

CITATION: Vell v. Mattel Canada Inc., 2016 ONSC 5789
COURT FILE NO.: CV-12-470990-CP
DATE: 20160916

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
LAURA VELL) *Jeff Orenstein and Andrea Grass for the*
) Plaintiff) Plaintiff
)
- and -)
)
MATTEL CANADA INC., MATTEL INC.) *D. Michael Brown and Kristine Spence for*
and FISHER-PRICE INC.) the Defendants
) Defendants)
)
)
Proceeding under the *Class Proceedings Act, 1992*) HEARD: September 16, 2016
)

PERELL, J.

REASONS FOR DECISION

1. Introduction

[1] Pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, this is an omnibus motion for: (a) certification of this action as a class action for settlement purposes; (b) approval of the notice of certification and of the right to opt-out of the settlement; (c) approval of the Class Counsel fee; and (d) approval of small honorariums to the Representative Plaintiffs.

2. The Class Actions

[2] The Plaintiff, Laura Vell, resides in the City of St. Catharines, Ontario. In 2010, she purchased one of the Defendants' products for her minor child.

[3] On September 29 and 30, 2010, the Defendants, who are well-known manufacturers of children's toys and furniture, voluntarily recalled a variety of products including toys, inflatable balls, tricycles, ramp ways, and highchairs.

[4] On December 28, 2012, Ms. Vell commenced this action as a proposed class action. A similar claim was filed in Québec in *Winkler c. Mattel Canada Inc. et al.* (Court File No. 500-06-

000526-109). The Plaintiffs in that action are Anthony Snyder and Andrew Winkler.

[5] Class Counsel, the Consumer Law Group, are the same in both actions. Class Counsel agreed to be retained pursuant to a contingency fee agreement. The retainer agreement with Ms. Vell provides a calculation of Class Counsel fees to be the greater of 30% of the total amount received or an amount equal to the total number of hours worked with a multiplier of 3.5, plus applicable taxes.

[6] In this motion, Class Counsel are not seeking to enforce the retainer agreement.

[7] Class Counsel agreed to indemnify the Plaintiff against any adverse costs award and no request for any funding was made to the Class Proceedings Fund.

[8] In the Statement of Claim, Ms. Vell alleged that the Defendants negligently manufactured, produced, distributed, marketed and/or sold toys which had inherent, hidden defects, which rendered them unsafe and/or dangerous. Ms. Vell alleged that although the Defendants issued a voluntary recall of their products, they did not do so properly and that a great many Class Members were never made aware of the recall.

[9] Ms. Vell alleged the torts of misrepresentation and negligence, as well as statutory violations under the *Sale of Goods Act*, R.S.O. 1990, c. S.1, the *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Schedule A, and the *Competition Act*, R.S.C., 1985, c. C-34. She also pleaded claims in unjust enrichment, waiver of tort, and constructive trust.

[10] After lengthy negotiations to settle both actions, the parties signed a Settlement Agreement that included the Defendants' consent to a certification for settlement purposes.

[11] The proposed class definition is:

All Persons in Canada, except Excluded Persons and Persons who are members of the Quebec Settlement Class, who:

- (i) purchased or acquired (including by gift) a Recalled Product for or on behalf of themselves or a minor child over whom they have custody and control as a parent or guardian, or to be given as a gift to another Person; or
- (ii) are the parent or guardian of a minor child who purchased or acquired (including by gift) a Recalled Product.

Excluded Persons means:

- (a) all Persons who purchased or acquired Recalled Products(s) for resale; and
- (b) all Defendants and their affiliated entities, legal representatives, successors and assigns.

[12] The list of Recalled Products is found at Exhibit "A" to the Settlement Agreement.

[13] The proposed common issue is: "Were the Defendants, or any of them, negligent in the manufacture, distribution, sale and/or recall of the Recalled Products?"

3. The Settlement Agreement

[14] On January 19, 2015, after lengthy negotiations, the Plaintiffs and the Defendants signed a Settlement Agreement in which the Defendants consented to certification of the class action for settlement purposes only.

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

- The Defendants consent to certification for settlement purposes.
- The settlement is conditional on the approval of the courts in Québec and Ontario.
- A Settlement Notice will be published, and the “Notice Date” for the purposes of the Settlement will be the date that the Settlement Notice is published.
- The “Claims Deadline” and the “Opt-Out Deadline” will be at 5:00 p.m. EST, 90 days after the Notice Date.
- Settlement Class Members who requested and were sent a Modification Kit prior to the Notice Date will receive a cheque from Mattel in the amount of \$8.00 per Modification Kit sent, up to a maximum of three (3) Kits (\$24.00 total) per Person and/or address.
- Settlement Class Members who: (i) are in possession of one or more Recalled Products on the Notice Date; (ii) have not been sent a Modification Kit; and (iii) who make or submit a valid Modification Kit Claim in respect of such Recalled Product(s) to Mattel on or after the Notice Date and before the Claims Deadline, will be entitled to receive the Modification Kit(s) requested and a cheque from Mattel in the amount of \$8.00 per valid Modification Kit Claim submitted up to a maximum of three (3) such Modification Kit Claims (\$24.00 total) per Person and/or address.
- Settlement Class Members are entitled to a maximum of one (1) Modification Kit and a maximum amount of \$8.00 for each Recalled Product purchased or acquired per Person and/or address.
- In order to make a claim (i.e. receive a Modification Kit and the \$8.00 cheque) eligible Settlement Class Members complete and submit such a request to the Defendants, through their designated Recall and Safety Alerts website <http://service.mattel.com/us/recall.aspx>.
- In the event that the total amount that would be payable in respect of Modification Kits sent and valid Modification Kit Claims submitted exceeds \$200,000.00, the amounts of all cheques payable to Settlement Class Members shall be reduced pro rata to a total of \$200,000.00.
- Cheques shall be mailed to Settlement Class Members within 90 days of the Claims Deadline, by regular mail to the mailing address provided by the Settlement Class Member for the delivery of the Modification Kit. The amount of any Settlement Benefit cheques that are returned by Canada Post as undeliverable, if any, shall revert to the Defendants.

- The Fonds d'aide aux actions collectives shall be entitled to a deduction of 2% of the Settlement Benefits paid to Quebec Settlement Class Members.
- The Defendants shall pay all Notice Expenses (\$15,086.03 Hearing Notice, \$35,404.41 Settlement Notice).
- The Defendants shall pay Class Counsel Fees in the amount of \$85,099.58 (\$75,000 plus applicable taxes).
- The Defendants shall pay the Plaintiffs' honorarium in the amount of \$500 each (\$1,500 in total).
- The Defendants Mattel will be responsible for their claims administration costs and expenses, including organizing Settlement Class Members' claims, printing of cheques, and the various mailings to Settlement Class Members.
- Class Counsel will be performing other claims administration tasks such as the receipt of correspondence from Settlement Class Members, including opt-outs and objections, as well as responding to Settlement Class Members' questions and inquiries by telephone and email.
- The Defendants will receive a release for any and all claims related to the allegations of the Quebec and/or Ontario Proceeding(s) and the Recalled Products, but this release does not include individual claims for personal injury.

[16] As of August 31, 2016, there have been approximately 14,500 requests for Modification Kits - approximately 13,500 have already been mailed and approximately 1,000 are currently being processed.

4. Settlement Approval Hearings

[17] On June 29, 2016, this Court approved the Notice of Certification and Settlement Approval Hearing. The Hearing Notice advised the Class Members of: (a) the terms of the Settlement Agreement; (b) the date, time, and place of the Approval Hearings in Ontario and in Quebec; (c) the method and manner of how to participate in the already existing recall program; (d) their right to opt-out of the Settlement Agreement or to object to it; (e) Class Counsel's request for fees of \$75,000 plus applicable taxes; and (f) the honorarium awards of \$500 for each of the Plaintiffs (totalling \$1,500).

[18] As of September 8, 2016, there have been no opt-outs of the Settlement Agreement and no objections to the Settlement Agreement.

[19] It is the parties' intention that if the Settlement is approved by the Courts, the Settlement Notice will be published and disseminated to Settlement Class Members pursuant to a Settlement Notice Dissemination Plan within 65 days following the later of the Approval Orders from both Courts. The short form notice will be published once, in each of the following newspapers, in either English or French: *The Globe and Mail*, national edition, *National Post*, national edition, *La Presse*, *The Montreal Gazette*, and *The Vancouver Sun*. The long form Settlement Notice will be posted on Class Counsel's website at www.clg.org.

[20] Ms. Vell approves of the settlement and the payment of the requested Class Counsel

Fees.

[21] Class Counsel believes that the settlement provides substantial relief and benefits to the Settlement Class in light of the risks that would arise from continuing the litigation and it recommends approval of the Settlement Agreement. It is Class Counsel's opinion that the Settlement Agreement is in the best interest of the Settlement Class Members and represents a fair and reasonable compromise of the litigation.

5. Fees and Disbursements

[22] As of September 8, 2016, the dollar value of Class Counsel's unbilled base time in prosecuting this litigation was approximately \$177,606.25. Class Counsel incurred disbursements of \$4,574.65.

6. Certification for Settlement Purposes

[23] The court is required to certify the action as a class proceeding where the following five-part test in s. 5 of the *Class Proceedings Act, 1992* is met: (1) the pleadings disclose a cause of action; (2) there is an identifiable class of two or more persons that would be represented by the representative plaintiff; (3) the claims of the class members raise common issues; (4) a class proceeding would be the preferable procedure for the resolution of the common issues; and (5) there is a representative plaintiff who: (a) would fairly and adequately represent the interests of the class; (b) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and (c) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[24] The fact that an action is certified on consent for settlement purposes does not dispense with the need to meet the certification criteria but they may be less rigorously applied in a settlement context: *Osmun v. Cadbury Adams Canada Inc.*, [2009] O.J. No. 5566 (S.C.J.) at para. 21.

[25] Pursuant to s. 5 (1) of the *Class Proceedings Act, 1992*, I am satisfied that all of the criteria for certification have been satisfied.

7. Settlement Approval

[26] 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.

[27] 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*.

[28] 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.

[29] 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), 24 CPC (5th) 396 at para. 13; *McCarthy v. Canadian Red Cross Society* (2007), 158 ACWS (3d) 12 (Ont. S.C.J.) at para. 17.

[30] The design of the approval process requires the court to carefully scrutinize any proposed settlement. The design of the approval process: (a) requires the proponents of the settlement to justify it; (b) provides an opportunity for those affected by the settlement to be heard; and (c) requires the court to evaluate the settlement and make a formal order. This design is meant both to deter bad settlements and also to ensure good ones that achieve the goals of the class action regime; namely: access to justice, behaviour modification, and judicial economy.

[31] In the immediate case, having regard to the various factors that the court must consider in approving or rejecting a settlement, I conclude that the settlement is fair, reasonable, and the best interests of the Class Members. I approve the settlement.

8. Class Counsel Fee

[32] 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.

[33] 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.

[34] 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 good result and more than earned their modest fee.

9. Honorarium

[35] I am satisfied that Ms. Vell made a valuable contribution to this consumer class action and she and the Québec Plaintiffs deserve the small honorariums of \$500 each.

10. Conclusion

[36] Orders accordingly.



Perell, J.

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LAURA VELL

Plaintiff

– and –

MATTEL CANADA INC., MATTEL INC. and
FISHER-PRICE INC.

Defendants

REASONS FOR DECISION

PERELL J.

Released: September 16, 2016