

CITATION: Somwar v. Fly Jamaica Airways Ltd., 2024 ONSC 209
COURT FILE NO.: CV-18-00609498-00CP
DATE: 20240110

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: JOHN SOMWAR, TULSIDAI SOMWAR and SHANTA PERSAUD, Plaintiffs

– and –

FLY JAMAICA AIRWAYS LTD., THE BOEING COMPANY, BASIL FERGUSON, KEONE BRYAN, MEXICANA MRO, S.A. DE. C.V., JOHN DOE #4 AIRCRAFT MAINTENANCE MECHANIC, Defendants

BEFORE: Justice E.M. Morgan

COUNSEL: *Valarie Lord, Joe Fiorante, Vincent Genova, and Sara Nagalingam*, for the Plaintiffs

Clay Hunter and Jiwan Son, for the Defendants, Fly Jamaica Airways Ltd., Basil Ferguson, and Keone Bryan, for the Defendants

Robert Fen, for the Defendant, The Boeing Company

Leon Beukman, for the Defendant, Mexicana MRO, S.A. DE C.V. and John Doe #4 Aircraft Maintenance Mechanic

HEARD: January 10, 2024

SETTLEMENT AND FEE APPROVAL

[1] This class action arises from an accident that occurred on November 9, 2018 at Georgetown Cheddi Jagan International Airport in Guyana. The Fly Jamaica Flight OJ 256 was *en route* to Toronto Pearson International Airport when it turned back for an emergency landing after developing problems with the plane’s hydraulic system. Upon touching down, the Boeing 757-23N aircraft went off the runway, sustained substantial damage, and passengers suffered physical injuries and other losses.

[2] After extensive negotiations conducted at arm’s length during the course of a number of years, in December 2023 a settlement was reached and a Settlement Agreement was executed by the Parties. Under the Settlement Agreement, the Defendants have agreed to pay a lump sum of \$5,550,000.00 as a full and final settlement of the action. OHIP has also indicated its consent to the Settlement Agreement in respect of its subrogated claim.

[3] As discussed at the approval hearing, the Defendants are to deliver the settlement funds to class counsel by March 1, 2024 at the latest. Defendants' counsel have indicated that their clients are also prepared to make best efforts to have the funds ready prior to that date, and will deliver the funds to class counsel prior to March 1, 2024 if it becomes possible to do so.

[4] All legal fees, noticing costs, and claims administration costs are to be paid from the settlement fund.

[5] On December 6, 2023, the Court approved the Plaintiffs' plan for providing notice of this motion for settlement approval. Form and content of the notice was likewise approved. Class counsel sent out the Notice of Hearing to all class members by email or regular mail. At the same time, co-class counsel and proposed claims administrator, Howie, Sacks and Henry LLP, updated their websites to provide details about the hearing for the present motion.

[6] Class counsel confirm that all of the parties' obligations pursuant to the Notice Approval Order have been fulfilled. As of today's date, no class member has objected to the terms of the Settlement Agreement. There were a number of class members in attendance at the approval hearing. They were invited to voice any objections to the settlement that they might have, but no one expressed an objection.

[7] The Plaintiffs and class counsel bring motions to:

- (a) Certify the claim as against the Defendant, Mexicana MRO S.A. de C.V for the purposes of settlement only;
- (b) approve the Settlement Agreement entered into between the parties;
- (c) approve Class Counsel's fees in the amount of 25% of the settlement amount along with disbursements totaling \$295,000.00; and
- (d) approve an honorarium for each of the Plaintiffs in the amount of \$5,000.

[8] Certification of this action under the *Class Proceedings Act (1992)*, S.O. 1992, c. 6 ("CPA") for the purposes of settlement is not controversial. The action was certified as against the initial named Defendants, Fly Jamaica Airways Ltd., The Boeing Company, and two individuals by Order of this Court dated September 19, 2019.

[9] Two new Defendants were added at a later time: Mexicana MRO, S.A. DE C.V. and John Doe #4 Aircraft Maintenance Mechanic (the "Mexicana Defendants"). The case is to be certified for settlement as against the Mexicana Defendants on the same bases as in my initial certification ruling: see *Somwar v. Fly Jamaica Airways Ltd.*, 2019 ONSC 5439.

[10] The Class is defined in the Certification Order as:

- (i) Passenger Class refers to the passengers who were aboard Flight OJ256. For clarity, the following persons are excluded from the Passenger Class: (i) pilots in command, co-pilots and flight attendants; and (ii) as against Fly Jamaica: passengers whose claims

against Fly Jamaica Airways, the flight crew and the cabin crew, are not subject to jurisdiction before the Courts of Canada under the *Carriage by Air Act*, R.S.C. 1985, c. C-26, as amended; and,

- (ii) (ii) Family Claimant Class refers to the spouse, children, grandchildren, grandparents, brothers, and sisters of a Passenger Class member who are entitled to claim damages pursuant to Section 61 of the *Family Law Act*, R.S.O. 1990, c.F.3, as amended and, or section 2(5) and Schedule II of the *Carriage by Air Act*, R.S.C. 1985, c. C-26, as amended. Relatives of a Passenger Class member who has chosen to opt out of the class proceeding are excluded from this class.

[11] By Order dated March 10, 2022, Mexicana MRO, S.A. DE C.V. and John Doe No. 4 Aircraft Maintenance Mechanic were added as Defendants to the action.

[12] The Settlement Agreement is designed to leave no class member uncompensated or undercompensated. The total settlement amount reflects a culmination of the assessed value of each passenger's claim.

[13] There are 7 minor passengers in the class. They suffered either no injuries or very minor injuries and are each expected to receive a settlement of approximately \$8,000.00 to \$15,000.00. Under the *Children's Law Reform Act*, where the total amount of money a child is to receive is \$35,000 or less, the money does not need to be paid into court. Those funds may be paid to the child's parent if the child resides with the parent.

[14] The overall settlement amount reflects individualized assessments of the damages claims of each passenger as class member as opposed to a more formulaic approach to compensation. Class counsel has produced a Distribution Protocol (Schedule "D" of the Settlement Agreement), in which there is a valuation of each class member's claim. A summary of this assessment will be delivered by class counsel to each class member eligible for compensation.

[15] Class counsel submit that the three representative Plaintiffs made a noteworthy contribution throughout the action. They retained class counsel to commence this action. In fulfilling their role, they subjected their private lives and personal health information to public scrutiny in order to ensure that this action was brought. This included swearing several affidavits in support of this action.

[16] The Divisional Court in *Doucet v. The Royal Winnipeg Ballet*, 2023 ONSC 2323 has confirmed that a modest honorarium to the representative Plaintiffs is permissible under the *Class Proceedings Act*. Here, class counsel support the payment of a modest honorarium of \$5,000 each for of the representative Plaintiffs. This is well within the range of honoraria that courts have acknowledged is appropriate.

[17] As for class counsel, they drove the action forward, did all of the investigation, advocacy, drafting, research, and negotiating that one would expect of experienced class action counsel. Class Counsel assumed the risks of this litigation and provided the Plaintiffs with an undertaking to indemnify them against adverse costs awards and to pay for all disbursements.

[18] Furthermore, class counsel has incurred over \$1,135,000 worth of time and \$295,000 in disbursements. Class counsel here seeks to have its Retainer Agreement approved. It also requests that its legal fees in the amount of 25% of the settlement fund - totaling \$1,293,432.50 plus \$168,146.22 HST and disbursements in the amount of \$295,000 – be approved.

[19] A key question in evaluating the merits of a proposed settlement is whether its terms lie within a range of reasonableness. In making this assessment, the court must balance the need to scrutinize the settlement against the recognition that there may be a number of possible outcomes within the range of reasonableness.

[20] The range of reasonableness has been described as follows:

[A]ll settlements are the product of compromise and a process of give and take and settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and cost of litigation.

Dabbs v. Sun Life Assurance Co. of Canada, 1998 CarswellOnt 5823, at para. 9.

[21] Considering the likelihood of success in the action, the extent of the investigation and evidence in the case, the representation of the class by experienced counsel, the likely expense of continued litigation, and the engagement of the parties in good faith, arm's-length bargaining (with no suggestion of collusion), the proposed terms and conditions of the settlement are very reasonable. As class counsel explain, there were also risks flowing from the limitation of liability on airlines as set out in the *Montreal Convention on International Carriage by Air* (1999), to which Canada is a party.

[22] It is in the best interests of the class for the settlement to be approved.

[23] Class counsel proposes that the law firm of Howie, Sacks and Henry LLP act as the Claims Administrator, if the Settlement Agreement is approved. In their experience, that firm is in the best position to administer the funds as set out in the Settlement Agreement.

[24] Turning to class counsel's request for fee approval, they seek approval of the Contingency Fee Agreements with the representative Plaintiffs dated November 20, 2018 and November 21, 2018. They also seek approval of their fees in the amount of 25% of the settlement amount (being \$1,293,432.50 plus \$168,146.22 HST) and disbursements in the amount of \$295,000.00 (inclusive of applicable taxes) that have been incurred in pursuing the action on behalf of the class.

[25] The test for fee approval is whether class counsel's proposed fees are fair and reasonable in all of the circumstances. To determine whether a fee is fair and reasonable, the risk undertaken by class counsel is to be taken into account, as is the degree of success achieved for the class: *Dow v. 407 ETR Concession Company Limited*, 2016 ONSC 7086, at para. 22. Class counsel is entitled

to a fair fee; the fee may include a premium for the risk undertaken and the result achieved, so long as the fees charged do not bring about a settlement that is in the interests of the rather than in the best interests of the class members: *Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374, at paras. 13, 63, 68 (SCJ).

[26] In terms of quantum, Justice Strathy observed in *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105, at para. 64, that no one should be surprised by a contingency fee in the range of 20% to 30% of the class's recovery. Likewise, Justice Belobaba stated in *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686, at para. 3 that, "I have also been persuaded that a one-third contingency fee agreement, if fully understood and accepted, should be accorded presumptive validity."

[27] The presumptive validity of the fee may be rebutted where there is evidence that (1) the representative Plaintiff did not fully understand or agree to the retainer agreement, (2) the contingency amount is substantially larger than the standard 33%, or (3) the fees awarded are so large as to be unseemly: *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686, at para. 9. None of these factors apply here.

[28] The representative Plaintiffs have each deposed that they fully understood the retainer agreement and agreed the provided contingency is fair. I see no reason not to approve the class counsel fees as requested.

Disposition

[29] For settlement purposes, the action is hereby certified pursuant to section 5(1) of the *CPA* as against the Mexicana Defendants.

[30] The Settlement Agreement is hereby approved.

[31] Class counsel's request for legal fees, disbursements and applicable taxes is hereby approved.

[32] Payment of a \$5,000 honorarium to each representative Plaintiff is hereby approved.

[33] There will be Orders to go as submitted.



Date: January 10, 2024

Morgan J.