

CITATION: Mackie v. Toshiba, 2013 ONSC 5665

COURT FILE NO.: CV-12-456603-00CP

DATE: 20130918

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Scott Mackie, Plaintiff

**AND:**

Toshiba of Canada Ltd. and Toshiba America Information Systems Inc.  
(collectively, "Toshiba"), Defendants

**BEFORE:** Conway J.

**COUNSEL:** *Jeff Orenstein*, for the Plaintiff

*Barry Glaspell*, for the Defendants

**HEARD:** September 11, 2013

Proceeding under the *Class Proceedings Act, 1992*

REASONS FOR DECISION

(re: Certification, Settlement and Class Counsel Fee Approval)

Conway J.

[1] The plaintiff moves for an order (i) certifying this action as a class proceeding for settlement purposes; (ii) approving the settlement pursuant to s. 29(2) of the *Class Proceedings Act, 1992*, S.O. 1992, c.6 (the "Act"); and (iii) approving class counsel fees.

[2] I signed the order today. These are my reasons for doing so.

Background and the Settlement

[3] The claim relates to the alleged premature failure of digital light projection ("DLP") bulbs in 2004 and 2005 Toshiba model DLP televisions. The proceedings largely replicate class action litigation in the United States, which has now been settled.

[4] In late 2005 and early 2006,<sup>1</sup> Toshiba American Consumer Products, L.L.C.P. noticed an unexpected volume of warranty claims arising out of failed bulbs in the lamps of its 2005 model DLP televisions. It investigated and determined that the bulbs used in certain 2005 DLP model televisions were not performing adequately. It worked with its light bulb supplier to improve the bulbs going forward. The company also established a remediation program for owners of the 2005 DLP televisions, by doubling the coverage period of its warranty for the bulbs.

[5] Ultimately, a class action proceeding was launched in the United States and a settlement was finally approved on February 24, 2009.

[6] The Canadian proceedings were intended to provide comparable relief to that achieved in the U.S. settlement. An action was commenced in Quebec on December 1, 2009<sup>2</sup> and in Ontario on June 19, 2012. The parties engaged in settlement discussions and entered into a settlement agreement dated September 6, 2012 (as amended on September 10, 2013, the "Settlement Agreement").

[7] The Settlement Agreement is conditional on obtaining court approval in both Quebec and Ontario. The approval motions were heard contemporaneously by the case management judges in Ontario (myself) and Quebec (L'Honorable Yves Poirier, J.C.S.), via teleconference call.<sup>3</sup>

[8] Essentially, the settlement provides as follows:

- a. Toshiba will extend the warranty on replacement bulbs from six to 12 months on a going forward basis.
- b. Members of the class who purchased<sup>4</sup> a Covered Model<sup>5</sup> that does not fall within the Remediation Program and who experienced (i) a single bulb failure between 12 and 18 months from the date of purchase of the television; or (ii) two or more bulb failures between 12 and 24 months; are eligible for reimbursement for the cost of the replacement bulb(s).
- c. Members of the class who purchased a 2005 Model Television that falls within the Remediation Program and who purchased one or more replacement bulbs between 12 and 24 months from the date of purchase of the television, are eligible for reimbursement for the cost of the replacement bulb(s).

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<sup>1</sup> This summary comes from the U.S. settlement approval materials that class counsel reviewed.

<sup>2</sup> The Quebec proceeding is *Ben Eli v. Toshiba*, No. 500-06-000491-098.

<sup>3</sup> The parties agreed that the Canadian Judicial Protocol for the Management of Multi-Jurisdictional Class Actions adopted by the Canadian Bar Association applied to the coordination of these joint settlement approval hearings.

<sup>4</sup> The Settlement Agreement refers to members who "owned" a Covered Model. The parties agreed to substitute the word "purchased" for "owned".

<sup>5</sup> Defined terms have the meanings set out in the Settlement Agreement, unless otherwise defined in these reasons.

[9] The Settlement Agreement contains a claims submission process. The member must submit a settlement claim form and proof of purchase of the television and the bulbs; however, an affidavit may be submitted if proof of purchase is not available.<sup>6</sup>

### Certification

[10] The plaintiff proposes that the action be certified as a class proceeding for settlement purposes. I note that the requirements for certification need not be as rigorously applied in the settlement context as they would be in the litigation context: see *Gariepy v. Shell Oil Co.*, [2002] O.J. No. 4022 (S.C.J.), at para. 27.

[11] The five-part certification test in s. 5(1) of the Act has been met.

[12] The pleading discloses a cause of action in negligence.

[13] There is an identifiable class - all resident Canadians who purchased a 2004 or 2005 model year Toshiba DLP television, excluding persons in Quebec.<sup>7</sup> Certification of a national class (other than Quebec) is appropriate. There is a real and substantial connection between the subject matter of the claim and the province of Ontario. Adequate notice has and will be provided to class members.<sup>8</sup>

[14] The common issues set out in paragraph 3 of the plaintiff's notice of motion dated April 18, 2013, subject to my deletions,<sup>9</sup> have the requisite degree of commonality and will avoid duplication of fact-finding or legal analysis.

[15] A class proceeding is the preferable procedure. It provides a fair, efficient and manageable way to resolve the common issues and will advance the proceeding to its resolution.

[16] There is a suitable representative plaintiff who falls within the proposed class definition and is able to fairly and adequately represent the interests of the class. He does not have an interest in conflict with those of the other class members on the common issues, has been actively involved in the litigation, and has produced a plan for the proceeding in the form of the Settlement Agreement. That agreement sets out a workable method of resolving the proceeding and of notifying class members of the proceeding.

[17] I signed the order certifying this action as a class proceeding for purposes of settlement.

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<sup>6</sup> The U.S. settlement required the claimant to provide proof of purchase. The parties in Canada agreed that an affidavit could be submitted, if proof of purchase was not available.

<sup>7</sup> The class definition excludes natural persons residing in the province of Quebec and all legal persons residing in the Province of Quebec having fewer than 50 employees.

<sup>8</sup> See *Currie v. McDonald's Restaurants of Canada Ltd.*, [2005] O.J. No. 506 (C.A.), at paras, 15-33. Toshiba's head office is in Ontario. The plaintiff resides in Ontario. Televisions were purchased in Ontario and throughout the country. Notices have and will be published in national newspapers and will be sent directly to class members known to Toshiba as outlined below. There is no issue about adequate representation of class members.

<sup>9</sup> Common issues (f) and (g) related to damages. Counsel agreed at the hearing that these should be deleted.

### Law relating to Approval of a Settlement

[18] Under s. 29 of the Act, 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, *Dabbs v. Sun Life Assurance*, (1998) 40 O.R. (3d) 429 (Gen. Div.), at p. 440-44, aff'd (1998), 41 O.R. (3d) 97 (C.A.).

[19] As Justice Perell stated in *Kidd v. Canada Life Assurance Co.*, [2012] O.J. No. 506, at para. 113, in determining whether to approve a negotiated settlement, the court may consider, among other things: (a) likelihood of recovery or success; (b) amount and nature of discovery, evidence or investigation; (c) settlement terms and conditions; (d) recommendation and experience of counsel; (e) future expenses and likely duration of litigation and risk; (f) recommendation of neutral parties; (g) if any, number of objectors and nature of objections; (h) the presence of good faith, arms' length bargaining and the absence of collusion; (i) degree and nature of communications by counsel and the representative plaintiffs with class members during the litigation; and (j) information conveying to the court the dynamics of and the positions taken by the parties during the negotiation.

[20] He notes that a reasonable and fair settlement is inherently a compromise and a reasonable and fair settlement will not be and need not be perfect: *Kidd*, at para. 114.

### Settlement Approval

[21] Considering the above factors, I approve the proposed settlement. It is fair, reasonable and in the best interests of the class members.

[22] The settlement extends the warranty on replacement bulbs in the future. It also provides compensation for class members who purchased replacement bulbs when the original one failed. The settlement affords recovery to class members who, given the modest size of their individual claims,<sup>10</sup> would not otherwise have received compensation. The amount of recovery is the actual cost of the bulb and will be provided to class members in cash, not coupons. There is no maximum aggregate recovery for the class.

[23] While discoveries have not been held, class counsel has received significant information to evaluate the merits of the claim and the settlement, including information provided as part of the U.S. litigation, information provided by Toshiba during the course of settlement discussions, conversations with the representative plaintiff and class members about the defective bulbs, and research conducted by class counsel.

[24] The claims procedure is a simpler method for class members to obtain compensation than if they had to prove damages at trial. The claims are facilitated by the ability to file an affidavit if proof of purchase of the television or bulb is not available. The claim process is to be

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<sup>10</sup> Replacement bulbs are in the \$200-300 range.

managed by Garden City Group, who administered the U.S. settlement and is experienced in processing these claims.

[25] The Settlement Agreement was negotiated at arm's length and with experienced counsel on both sides.

[26] Class counsel supports the settlement. In so doing, counsel has considered the risks of a defended certification hearing and, assuming the action is certified, the risks and delays of a common issues trial, individual damage assessments, and appeals. The representative plaintiff supports the settlement.

[27] The court-approved form of notice (and method of publication) of this hearing were published on July 25 and 26, 2013. Class counsel has received no objections to the proposed settlement. Garden City Group received 37 calls from potential class members but no objections.<sup>11</sup> Counsel proposes the same method of disseminating the notice of settlement approval to class members. In addition, I required that the notice be mailed directly to all class members known to Toshiba and counsel have incorporated that requirement in the order.

[28] I signed the order approving the settlement on the terms set forth in the Settlement Agreement and as otherwise set out in the order. The order requires the parties to report back to the court once Garden City Group's administration of the settlement has been completed.

### Legal Fees

[29] Under the retainer agreement with the plaintiff, class counsel will receive the higher of 30% of the total value of the settlement or a multiplier of 3.5 times the total number of hours worked on by counsel, plus disbursements and taxes.

[30] The fees and disbursements payable by Toshiba to class counsel pursuant to the Settlement Agreement are less than those under the retainer agreement. Class counsel seeks approval of, and the plaintiff supports, legal fees and disbursements of \$79,500, plus taxes (total amount for both Ontario and Quebec). Counsel's docketed time exceeds \$114,814 and disbursements are close to \$6000, plus taxes. The costs sought represent a multiplier of approximately .62 of counsel's time and disbursements.

[31] Considering the factors in *Smith Estate v. National Money Mart Co.* (2011), 106 O.R. (3d) 37, at paragraph 80 (C.A.), I am satisfied that the fees claimed are reasonable. They fairly reflect the risks assumed by counsel of conducting this litigation, as well as the favourable and timely results achieved through the Settlement Agreement.

[32] I signed the order approving the payment of fees and disbursements by Toshiba to class counsel in the amount of \$79,500, plus applicable taxes.

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<sup>11</sup> Class counsel received one call from a class member that led to a favourable amendment for the class, namely the ability to file an affidavit for the television if proof of purchase is not available.

**Orders**

[33] Order accordingly. If the parties require assistance during the course of administering the settlement, I may be spoken to.

  
Conway J.

**Date: September 18, 2013**