class members' severance pay and termination pay, before legal fees.

[25] Class Counsel expects that each claimant will receive approximately 50% recovery after legal fees, disbursements, taxes, and the costs of administration, which is the equivalent to six weeks of wages and, for those entitled to severance pay, an additional half week of wages per year of employment.

[26] For all but approximately 15 individuals, the Class Members' anticipated recovery of six weeks' pay, net of legal fees, will exceed their damages in lieu of notice at common law for wrongful dismissal. All but about 15 long-term employees were clerical employees, who had worked at IQT for less than two years as of the date of the mass termination.

[27] Class Counsel recommends the settlement and it is supported by Mr. Brigaitis and Ms.

Rupert.

[28] Given the difficulties which would have to be overcome in order for the Class Members to recover any damages, Class Counsel's opinion is that the proposed settlement is a fair and reasonable means of ensuring that Class Members obtain compensation for their claims and is preferable to continuing with uncertain, risky, and protracted litigation.

[29] There was one objection from a Class Member, who gave no reasons for the objection.

[30] Class Counsel proposes that counsel fees and disbursements be awarded in the amount of 33⅓% of the settlement amount, or $591,052.20, plus HST of $76,836.79, and disbursements of $39,685.46, for a total of $707,574.45, to be paid out of the settlement fund.

[31] Class Counsel requests that the interim costs awarded at certification, in the amount of $40,713.57, ought not to be credited against the fees sought, because the contingency fee retainer agreement and Notice of Certification provided that interim awards go to Class Counsel, and because the docketed time on this matter has a total value of $576,621.25 inclusive of HST. Thus, there is very little premium for the lawyer's work for this difficult, contentious, and high risk proceeding.

[32] Both representative plaintiffs support Class Counsel's request for fees.

4. Settlement Approval

[33] Section 29(2) of the *Class Proceedings Act, 1992*, provides that a settlement of a class proceeding is not binding unless approved by the court. 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 the class: *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 (S.C.J.) at para. 57; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 (S.C.J.) at para. 43; *Kidd v. Canada Life Assurance Company*, 2013 ONSC 1868.

[34] In determining whether a settlement is reasonable and in the best interests of the class, the following factors may be considered: (a) the likelihood of recovery or likelihood of success; (b) the amount and nature of discovery, evidence or investigation; (c) the proposed settlement terms and conditions; (d) the recommendation and experience of counsel; (e) the future expense and likely duration of the litigation; (f) the number of objectors and nature of objections; (g) the presence of good faith, arm's-length bargaining and the absence of collusion; (h) the information conveying to the court the dynamics of, and the positions taken by, the parties during the negotiations; and (i) the nature of communications by counsel and the representative plaintiff with class members during the litigation. See: *Fantl v. Transamerica Life Canada*, *supra*, at para. 59; *Corless v. KPMG LLP*, [2008] O.J. No. 3092 (S.C.J.) at para. 38; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, *supra,* at para. 45; *Kidd v. Canada Life Assurance Company*, *supra*.

[35] In determining whether to approve a settlement, the court, without making findings of fact on the merits of the litigation, examines the fairness and reasonableness of the proposed settlement and whether it is in the best interests of the class as a whole having regard to the claims and defences in the litigation and any objections raised to the settlement: *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (S.C.J.) at para. 10. An objective and

rational assessment of the pros and cons of the settlement is required: *Al-Harazi v. Quizno's Canada Restaurant Corp.* (2007), 49 C.P.C. (6th) 191 (Ont. S.C.J.) at para. 23.

[36] The case law establishes that a settlement must fall within a zone of reasonableness. Reasonableness allows for a range of possible resolutions and is an objective standard that allows for variation depending upon the subject-matter of the litigation and the nature of the damages for which the settlement is to provide compensation: *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) at para. 70; *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.). A settlement does not have to be perfect, nor is it necessary for a settlement to treat everybody equally: *Fraser v. Falconbridge Ltd.* [2002] O.J. No. 2383 at para. 13 (S.C.J.); *McCarthy v. Canadian Red Cross Society* (2007), 158 ACWS (3d) 12 (Ont. S.C.J.) at para. 17.

[37] In my opinion, Class Counsel secured a very good result for the Class. I approve the settlement.

5. Class Counsel Fee

[38] The fairness and reasonableness of the fee awarded in respect of class proceedings is to be determined in light of the risk undertaken by the lawyer in conducting the litigation and the degree of success or result achieved: *Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374 (S.C.J.) at para. 13; *Smith v. National Money Mart,* 2010 ONSC 1334 at paras. 19-20, varied 2011 ONCA 233; *Fischer v. I.G. Investment Management Ltd.*, [2010] O.J. No. 5649 (S.C.J.) at para. 25.

[39] 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; and (j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement: *Smith v. National Money Mart, supra*; *Fischer v. I.G. Investment Management Ltd., supra*, at para. 28.

[40] In my opinion, having regard to the various factors used to determine whether to approve the fees of Class Counsel, the fee request in the immediate case should be approved. Class Counsel achieved a very good result and earned their fee.

6. Conclusion

[41] For the above reasons, I approve the settlement and Class Counsel's fee request.

Perell, J.

Released: October 28, 2016

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Defendants

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