

CITATION: *Abdulrahim v. Air France*, 2011 ONSC 398

COURT FILE NO.: 05-CV-294746 CP

DATE: 20110121

ONTARIO SUPERIOR COURT OF JUSTICE

RE: Hussein Abdulrahim and Fadi Abedrabbo, Plaintiffs

Air France, Greater Toronto Airports Authority, NAV Canada et al.,
Defendants

BEFORE: G.R. Strathy J.

COUNSEL: J.J. Camp Q.C., for the Plaintiffs

Robert Fenn, for NAV Canada

Timothy Trembley, for Air France

DATE HEARD: January 14, 2011

ENDORSEMENT

(Settlement Approval)

[1] This is a motion pursuant to s. 29(2) of the *Class Proceedings Act, 1992*, S.O. 1992 c. 6, to approve a settlement agreement entered into by the representative plaintiffs with the defendant NAV Canada ("NAV") and the defendants Air France, Alain Rosaye and Frédéric Naud (collectively, "Air France"). The settlement includes settlement of the claims of passengers A. Haddad, M. Fawaz and K. Fawaz (collectively, "Haddad and Fawaz"), who were added to the class by order dated December 7, 2010.

[2] This follows earlier settlements between the plaintiffs and Air France, Goodrich, Airbus and GTAA that have been approved by Lax J.: *Abdulrahim v. Air France*, [2009] O.J. No. 5550 (S.C.J.); *Abdulrahim v. Air France*, 2010 ONSC 3736 (unreported).

[3] Under the terms of this settlement agreement, NAV and Air France have agreed to pay the class the sum of \$7,100,000, plus accrued interest, in settlement of all claims against them. This sum is in addition to the amounts previously approved by this court in the earlier settlements. As a result of this latest and final settlement, the class action will be concluded for the total sum of \$20,750,000, all inclusive. In addition to these amounts, the plaintiffs have recovered approximately \$50,000 in costs from NAV and there is somewhat less than \$100,000 in interest earned on the previous settlement payments.

Background and Settlement Terms

[4] This action arises out of the crash of Air France Flight 358 from Paris to Toronto, which ran off the end of the runway at Pearson International Airport on August 2, 2005. All 297 passengers and the crew were able to evacuate before the aircraft was consumed by flames. The representative plaintiffs allege that they and other class members suffered damages as a result of these events, including personal injury and loss or damage to personal property.

[5] This action was commenced on August 5, 2005, on behalf of passengers of Flight 358 against: Air France S.A.S., the air carrier and operator of Flight 358; Alain Rosaye, the captain; Frédéric Naud, the first officer; NAV, the provider of air traffic control and navigation services at Pearson; the Greater Toronto Airports Authority ("GTAA"), the operator of the airport; Airbus S.A.S. ("Airbus"), the manufacturer of the aircraft; and Goodrich Corp. ("Goodrich"), the manufacturer of the emergency evacuation system and slides for the aircraft. The action also includes claims under the *Family Law Act*, R.S.O. 1990, c. F.3 (the "*FLA*"), on behalf of family members of the passengers on Flight 358.

[6] This action was certified as a class proceeding on August 15, 2006, with two principal classes: first, passengers on the aircraft and second, those of their family members entitled to assert an *FLA* claim. Family members of passengers who opt out of the class action are excluded from the second class.

[7] Of the 297 passengers on the aircraft, 47 initially opted out of the class action, including Haddad and Fawaz. A further 68 settled their claims with Air France and signed releases in its favour prior to certification of this action. Class counsel has taken the position that these releases did not effectively release the other defendants. Class counsel has reviewed those 68 settlements and has concluded that some of the claims were appropriately compensated and the settling passengers have been informed accordingly. The majority of the 68 passengers will be entitled to additional compensation as a result of the settlements with the defendants other than Air France. The remaining 182 passengers had not settled any portion of their claims for damages with any defendant prior to the commencement of this action.

[8] On December 7, 2010, I issued an order rescinding the opt-out notices of Haddad and Fawaz and ordered that they be added to the class. As a result, the total number of opt-outs at present is 44.

[9] The passenger class members reside primarily in Canada and France. At present, there are fifteen minor passenger class members who have not resolved any portion of their claims with the defendants. In addition, there are two other minor passenger class members who entered into settlement agreements with Air France prior to the certification of this class action.

[10] Class counsel have identified 454 *FLA* claimant class members. These individuals reside in Canada, France, Bosnia, Croatia, Germany, Hungary, India, Iran, Iraq, Italy, Jordan, Lebanon, Morocco, Romania, Russian Federation, Spain, Sweden and Syria.

[11] In or around August 2008, an agreement in principle was reached to settle the claims of the class members as against Air France. This settlement did not include the Haddad and Fawaz claims.

[12] While negotiation and drafting of that settlement agreement was underway, class counsel entered into additional settlement negotiations with Goodrich, Airbus, GTAA and NAV. A mediation with these defendants was held on November 25, 2008, with Justice C.L. Campbell acting as mediator.

[13] At the mediation, it became apparent that the lack of progress in the opt-out actions could become an obstacle to the resolution of the class action, especially if those defendants who wished to settle were unable to gauge their exposure in the opt-out cases. As a result, the mediation was adjourned and the mediator requested that opt-out counsel attend at the resumption of the mediation to provide a status report on their cases.

[14] The mediation was reconvened on March 10 and 11, 2009. At that time, it became clear that there had been no real progress made in the Haddad and Fawaz claims. At the request of the mediator and with the concurrence of counsel then acting for Haddad and Fawaz, it was determined that the best course of action would be to fold those claims back into the class action.

[15] Class counsel were instructed by Haddad and Fawaz to proceed on this basis. The defendants Goodrich and Airbus agreed on this course of action and settlements were achieved at this mediation with those defendants on the basis that the Haddad and Fawaz claims would be included in those settlements in the class action. No settlements were achieved at that time with GTAA or NAV.

[16] On July 21 and 22, 2009, class counsel applied to Justice Lax for approval of the initial Air France settlement as well as the Goodrich and Airbus settlements. Shortly before the hearing date, class counsel reached a tentative settlement with GTAA, which was predicated on including the Haddad and Fawaz claims.

[17] On December 24, 2009, Justice Lax approved the Air France settlement and the Goodrich and Airbus settlements. The remaining non-settling defendant, NAV, appealed.

[18] On June 2, 2010, the Court of Appeal dismissed NAV's appeal.

[19] On June 28, 2010 Justice Lax approved the GTAA settlement. As of that date, therefore, the following settlements had been achieved:

Settling Defendant	Settlement Approval Date	Settlement Amount	Inclusive of Fawaz & Haddad Claims
Air France	December 24, 2009	\$10,000,000.00	NO
Goodrich Corp. and Airbus S.A.S.	December 24, 2009	\$1,650,000.00	YES
Greater Toronto Airports Authority	June 28, 2010	\$2,000,000.00	YES

Total settlements		\$13,650,000.00	
-------------------	--	-----------------	--

[20] Immediately after the mediation in March 2009, class counsel took steps to take over conduct of the Haddad and Fawaz claims from previous counsel. Class counsel continued to negotiate with Air France and later with NAV regarding the resolution of the Haddad and Fawaz claims. Negotiations with NAV also took place with a view to the resolution of all the claims in the class action.

[21] On November 22, 2010, an agreement in principle was reached with NAV and with Air France to resolve the class action, including the Haddad and Fawaz claims, for the additional sum of \$7,100,000, creating a settlement fund of \$20,750,000 inclusive of all settlements achieved to date. It has been agreed that the settling parties will not disclose the apportionment of the settlement amount as between themselves.

[22] Class counsel considered this settlement to be in the best interests of the class members as well as Haddad and Fawaz. As a result of the case being settled in this manner, it became necessary for class counsel to formally value the Haddad and Fawaz claims as has been done for the claims of all other class members. This was done and the valuations have been submitted to Justice Campbell for review.

[23] The pertinent terms of this settlement agreement with Air France and NAV are as follows:

(a) Air France is party to the settlement agreement for the sole purpose of paying an additional amount in full and final settlement of the Haddad and Fawaz Claims;

(b) the settlement fund will be distributed to class members in accordance with the amended claims process approved by this court on September 27, 2010; and

(c) class members will execute a full and final release in favour of Air France and NAV in exchange for payment under the amended claims process.

[24] As Lax J. observed in her earlier decision approving the Air France, Goodrich and Airbus settlements, the legal framework of this case is unique because it involves the application of different bodies of law to different groups of defendants: see *Abdulrahim v. Air France*, [2009] O.J. No. 5550 (S.C.J.) at para. 44. The claims against Air France are governed by international conventions pertaining to the international carriage of passengers which have been enacted into law in Canada: the *Warsaw Convention* and the *Montreal Convention*, part of the law of Canada under the *Carriage by Air Act*, R.S.C. 1985, c. C-26. The damages compensable under these conventions are limited in nature. The claims against the remaining defendants are governed by the domestic tort law of Canada which recognizes a broader scope of damages. The proposed settlement agreements draw a distinction between damages compensable under the conventions

(the so-called "*Convention Damages*") and those damages recognized under Canadian domestic law other than *Convention Damages* (the so-called "*Extra-Convention Damages*"). The combined effect of the two settlement agreements is to make Air France solely responsible for the payment of *Convention Damages* while at the same time narrowing the scope of liability of the Non-Settling Defendants to their several share of liability for *Extra-Convention Damages*.

Analysis and Disposition

[25] The principles applicable to settlement approval have been set out in *Nunes v. Air Transat A.T. Inc.* (2005), 20 C.P.C. (6th) 93, [2005] O.J. No. 2527 (S.C.J.) at para. 7 and in *Dabbs v. Sun Life Assurance Company of Canada*, [1998] O.J. No. 1598 (Gen. Div.) at para. 13; see also *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 at 440-444, [1998] O.J. No. 2811 (Gen. Div.); aff'd (1998), 41 O.R. (3d) 97, [1998] O.J. No. 3622 (C.A.), leave to appeal to S.C.C. denied, [1998] S.C.C.A. No. 372. I do not propose to elaborate on those principles, or their applicability to this particular case, as they were reviewed by Justice Lax in her decision on the earlier settlement approval motion.

[26] The fundamental question is whether the proposed settlement is fair, reasonable, and in the best interests of the class as a whole. I have no hesitation in giving a positive answer to that question in this case. I will briefly set out my reasons.

[27] Class counsel has made a thorough assessment of the claim of each and every member of the class and is reasonably confident that each class member will receive approximately 80% of his or her recoverable damages out of the available fund after payment of his or her share of class counsel fees and other expenses. The fact that every class member will receive a very substantial indemnity for his or her damages is an extremely important factor. It is also highly significant, in my view, that it is expected that the payments will be made to class members within the very near future and without a complicated claims process. Class counsel has already done the heavy lifting in that regard and it is expected that money will be in the hands of class members within four months.

[28] The claims process established for the compensation of class members was modeled on the process that was approved by Cullity J. in *Nunes v. Air Transat A.T. Inc.*, above. It was reviewed and approved by Lax J. in her approval of the initial settlement with Air France and the defendants other than GTAA and NAV. As was the case in the subsequent GTAA settlement, the funds will be added to the existing funds and will be distributed in accordance with the claims process that has already been approved.

[29] There has been detailed communication with every class member concerning the settlement and not a single voice has been raised in opposition. The representative plaintiffs support the settlement. These are very significant factors.

[30] Having presided over several motions and case conferences, I am entirely satisfied that this settlement is the result of an extensive and hard-fought negotiating process between class counsel and counsel for NAV and Air France. As the authorities confirm, there is a strong initial presumption of fairness when a proposed settlement, negotiated at arm's length, is presented to the court for approval.

[31] The plaintiffs' claim against NAV was complex, novel, and attendant on significant litigation risks and costs. The settlement came at a time when the plaintiffs were essentially ready for trial, extensive discovery had taken place, numerous experts (including medical experts, air traffic control experts, pilots and human factor experts) had been retained, and class counsel was able to make a full assessment of the strengths and weaknesses of the case. The settlement comes with the recommendation of highly experienced class counsel who is fully aware of the merits of the action and the risks attached to it.

[32] In considering the approval of this settlement I bear in mind that this settlement will bring finality to the litigation and will result in a final resolution for all class members. If this settlement had not been achieved, it is highly likely that there would have been years of litigation, with no certainty of the result.

[33] As has been noted in many cases, the public interest favours the resolution of complex multi-party litigation: see *J.M. v. Bradley* (2004), 71 O.R. (3d) 171, [2004] O.J. No. 2312 at para. 65 (C.A.).

[34] Class counsel has undertaken to provide an interim report of the claims administrator with respect to the status of the claims assessment process as well as the current and prospective costs of the administration.

[35] For these reasons, the settlement is approved.

[36] There are fifteen minor members of the passenger class as well as two minor passengers who entered into settlements with Air France prior to certification and who did not release the other defendants. Fortunately, none of these minors suffered serious injuries. I approve the settlement on behalf of the minor passengers as well as members of the *FLA* class who are minors. The monies due to them will be paid into court and may be drawn out on attaining their majority, subject to the execution of a release.

[37] As contemplated by the claims process, the court will maintain a supervisory jurisdiction to ensure that the settlement fund is administered and distributed to class members in a timely and efficient manner. This supervision shall continue until all claims and expenses have been paid. I will require a report from class counsel and the claims administrator before any distributions take place and a final report when the fund has been fully administered, as well as any interim reports as may be requested or necessary.

[38] As a final housekeeping matter, the opt-out actions commenced by Haddad and Fawaz will be dismissed, without costs.



G.R. Strathy J.

DATE: January 21, 2011