CITATION: Brant v. De Beers Canada Inc., 2017, ONSC 7269
COURT FILE NO.: 1399/10CP
DATE: 20171218

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Kirk Brant, Plaintiff

AND:

De Beers Canada Inc., DB Investments Inc., De Beers S.A., De Beers Consolidated Mines, Ltd., De Beers UK Limited (f/k/a the Diamond Trading Company Limited), CSO Valuations A.G, and De Beers Centenary A.G., Defendants

BEFORE: Rady J.

COUNSEL: Reidar Mogerman and Linda Visser, counsel for the plaintiff

Katherine Kay, counsel for the defendants

HEARD: October 30, 2017

ENDORSEMENT

Corrected decision: The text of the original judgment was corrected in paragraph 14 on January 23, 2018.

Introduction

[1] The plaintiff seeks court approval of a settlement reached with the defendants, a distribution protocol, and counsel's fees and disbursements. The settlement agreement resolves this and parallel proceedings in British Columbia and Québec. The proposed class is a national one that includes Saskatchewan residents. This is significant for reasons more fully set out below.

Background

[2] The plaintiffs in the various proceedings seek damages for the defendants' alleged conspiracy to raise, maintain, fix and stabilize the price of natural diamonds used as gemstones in jewellery or purchased for investment.

[3] The first action was commenced in British Columbia on February 22, 2007. Parallel actions were subsequently brought in Ontario (June 1, 2010), Québec (June 16, 2011) and Saskatchewan (June 23, 2011). The plaintiffs in the Ontario, British Columbia and Québec actions are parties to the settlement agreement. They are represented by a consortium of counsel working cooperatively. Attached to these reasons is a chronology of the litigation to date prepared by counsel. It will be apparent from a review of the

chronology that this litigation has been aggressively prosecuted and defended. There have been multiple motions and appeals throughout, including:

a) a challenge to the plaintiffs' retainer of their expert;

b) a challenge to the court's jurisdiction in the British Columbia action and an appeal of the decision, including a request for leave to appeal to the Supreme Court of Canada; and

c) a contested certification hearing in the British Columbia action and an appeal of the decision.

[4] There were issues around the settlement of the order, the terms of a confidentiality order and an application to lift an implied undertaking that was briefed but never adjudicated.

[5] The plaintiffs in the Saskatchewan action, who are represented by the Merchant Law Group (MLG), are not parties to the settlement agreement. They are, however, members of the national class contemplated by the settlement agreement. The settlement is conditional on the Saskatchewan court permanently staying or dismissing the action brought in that province.

[6] The defendants have agreed to pay $9.4 million in exchange for a release and the dismissal of the Ontario, British Columbia and Québec actions, and the stay or dismissal of the Saskatchewan action. There is also an opt-out threshold, which if exceeded, permits the defendants to terminate the settlement agreement. Motions to approve the settlement and distribution protocol have also been brought in British Columbia and Québec.

[7] A similar action was brought earlier in the United States and it resulted in a settlement of USD $295 million.

The Saskatchewan Action

[8] The Saskatchewan proceeding was commenced in June 2011 by MLG on behalf of a national class. Justice Currie of the Saskatchewan Court of Queen's Bench was appointed to case manage the action. As I understand the chronology of events, no steps were taken by MLG until January 2014 when the scheduling of a certification hearing was sought. By this time, the proceedings in the other jurisdictions are said to have been more advanced.

[9] Justice Currie heard several motions between September 28 and October 2, 2015, namely:

(i) by the MLG plaintiffs to amend the pleadings in the Saskatchewan action;

(ii) by the MLG plaintiffs to certify the Saskatchewan action as a class proceeding on behalf of a national class;

(iii) by the MLG plaintiffs and the defendants to strike affidavits; and

(iv) by the plaintiffs in the British Columbia and Ontario actions to conditionally stay the Saskatchewan action or for an order declining to certify it.

[10] On February 17, 2016, Justice Currie granted the Ontario plaintiff's application for a conditional stay of the Saskatchewan action pending the outcome of the certification application in the Ontario action. The court declined to decide the other motions. On June 10, 2016, the Saskatchewan Court of Appeal granted leave to appeal. On December 22, 2016, the appeal was dismissed.

[11] Mr. Scott Olson of Olson Goldsmiths Inc., one of the representative plaintiffs in the Saskatchewan action, filed an affidavit in the Saskatchewan Court of Appeal in which he questioned the providence of the settlement agreement. The Court of Appeal did not consider the merits of either the settlement agreement or the concerns raised by Mr. Olson.

[12] As a result of the appeal, class counsel sought direction from Justice Currie regarding the appropriate time to seek a permanent stay or dismissal of the Saskatchewan action. Mr. Olson filed a second affidavit with the Saskatchewan Court of Queen's Bench again raising concerns about the settlement agreement.

[13] In June 2017, Justice Currie directed that the motion to permanently stay or dismiss the Saskatchewan action be brought following my decision respecting the proposed Ontario settlement. He did not address Mr. Olson's concerns about the adequacy of the proposed settlement because the issue was not before him.

[14] Mr. Olson filed no material in this proceeding setting out his apparent concerns about the proposed settlement. **I am advised that some 73 class members, including Mr. Olson, have opted out of the settlement. Seventy of those opt-outs have come from the MLG offices.** It appears that it is a private opt-out process that is not supervised by the court. A copy of Mr. Olson's opt-out form is found in the motion record and includes a letter from MLG to Mr. Olson dated October 20, 2017 enclosing the form for his signature. No objections were filed by any other members of the proposed class in the Ontario action.

<u>The Settlement Agreement</u>

[15] As already noted, the defendants have agreed to pay $9.4 million. The agreement was reached following extensive negotiations. A mediation was held in London, England on January 27 and 28, 2016 before an experienced mediator. The mediation did not immediately yield a resolution. However, discussions continued with the mediator's assistance and ultimately resulted in this settlement agreement.

[16] As already noted, the litigation has been hard fought and protracted. Moreover, it was being litigated in an environment where the law was or is currently unsettled and evolving. For example, until the Supreme Court of Canada settled the issue in its

decision *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 S.C.C. 57 and the two companion proceedings, the right of indirect purchasers to maintain an action was unclear. The issue respecting the rights of umbrella purchasers has yet to be heard by the Ontario Court of Appeal.

[17] In her affidavit sworn October 25, 2017 and filed in support of the approval motion, Ms. Visser deposes that in evaluating the merits of the settlement, class counsel considered the following:

(a) the evidence filed by the defendants in the British Columbia litigation, including both direct and expert evidence, the cross-examination on the affidavit of the defendants' expert and the affidavit of the finance director of De Beers U.K. Limited. This evidence is said to show that market power, the ability to overcharge, the size of any overcharge, the fact and amount of pass through and the variability of damages were all live issues;

(b) documents produced by the defendants in the British Columbia action, which confirmed the direct and expert evidence referred to above and showed the way in which De Beers had restricted its business, with the approval of regulators in Europe, to reduce its market power and change the nature of its contracts in a way that negatively affected the plaintiffs' ability to prove their case;

(c) information on the defendants' complete lack of relevant Canadian direct sales;

(d) comparison to the settlement in the United States action;

(e) expert reports from Canada and the United States, which provided detailed descriptions of the relevant industry and economic factors;

(f) the Canadian Competition Bureau has not investigated the defendants for possible anticompetitive conduct;

(g) the publicly available information relating to the investigations by the Department of Justice and the European Commission that showed that De Beers was not off-side any regulator on the key issues in the case; and

(h) the exchange of briefs and positions at the mediation held on January 27-28, 2016, which showed that all of the litigation issues were very much contested.

[18] Ms. Visser explains that one of the significant pieces of information considered was the overall size of the Canadian indirect gem grade diamonds market vis-à-vis the global market share. I am told that Canada had a 1.7 percent share of the global diamond market, measured by the value of retail sales based on the only, albeit dated, information available. In comparison, the United States had a 55.8 percent share. Based on this information, and without other considerations, a comparable Canadian settlement would be USD $9.52 million.

[19] Ms. Visser notes that in the United States action, the indirect purchaser settlement fund was allocated 50.3 percent to resellers and 49.7 percent to consumers. This is said to be reflective of the decision that resellers absorbed 50.3 percent of the overcharge and consumers 49.7 percent. The expert retained by the indirect purchasers concluded that the average overcharge on rough diamonds was 4.85 percent.

[20] Ms. Visser then outlines the following litigation risks that influenced counsel's evaluation of the settlement:

(a) the British Columbia Court of Appeal might overturn the certification decision;

(b) the Ontario court might not certify the action on behalf of a national class (excluding British Columbia) or certification would be overturned on appeal. In the British Columbia action, the defendants opposed certification in respect of all five criteria. It might reasonably be expected that they would take a similar approach in Ontario;

(c) the Courts could determine that an aggregate assessment of damages was not possible in light of the complex distribution chain;

(d) the Courts might find that the defendants' conduct did not constitute a price-fixing conspiracy but was rather unilateral or monopolistic conduct that is not unlawful, *per se*, in Canada and does not give rise to a private claim for damages under the *Competition Act*;

(e) even if a conspiracy was proven, the Courts could find that the agreement entered into by the defendants was ineffective, or that any illegal agreement had little or no effect on prices at the direct or indirect levels;

(f) the Courts might not allow the "umbrella purchaser" claims made on behalf of class members who did not, directly or indirectly, purchase diamonds from the defendants, but rather purchased diamonds mined by a non-conspirator entity;

(g) there would be appeals on many substantive issues even in the event that the plaintiffs were successful in all phases of the litigation;

(h) the matter would be brought to trial in British Columbia with uncertain results; and

(i) the Courts might find some, or all, of the class members' claims were time-barred. The Ontario and Québec actions had been commenced more than two years after the British Columbia action.

The Law

[21] The principles that guide settlement approval are well established and need not be exhaustively reviewed here. The following summary should suffice:

(a) the settlement must be fair, reasonable and in the best interests of the class;

(b) settlements are to be encouraged and are consistent with sound public policy;

(c) there is a presumption of fairness when a settlement negotiated at arm's length is presented for approval;

(d) reasonableness is assessed along a spectrum – there is a zone of reasonableness that permits a number of possible and acceptable outcomes;

(e) settlements are the product of compromise and rarely provide all parties what they would like; and

(f) the court is not to substitute its judgment for that of the parties, renegotiate the settlement, or litigate the merits. However, the court does not simply rubber stamp a settlement.

[22] See *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2643; aff'd 2010 ONCA 841; leave to appeal to S.C.C. denied 2011 CarswellOnt 6019.

[23] *Osmun* also instructs that a number of factors can be considered to assist in assessing the reasonableness of a proposed settlement. They are:

(a) the presence of arm's-length bargaining and the absence of collusion;

(b) the proposed settlement terms and conditions;

(c) the number of objectors and nature of objections;

(d) the amount and nature of discovery, evidence or investigation;

(e) the likelihood of success or recovery;

(f) the recommendations and experience of counsel;

(g) the future expense and likely duration of litigation;

(h) information conveying to the court the dynamics of, and the positions taken by the parties during, the negotiations;

(i) the recommendation of neutral parties, if any; and

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

[24] See also *Waldman v. Thomson Reuters Canada Limited*, 2016 ONSC 2622 (Div. Ct.).

The Objection

[25] It may not, strictly speaking, be necessary to consider Mr. Olson's objections to the proposed settlement. First, he has exercised his right to opt out. Second, he filed no material in this proceeding or for this hearing. Rather it was filed by class counsel as part of the motion record. There are two affidavits dated November 3, 2016 and June 9, 2017 that are largely the same. For the sake of completeness, however, Mr. Olson's concerns are addressed here.

[26] At its core, his objection is to the adequacy of the settlement, which he says provides only nominal recovery to class members. He comes to this conclusion based on:

a) the value of the settlement compared to that achieved in the United States class proceeding (which he also considers to be deficient);

b) the return to class members based on his estimate of the number of diamonds sold in Canada, using marriage statistics and based on his long experience in the diamond and wedding industry;

c) his disappointment that he is "beholden" to the Ontario court who would make a decision without the benefit of the Saskatchewan record;

d) his estimate of the number of potential class members;

e) the fees and disbursements that will be paid to class counsel; and

f) his estimation of the costs of administering the settlement.

[27] Mr. Olson compares the United States settlement of USD $295 million unfavourably to the proposed Canadian settlement. He estimates that Canada has approximately 10 percent of the population of the United States. Accordingly, a comparable Canadian settlement should be in the range of USD $29.5 million (or $39.6 in Canadian dollars). The proposed settlement is less than 25 percent of that figure.

[28] He also reviews Canadian marriage statistics that show that there were 145,000 new marriages each year between 2001 and 2008. Based on his experience of 25 years, he believes that over 50 percent of those persons purchased a gem grade diamond. He calculates that the indirect purchaser class could include more than one million people.

[29] After deducting class counsel's proposed fees and disbursements and distribution costs, he concludes that if there were 1,595,000 claims (50 percent of the number of marriages from 1994 to 2016) each claimant would recover a mere $3.63.

[30] Class counsel submit and I accept that Mr. Olson's concerns are misplaced for a number of reasons, including:

a) the relative size of the United States and Canadian population does not translate accurately into the relative size of the jewellery market. Available

market data would suggest that Canada has a small share of the diamond jewellery market by retail sales value;

b) the United States settlement was negotiated after default judgments were signed against the defendants there;

c) the United States claims were brought under the *Sherman Act* which, with the *Clayton Act*, create a private right of action for monopolization and the potential to recover treble damages;

d) De Beers restructured its business, reducing its market power – after the United States class period but during the Canadian class period.

[31] I note as well, there is no evidence that Mr. Olson quarrels with class counsel's assessment of the litigation risks, which in my view are considerable.

Analysis and Conclusion

[32] I am satisfied that the proposed settlement is fair, reasonable and in the best interests of the class. Success was far from a "sure thing" from the plaintiffs' perspective. If history is a good indicator, absent a settlement, the litigation would have continued and undoubtedly would have been protracted and expensive.

[33] While it might be argued that the quantum is at the modest end of the range, it is nevertheless a good result produced by arms-length negotiations with the assistance of a neutral third-party. Counsel, who have long experience in class action litigation, recommend the settlement as a reasonable compromise based on their review of the evidence produced to date. I have considered Mr. Olson's objection and have concluded that it should not stand in the way of court approval. There are no other objections that I am aware of except from the Saskatchewan group.

[34] For all of these reasons, the proposed settlement is approved.

"Justice H. A. Rady"
Justice H.A. Rady

Date: December 18, 2017