

SUPERIOR COURT

(Class action)

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

N°: 500-06-000561-114

DATE: November 22, 2016

PRESIDING : THE HONOURABLE MICHELINE PERRAULT, J.S.C.

DE WAYNE MILLER
Petitioner

vs

KABA ILCO INC.
-and-
KABA ILCO CORP.
-and-
KABA AG
Respondents

JUDGMENT ON THE MOTION FOR THE APPROVAL OF A CLASS ACTION SETTLEMENT

1. INTRODUCTION

[1] On March 28, 2011, the Petitioner filed a Motion to Authorize the Bringing of a Class Action & to Ascribe the Status of Representative against the Respondents (the "**Motion for Authorization**"). On July 3, 2013, the Petitioner filed an Amended Motion for Authorization and on April 3, 2014, the Petitioner filed a Re-Amended Motion for Authorization on behalf of the following Class (as re-amended) :

"All residents in Canada who have purchased and/or own a pushbutton lock sold under the brand names Unican and Simplex with regard to their Series 1000/L1000, 2000, 3000, 5000, 6000, 6200, 7000, 7100, 8100, E-Plex 2000, and any such other locks manufactured by KABA that are capable of being opened with a magnet (the "Locks"), or any other group to be determined by the Court;

Alternately (or as a sub-class)

All residents in Quebec who have purchased and/or own a pushbutton lock sold under the brand names Unican and Simplex with regard to their Series 1000/L1000, 2000, 3000, 5000, 6000, 6200, 7000, 7100, 8100, E-Plex 2000, and any such other locks manufactured by KABA that are capable of being opened with a magnet (the "Locks"), or any other group to be determined by the Court;"

[2] The Re-Amended Motion for Authorization alleged, *inter alia*, that the Respondents sold the Locks with a design defect such that they were susceptible to being opened through the use of a special rare earth magnet.

[3] The Petitioner was seeking to bring an action in damages and for injunctive relief pursuant to the *Consumer Protection Act* and the *Civil Code of Quebec* ("**CCQ**").

[4] On April 28, 2014, in light of settlement discussions, the Court granted a Joint Motion to Postpone the Hearing of the Authorization of the Class Action.

[5] On June 16, 2015, the Petitioner and the Respondents reached an agreement in principle and, on July 7, 2015, an out-of-court settlement was entered into (the "**Settlement Agreement**"). The Court will also refer to the Settlement Agreement as the «**Transaction**»).

[6] The Settlement Agreement applies to persons who are members of the following "**Settlement Class**" :

"All residents in Quebec who use or own a Simplex® or Unican™ Model/Series 1000, L1000, 2000, 3000, 6200, 7000, 7100, 8000 or File Guard mechanical pushbutton lock manufactured before January 1, 2011 ("End-Users") or who purchased such a lock for re-sale ("Locksmiths")."

2. AUTHORIZATION OF THE CLASS ACTION AND PRE-APPROVAL PROCEDURE

[7] On August 25, 2016, the Court authorized the bringing of a class action against the Respondents and the designation of the Petitioner as representative of the class members for settlement purposes only, and approved the form and content of :

- a) the Pre-Approval Notice,
- b) the Claim Form and,
- c) the Opt-Out Form.

[8] As provided by the Settlement Agreement and the Notice Plan, prior to the Settlement Approval Hearing, the parties published the Pre-Approval Notice once in the

form of an approximately 1/3 of a page advertisement in the following French or English newspapers:

- La Presse Plus
- Le Soleil
- The Montreal Gazette
- The Canadian Jewish News
- The Heimishe Newsflash, and
- The Suburban

[9] The Pre-Approval Notice was also posted on the Settlement Website at www.simplexlockcase.ca as well as on Class Counsel's website at www.clg.org.

[10] The parties are now proceeding to a hearing on the Motion for the Approval of a Class Action Settlement, Approval of a Notice to Class Members, Approval of Class Counsel Fees, and Approval of an Incentive Award to the Petitioner.

3. APPROVAL OF THE SETTLEMENT AGREEMENT

3.1. The law

[11] Article 590 CCP requires that any transaction in a class action be approved by the Court. It reads as follows :

590. A transaction, acceptance of a tender, or an acquiescence is valid only if approved by the court. Such approval cannot be given unless notice has been given to the class members.

In the case of a transaction, the notice must state that the transaction will be submitted to the court for approval on the date and at the place indicated. It must specify the nature of the transaction, the method of execution chosen and the procedure to be followed by class members to prove their claim. The notice must also inform class members that they may assert their contentions before the court regarding the proposed transaction and the distribution of any remaining balance. The judgment approving the transaction determines, if necessary, the mechanics of its execution.

[12] Before approving the Transaction the Court must be convinced that the settlement is fair and reasonable and in the best interest of the Settlement Class Members who will be bound by the Transaction once it has been approved.

[13] The criteria that must guide the Court when approving a transaction are well known. They were stated namely in the decision of *Pellemans c. Lacroix* :

- “ ➤ les probabilités de succès du recours;
- l'importance et la nature de la preuve administrée;
- les termes et les conditions de la transaction;
- la recommandation des procureurs et leur expérience;
- le coût des dépenses futures et la durée probable du litige;
- la recommandation d'une tierce personne neutre, le cas échéant;
- le nombre et la nature des objections à la transaction;
- la bonne foi des parties;
- l'absence de collusion. ”

[14] That being said, in the course of this exercise, the Court must encourage the conclusion of an amicable settlement unless there are serious and important reasons to refuse the approval of the Transaction. However, the Court cannot modify or rewrite the Transaction. The Transaction has to be approved “as is” or not at all.

3.2. The decision

[15] The Court will now apply the above mentioned criteria to the case at hand.

3.2.1. The probability the action will succeed

[16] The conduct of civil litigation is never easy and the final result is often unpredictable. Petitioner alleges that certain push-button locks (the “Effectuated Locks”) manufactured by Respondents are susceptible to manipulation and defective in their design and unfit for their intended use. Petitioner further alleges that Respondents misrepresented the quality, characteristics and/or reliability of the Effectuated Locks. Respondents, on the other hand, deny all of Petitioner’s allegations and maintain that they have not committed a fault. The probability of success therefore depends on the Court’s analysis of the fault, the prejudice and the causal link between the two,

3.2.2. The importance and the nature of the evidence

[17] The parties were facing a serious and contradictory debate and hence a long trial with respect to the liability and the amount of the damages. They were therefore able to evaluate rationally the extent of the compromises they were willing to make.

3.2.3. The terms and conditions of the Transaction

[18] The Settlement Agreement provides for following noteworthy benefits :

« **3. Settlement Benefits**

A. Settlement Benefit for Locksmith Settlement Class Members

- 3.1 Locksmith Settlement Class Members who have inventory of unsold Effected Locks which were manufactured between January 1, 2001 and January 1, 2011, or thereafter in the event the lock was not upgraded to deter against magnetic manipulation, shall be eligible, within the Claims Period, to exchange the unsold inventory which is unused, complete with all parts and in its original factory package in a resalable condition with Respondents for identical product that has been upgraded to deter against magnetic manipulation.
- 3.2 Respondents shall be responsible for shipping costs to and from the Locksmith. Neither the shipping costs nor any other costs Respondents incur in making this exchange shall be deducted from the Maximum Installation and Shield Costs. This inventory exchange as described in this paragraph is the sole benefit afforded the Locksmith Settlement Class Members.
- 3.3 Members of the Locksmith Settlement Class Members who want to exchange unsold inventory do not have to complete a claim form; they simply have to contact the Respondents at 855-621-5879 or by writing at 2941 Indiana Avenue, Winston Salem, North Carolina 27105, to obtain a Return Goods Authorization in the form set forth in Schedule E.

B. Settlement Benefit for End-User Settlement Class Members

- 3.4 All End-User Settlement Class Members are entitled to receive one do-it-yourself installation ("DIY") Upgrade Kit for each corresponding Effected Lock in their possession. Respondents will provide the DIY Upgrade Kit to such Settlement Class Members without charge, and, postage-paid. The cost of the DIY Upgrade Kits and the postage for those kits will not be deducted from the Maximum Installation and Shield Costs.
- 3.5 End-User Settlement Class Members who purchased their Effected Locks after January 1, 2001 shall have the following alternatives to the right to receive one DIY Upgrade Kit for each lock :

- a) DIY Shields are available for Simplex 1000, 6000, 7000 and 8100 series locks. Instead of receiving a DIY Upgrade Kit, End-Users who, after January 1, 2001, purchased a model/series of these locks for which Respondents make a DIY Shield, and who make a timely claim, may elect to receive one DIY Shield for each Effected Lock. End-User Settlement Class Members who receive a DIY Shield shall not be eligible for the installation benefit as described in the next paragraph. Respondents' costs for the Shields shall be deducted from the Maximum Installation and Shield Costs at a flat rate of \$10 CND per Shield ("**Shield Costs**"); or
 - b) End-User Settlement Class Members who purchased their Effected Lock after January 1, 2001, who make a timely claim and do not elect to receive a DIY Shield, will be eligible to have Respondents arrange for installation of a DIY Upgrade Kit at Respondents' expense ("**Installation Claims**"). Costs for the Installation Claims for DIY Upgrade Kits shall be deducted from the Maximum Installation and Shield Costs;
- 3.6 End-User Settlement Class Member Claims Process : Claim forms will require End-User Settlement Class Members to provide their basic contact information, along with the number of locks, the date of purchase, and the model/series of locks for which they are making a claim. All claim forms must be submitted within the Claim Period. Proof of purchase is not required for any End-User Settlement Class Member to file a claim, unless the End-User Settlement Class Member files a claim for more than five Effected Locks. The Claim Form shall use the same language and be substantially in the same form as the example attached as Schedule A.

C. Maximum Installation and Shield Costs

- 3.7 Respondents shall reserve an amount up to no more than CND \$80,000 (Eighty thousand dollars) to cover the costs associated with the claims made by the End-User Settlement Class Members who purchased their Effected Locks after January 1, 2001 and have alternatives to the right to receive one DIY Upgrade Kit, as described at Section 3.5 above ("**Maximum Installation and Shield Costs**"). Any part of the reserved amount for Maximum Installation and Shield Costs which is not used to satisfy End-User Settlement Class Member claims shall remain the Respondents' sole property, whom shall have complete control, use and possession of same at the conclusion of the Claims Period.
- 3.8 For further clarity, the Maximum Installation and Shield Costs establishes a maximum exposure for the financial responsibility of Respondents for the cost of the Installation Claims and Shield Costs provided for on an individual basis in Section 3.5 of the Settlement Agreement and does not constitute an amount to be recovered through a liquidation of claims or any other distribution to the Settlement Class.

3.9 At the conclusion of the Claim Period, Respondents will organize the Installation Claims by postal code.

3.10 Respondents will compute the total estimated cost to complete the installation for those class members who have made a claim for installation, and will provide the basis for its calculations to Class Counsel.

- a) If the total estimated Installation Claims are less than the amount reserved for Maximum Installation and Shield Costs (less amounts already deducted for Shields Costs), Respondents will directly pay the selected locksmiths or other security professionals to proceed with the installations, without any further calculation or contribution from the Settlement Class Members;
- b) If, on the other hand, the total estimated Installation Claims exceed the amount reserved for Maximum Installation and Shield Costs (less amounts already deducted for Shield Costs), each eligible Settlement Class claimant will pay the difference to obtain installation. The payment will be on a *pro rata* share, and will be calculated to generate enough money to cover only the portion of the Installation Claims that exceeds the amount reserved by Respondents for Maximum Installation and Shield Costs. Eligible Class Members will pay the difference to Kaba or to the installer at the time of installation. "

3.2.4. The attorneys' recommendation and their experience

[19] The attorneys representing the Petitioner ("CLG") have developed an expertise in the area of consumer class actions, and have recommended the approval of the terms and conditions of the Settlement Agreement. The same goes for the attorneys for Respondents. Their experience in the area of class actions enables them to evaluate the fairness and reasonableness of the Settlement Agreement.

3.2.5. The costs of future expenses and expected duration of the trial

[20] The Transaction has the benefit of shortening the delays and reducing the costs inherent in legal proceedings, especially the expert costs which would have been required in this case.

3.2.6. The recommendation of a neutral third party.

[21] Seeing that the attorneys for both parties are experienced in class actions, the absence of a recommendation by a neutral third party has little or no impact. Furthermore, the Settlement Agreement provides similar Settlement Benefits to those of the U.S. Settlement Agreement as much as possible or applicable. The U.S. Settlement

Agreement was approved as being fair, reasonable, and in the best interests of the class members.

3.2.7. Objections to the Transaction, good faith and absence of collusion

3.2.7.1. Objections to the Transaction

[22] There have been no opt-outs or objections to the approval of the Transaction pursuant to the dissemination of the Approval Notice, which is indicative that the Settlement Class Members are satisfied with the result of these proceedings.

3.2.7.2. Good faith and absence of collusion

[23] The Court presumes the parties are acting in good faith as provided by article 2805 of the Civil Code of Quebec. Nothing indicates there was any collusion between the parties.

3.3. The Class counsel fees, disbursements and other expenses

[24] The Settlement Agreement provides the following:

“10.1 Subject to the approval of same by the Court, Respondents agree to pay an amount of \$212,500 plus applicable Goods and Service Tax (“GST”) and Quebec Sales Tax (“QST”) to Class Counsel for Class Counsel Fees, Disbursements and all Other Expenses in the present Proceedings (exclusive of the payment to the Petitioner as set forth in paragraph 10.7 below).

10.2 Respondents do not oppose, and will not encourage or assist any third party in opposing, Class Counsel’s request for Class Counsel Fees, Disbursements and all Other Expenses in the amount of \$212,500 plus applicable GST and QST. Class Counsel will not seek reimbursement in excess of \$212,500 plus applicable GST and QST and, in any event, Class Counsel agree that Respondents shall not pay, nor be obligated to pay, any sum in excess of \$212,500 plus applicable GST and QST.

10.3 The Parties negotiated and agreed to the amount of Class Counsel Fees, Costs and all Other Expenses only after reaching agreement upon all other material terms of the Settlement Agreement and thus constitute an integral part thereof.

10.4 The Parties agree that the amount in this Section represents Respondents’ all-inclusive, full payment for all Class Counsel Fees, Disbursements and all Other Expenses in relation to the claims covered by the contemplated release; including, but not limited to fees, costs, and other expenses incurred by any

counsel in the Proceedings, whether known or unknown to Respondents, as well as any objectors or later-appearing counsel.

10.5 The amount described in this Section shall constitute full satisfaction of Respondents' obligation to pay any person, attorney or law firm for Class Counsel Fees, Costs, and all Other Expenses, and shall relieve Respondents' and the Released Persons from any other claims or liability to any other attorney or law firm or Persons for any Class Counsel Fees, Disbursements and all Other Expenses to which the Petitioner, any Settlement Class Member, objector, or any other person may claim that are in any way related to the Released Claims.

10.6 In furtherance of the agreement in this Section, in the event of any Objections to the Settlement Agreement or appeal from any judgment regarding the approval of the Settlement Agreement, Class Counsel agree that they will be solely responsible for responding to objectors and defending the Court's order or judgment on appeal at their own cost. Respondents will join and/or not oppose Class Counsel's defence of the Settlement Agreement and any resulting order or judgment. Respondents agree not to appeal, or otherwise support any appeal, of any order or judgment entered by the Court that is consistent with this provision and the terms of the Settlement Agreement. Any fees, costs and other expenses incurred by Class Counsel in such appeals, including fees, costs or any other expenses incurred to settle any claims by objectors, are the sole responsibility of Class Counsel. No one may seek to recover such fees, costs or other expenses from Respondents.

10.7 Subject to the approval of same by the Court, Respondents agree to pay a one-time all-in incentive payment to Petitioner De Wayne Miller of \$2,500.

10.8 The Parties agree that Respondents shall not pay, or be obligated to pay, any sum in excess of \$2,500 to the Petitioner. This payment is in addition to any benefit provided to the Petitioner as a Settlement Class Member under the Settlement Agreement.

10.9 Any Class Counsel Fees, Disbursements and all Other Expenses awarded by the Court to Class Counsel and any incentive payment to Petitioner shall be paid by Respondents to Class Counsel and to the Petitioner within ten (10) days of the Effective Date. Releases ”

[25] CGL informs the Court that as of the date of the present Motion, the combined dollar value of CGL's unbilled base time in prosecuting this litigation was \$250,418.75, plus \$4,925.50 in disbursements. CGL also points out that it will need to devote time to complete the implementation of the settlement and estimates such work to amount to approximately \$25,000, which brings the total base to \$275,418.75. This additional time will not be submitted for a fee request to the Court and is already contemplated by the total amount of fees requested.

[26] In view of the foregoing, as well as the material filed in the Court record and the representations of counsels for both parties, the Court finds that the Settlement Agreement reached by the parties is fair, reasonable and in the best interests of the Settlement Class Members.

POUR CES MOTIFS, LE TRIBUNAL :**FOR THESE REASONS, THE COURT:**

[9] **ACCUEILLE** la présente requête;

[9] **GRANTS** the present motion;

[10] **ORDONNE** qu'aux fins du présent jugement, les définitions énoncées dans l'Entente de Règlement sont applicables et incorporées, sauf indication contraire dans ce jugement;

[10] **ORDERS** that, unless otherwise provided herein, for the purposes of this Judgment, the definitions set out in the Settlement Agreement apply and are incorporated herein;

[11] **ACCUEILLE** la requête du Requérent en approbation de l'Entente de Règlement;

[11] **GRANTS** the Petitioner's motion to approve the Settlement Agreement;

[12] **APPROUVE** l'Entente de règlement;

[12] **APPROVES** the Settlement Agreement;

[13] **DÉCLARE** que l'Entente de Règlement (incluant son préambule et ses Annexes) :

[13] **DECLARES** that the Settlement Agreement (including its Preamble and its Schedules):

- a) est juste, raisonnable et qu'il est dans le meilleur intérêt des Membres du Groupe du Règlement,
- b) est approuvé en vertu de l'article 590 C.p.c., et
- c) sera mis en œuvre conformément à ses dispositions;

- a) is fair, reasonable and in the best interests of the Settlement Class Members,
- b) is hereby approved pursuant to article 590 C.C.P., and
- c) shall be implemented in accordance with all of its terms;

[14] **DÉCLARE** que l'Entente de règlement constitue une transaction au sens des articles 2631 et suivants du *Code civil du Québec*, qui lie toutes les parties ainsi que tous les Membres du Groupe du Règlement;

[14] **DECLARES** that the Settlement Agreement constitutes a transaction in conformity with article 2631 of the *Civil Code of Quebec*, binding all parties and all Settlement Class Members;

[15] **ORDONNE** que les prestations énoncées dans l'Entente de Règlement soient fournies en satisfaction complète des obligations des Intimées en vertu de l'Entente de règlement;

[15] **ORDERS** that the Settlement Benefits set forth in the Settlement Agreement shall be provided in full and complete satisfaction of the obligations of the Respondents under the Settlement Agreement;

[16] **DÉCLARE** que l'Entente de

[16] **DECLARES** that the Settlement

règlement dans son ensemble (y compris son préambule et ses annexes) fait partie intégrante du présent jugement;

Agreement in its entirety (including its recitals and schedules) is an integral part of this Judgment;

[17] **ORDONNE** aux parties et aux Membres du Groupe du Règlement de se conformer à l'Entente de règlement;

[17] **ORDERS** the parties and the Settlement Class Members to comply with the Settlement Agreement;

[18] **ORDONNE** que RicePoint Administration Inc. soit nommé comme Administrateur des réclamations;

[18] **ORDERS** that RicePoint Administration Inc. shall be appointed as Claims Administrator;

[19] **APPROUVE** la forme et le contenu de l'Avis d'approbation essentiellement en la forme de l'avis produit comme pièce R-2;

[19] **APPROVES** the form and content of the Approval Notice substantially in the form produced herein as Exhibit R-2;

[20] **ORDONNE** que l'Avis d'approbation soit publié et distribué essentiellement selon les modalités du Plan de diffusion de l'Avis d'approbation prévu à l'Entente de Règlement;

[20] **ORDERS** that the Approval Notice shall be published and disseminated substantially in accordance with the Notice Plan as set forth in the Settlement Agreement;

[21] **DÉCLARE** que la forme et le mode d'avis tel que décrit dans l'Avis d'approbation, et le plan de diffusion de l'avis tel qu'approuvé dans le présent jugement, représentent une façon juste et raisonnable d'aviser toutes les personnes ayant droit de recevoir l'avis et satisfont aux exigences de préavis en vertu des articles 579, 581 et 590 C.p.c.;

[21] **DECLARES** that the form and manner of notice as set out in the Approval Notice and the notice plan as approved herein represents fair and reasonable notice to all persons entitled to notice, and satisfies the requirements of notice under articles 579, 581 and 590 C.C.P.;

[22] **ORDONNE** que, conformément aux modalités de l'Entente de Règlement, les Intimées doivent payer tous les coûts associés à l'Avis d'approbation;

[22] **ORDERS** that, in accordance with the terms of the Settlement Agreement, the Respondents shall pay the costs associated with the Approval Notice;

[23] **APPROUVE** le versement aux Avocats du Groupe des honoraires extrajudiciaires et déboursés tel que prévu à l'Entente de Règlement;

[23] **APPROVES** the payment to Class Counsel of its extrajudicial fees and disbursements as provided for in the Settlement Agreement;

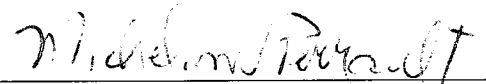
[24] **ORDONNE** que le Requérant reçoive des honoraires de 2 500 \$ en reconnaissance de ses efforts dans la poursuite de l'action collective jusqu'au règlement

[24] **ORDERS** that the Petitioner shall be paid an Incentive Award of \$2,500 in recognition of his efforts in prosecuting the class action through settlement;

[25] **RÉSERVE** le droit des parties de [25] **RESERVES** the right of parties to ask demander à la Cour de régler tout the Court to settle any dispute arising from différend découlant de l'Entente de the Settlement Agreement; règlement;

[26] **LE TOUT**, sans frais de justice.

[26] **THE WHOLE**, without legal costs.



MICHELINE PERRAULT, J.S.C.

Me Jeff Orenstein
Me Andrea Grass
CONSUMER LAW GROUP INC.
Attorneys for Petitioner

Me Bernard Amyot
Me Sébastien C. Caron
LCM AVOCATS INC.
Attorneys for Respondents

Hearing Date : November 22, 2016