

CITATION: de Muelenaere v. Great Gulf Homes Limited, 2024 ONSC 868
COURT FILE NO.: CV-14-51244700CP
DATE: 20240208

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:)	
)	
ETIENNE DE MUELENAERE and JONATHAN GUY)	
)	
Plaintiffs)	<i>Harvey T. Strosberg, K.C. for the Plaintiff</i>
)	
- and -)	
)	
GREAT GULF HOMES LIMITED, GREAT GULF (JARVIS-CHARLES) LTD. and JARVIS-CHARLES G.P. INC.)	
)	
Defendants)	HEARD: February 8, 2024
)	
Proceedings under the <i>Class Proceedings Act, 1992</i>)	
)	

PERELL, J.

REASONS FOR DECISION

A. Introduction

[1] This is a certified class action¹ under the *Class Proceedings Act, 1992*.²

[2] Etienne de Muelenaere and Jonathan Guy are the Plaintiffs. They sue Great Gulf Homes Limited, Great Gulf (Jarvis-Charles) Ltd. (“Great Gulf (JC)”) and Jarvis-Charles G.P. Inc. (collectively “Great Gulf Homes”).

[3] Great Gulf Homes built a 44-storey residential condominium in Toronto with 417 residential units. One of the features of the residences at the condominium complex when the units were originally sold by the developer was a pressure-balanced valve for the bathtubs and the showers, but the Plaintiffs allege that non-pressure-balanced valves were installed with the consequence of unpredictable temperature fluctuations including a serious risk of harm.

¹ *de Muelenaere v. Great Gulf Homes Limited et al*, 2023 ONSC 6763.

² S.O. 1992, c. 6.

[4] On December 2, 2021, the date before the certification motion was scheduled to be argued, the parties settled the certification motion for settlement purposes. The settlement agreement provides for a settlement fund of \$1.0 million and a claims program to be administered by a Claims Administrator.

[5] This is a motion for approval of a settlement and for approval of Class Counsel's counsel fee. The motion is for an order, substantially in the form of an order attached as a schedule to the notice of motion, which provides as follows.

- a. a declaration that the settlement of this Action in accordance with the Agreement is fair, reasonable and in the best interest of the Class and is hereby approved;
- b. an Order that RicePoint Administration Inc. is appointed as the Claims Administrator, with the duties and responsibilities as set out in the Agreement and the Approval Order;
- c. an Order that the Plaintiffs and each Class Member who has not opted out of the settlement in accordance with the Certification Order dated November 30, 2023, release, waive and forever discharge the Released Parties from his, her or their Released Claims;
- d. an Order that any benefits offered or obtained pursuant to the Agreement are in full, complete and total satisfaction of all of the Released Claims against the Released Parties, the benefits are sufficient and adequate consideration for each and every term of this Release and this Release shall be irrevocably binding upon Class Members who do not opt-out of the Settlement Class;
- e. an Order that the Release shall be effective with respect to all Class Members, regardless of whether those Class Members ultimately file a Claim or receive compensation under the Settlement Agreement and this Approval Order;
- f. an Order that if a Class Member does not submit a Claim within the Claims Period, stipulated to in the Agreement, which begins on the date the Approval Order becomes final and ends four (4) months thereafter, the Class Member shall be forever barred from participating in the settlement but shall, in all other respects, be bound by the terms of this Order;
- g. an Order that the agreements as to Legal Fees and Disbursements between the representative plaintiffs and Class Counsel is fair, reasonable and in the best interests of the Class Members and that their terms are hereby approved;
- h. an Order that Class Counsel shall recover fees equivalent to 30% of the Settlement Trust plus 30% of the interest earned on the Settlement Trust plus disbursements and applicable taxes, to be paid from the Settlement Trust before the balance of the Settlement Trust is paid to the Claims Administrator. Class Counsel shall be paid from the Settlement Trust total fees, interest, disbursements and HST calculated as follows:
 - i. a fee of 30% of \$1 million equals \$300,000 plus \$39,000 in HST totaling \$339,000; plus
 - ii. 30% of the \$21,688.76 interest earned from the Settlement Trust equals \$6,500.62 plus HST of \$845.08 totaling \$7,345.70; plus
 - iii. disbursements totaling \$46,099.33 inclusive of taxes;

- i. an Order that the total cost of RicePoint’s administration is \$75,000 including HST;
- j. an Order that Strosberg Sasso Sutts LLP will pay to RicePoint from the Settlement Trust the amount of \$40,000 plus HST of \$5,200 totaling \$45,200 as payment on account of RicePoint’s fees and disbursements;
- k. an Order that after payments of the amounts authorized above from the Settlement Trust, Strosberg Sasso Sutts LLP will transfer the balance of the Settlement Trust to RicePoint and RicePoint will hold the balance of the Settlement Trust in trust;
- l. an Order that RicePoint will file with the Canada Revenue Agency any trust returns required by the Settlement Trust and RicePoint is hereby authorized to pay any amounts owing to the Canada Revenue Agency from the Settlement Trust and any cost associated with this payment;
- m. an Order that the request for honoraria submitted by the plaintiffs is dismissed;
- n. an Order that RicePoint must report to the Court some time after four months after the Approval Order becomes final on its proposed distribution and any other further costs associated with the Canada Revenue Agency payment;
- o. an Order that Class Counsel, the defendants and/or the Claims Administrator may make a motion or motions to the Court for directions necessary to administer the settlement of this Action or to authorize payment to the Class Members and/or for any other disbursements;
- p. an Order that no person may bring any action or take any proceeding against the Claims Administrator or any of its employees, agents, partners, associates, representatives, in respect of the implementation of this Order or the administration of the Settlement Agreement, except with leave of this Court; and
- q. an Order for such further and other relief or direction as counsel may advise and this Honourable Court permit.

[6] For the reasons that follow, the motion is granted.

B. Factual Background

[7] The essential allegation in the immediate case is that Great Gulf Homes installed dangerously defective pressure-balanced valves (“PBVs”) in a 44-storey residential condominium in Toronto that had 417 residential units.

[8] On **September 18, 2014**, Etienne de Muelenaere commenced a proposed class action against Great Gulf Homes. Jonathan Guy was joined as a co-plaintiff in 2023.

[9] The Plaintiffs’ lawyers are a consortium of Strosberg Sasso Sutts LLP and Charney Lawyers. The Plaintiffs each agreed that their lawyers should be paid a contingency fee of 30% of the “recovery” in the action where “recovery” is defined as “the amount actually recovered by award, judgment, settlement or otherwise, including costs, disbursements and HST”.

[10] The class period for the action is from the time the first condominium units were sold (November 8, 2010) to the date the action was certified (September 5, 2023) a period of 12 years and 10 months.

[11] In **2015**, Great Gulf Homes offered to install a replacement valve and pay \$500 to each Unit owner. This offer was accepted by 148 Unit owners and thus the Class Members are the persons associated with the other 269 units in the condominium.

[12] On **August 1, 2023**, the class action was settled by a Settlement Agreement. The settlement amount was \$1,000,000.

[13] Under the Settlement Agreement, there are three categories of claims: Category B Claims, Category C Claims, and Category A Claims.

a. **Category B Claims** are defined in the Settlement Agreement as:

“...from November 8, 2010 to the date of the Certification Order, any former owner(s) of a Unit, current owner(s) of a Unit, former tenant(s) of a Unit and current tenants(s) of a Unit who have incurred costs to repair or replace the Pressure Balanced Valve(s) provided he, she or it must produce a receipt(s), evidencing the repairs or replacement intended to address temperature fluctuations in shower(s) and/or bathtub(s) and provided that an owner(s) or a former owner(s) of the Unit did not sign a Release.”

b. During the Class Period, there were nine putative Class Members who advised Class Counsel that they had repaired or replaced the PBV. The cost of repair and/or replacement ranged between a few hundred dollars to one claim of more than \$6,500.

c. Category B is a fund of \$60,000 dealing with the cost of repair and replacement of PBVs. A Class Member may claim for the actual cost of repairs or replacement of the PBV subject to a maximum of \$6,500 per Unit. (The \$6,500 payment may be reduced if there are claims totaling more than \$60,000.)

d. **Category C Claims** are defined in the Settlement Agreement as:

“...since November 8, 2010 to the date of the Certification Order, all former and current owner(s) of a Unit, all former and current tenants(s) of a Unit, and all family members and guests of the former and current owner(s) or former and current tenant(s) of a Unit who suffered personal injury arising from an unpredictable temperature fluctuation during a shower at the Unit and consulted a physician or nurse and she or he has not signed a Release.”

e. During the Class Period, fifteen putative Class Members reported mild burns to Class Counsel. None of these reported that he or she sought medical treatment.

f. Category C is a fund of \$30,000 plus a fund of \$3,000 for OHIP/Ontario Ministry of Health totaling \$33,000 for payments for injury that needed medical attention arising from the unpredictable temperature fluctuations caused by the PBV.

g. Under Category C Claims, a Class Member who sought medical attention may apply and if approved, he or she may receive \$2,000 plus up to \$200 for a doctor’s or nurse’s report. The \$2,000 payment may be reduced if there are proper claims totaling more than \$30,000.

h. **Category A Claims** are defined in the Settlement Agreement in paragraph 4.1 as:

“A Class Member who is the current owner(s) of a Unit, a former owner (s) of a Unit, a current tenant(s) or former tenant(s) of a Unit who has not signed a release...may within the Claims Period, request payment of \$1,500...”

i. There are owners of 269 Units eligible to claim in Category A.

j. It is estimated that after payment of the administrator RicePoint's fixed administration fee of \$75,000 all inclusive, and Class Counsel's fee, there will be \$461,223 for Category A claimants.

k. If all eligible Class Members of the 269 units asserted Category A claims (which is an unlikely 100% take-up rate), each unit would receive \$1,714. Assuming a 33% take-up rate, each eligible owner who applies would receive at least \$5,142.

l. If there is any surplus in Category B Claims and/or Category C Claims, this surplus will be added to Category A Claims.

[14] On **November 30, 2023**, the action was certified for settlement purposes.

[15] "Class Member" means:

"during the Class Period (November 8, 2010 to September 5, 2023), all persons who did not sign a release and who own, owned, rent, rented, was ordinarily resident in a Unit and their family members and guests, excluding the Defendants and their senior officers and directors."

[16] Class Counsel and the Representative Plaintiffs recommend the settlement.

[17] After notice was given to the Class Members of the certification for settlement purposes no Class Member opted out and none objected to the settlement.

[18] Class Counsel's proposed 30% contingency fee is \$306,500.62. As of January 19, 2024, Class Counsel's work in progress ("WIP") was valued at \$634,803 (Strosberg Sasso Sutts LLP \$329,606.50 and Charney Lawyers \$305,197.25)

C. Discussion and Analysis

1. Settlement Approval

[19] Section 27.1 (1) 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.³

[20] 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

³ *Kidd v. Canada Life Assurance Company*, 2013 ONSC 1868; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 at para. 43 (S.C.J.); *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 at para. 57 (S.C.J.).

(i) the nature of communications by counsel and the representative plaintiff with class members during the litigation.⁴

[21] 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.⁵ A settlement does not have to be perfect, nor is it necessary for a settlement to treat everybody equally.⁶

[22] In the immediate case, as the above recitation of the facts reveals, all of the relevant criteria used to determine whether a settlement is fair, reasonable and in the best interests of the Class Member, favour the approval of the settlement. I approve the settlement as requested. I approve all the ancillary relief requested.

2. Fee Approval

[23] Section 32 (2) of the *Class Proceedings Act, 1992* stipulates that an agreement respecting fees and disbursements between class counsel and a representative plaintiff is not enforceable unless approved by the court.

[24] 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.⁷

[25] In the immediate case, Class Counsel has succeeded in achieving a result that is fair, reasonable and in the best interests of the class. The major purpose of the class proceedings regime of providing access to justice has been achieved.

[26] There is no profit for Class Counsel in the success achieved for the class and Class Counsel has more than earned their fee.

[27] I approve Class Counsel's fee.

⁴ *Kidd v. Canada Life Assurance Company*, 2013 ONSC 1868; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 at para. 45 (S.C.J.); *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 at para. 59 (S.C.J.); *Corless v. KPMG LLP*, [2008] O.J. No. 3092 at para. 38 (S.C.J.).

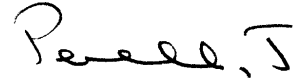
⁵ *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.); *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 at para. 70 (S.C.J.).

⁶ *McCarthy v. Canadian Red Cross Society* (2007), 158 ACWS (3d) 12 at para. 17 (Ont. S.C.J.); *Fraser v. Falconbridge Ltd.*, [2002] O.J. No. 2383 at para. 13 (S.C.J.).

⁷ *Smith v. National Money Mart*, 2010 ONSC 1334, var'd 2011 ONCA 233; *Fischer v. I.G. Investment Management Ltd.*, [2010] O.J. No. 5649 at para. 28 (S.C.J.).

D. Conclusion

[28] For the above reasons, the Plaintiffs' motion is granted. Order accordingly.

A handwritten signature in black ink, appearing to read "Perell, J.", written in a cursive style.

Perell, J.

Released: February 8, 2024

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