CITATION: Estate of Hugh Cullaton v. MDG Newmarket Inc., 2021 ONSC 6996
COURT FILE NO.: 1850/16CP
DATE: 20211021

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: The Estate of Hugh Cullaton deceased, by his Executrix, Karen Cullaton, Plaintiff

AND:

MDG Newmarket Inc., holding itself out as Ontario Energy Group and Ontario Energy Solutions and Home Trust Company, Defendants

BEFORE: Justice R. Raikes

COUNSEL: Jonathan Foreman and Jean-Marc Metrailler - Counsel, for the Plaintiff

Marie Henein and Alex Smith - Counsel, for the Defendant, MDG Newmarket Inc.

Nicholas Kluge and Brent Arnold - Counsel, for the Defendant, Home Trust Company

HEARD: September 23, 2021

ENDORSEMENT

[1] The plaintiff seeks an order:

a. Approving a settlement agreement between the parties dated March 29, 2021 pursuant to s. 29 of the *Class Proceedings Act, 2002* ("*CPA*");

b. Dismissing the action as against the defendants with prejudice and without costs;

c. Approving a plan submitted by plaintiff's counsel for distribution of the settlement;

d. Appointing Epiq Class Action Services Canada Inc. as the Claims Administrator and approving Epiq's fee proposal for such services to be paid from the settlement;

e. Permitting plaintiff's counsel to be reimbursed for settlement administration expenses up to $10,000 from the settlement and to apply for further court approval for any additional such expenses;

f. Directing that the approval order be posted on class counsel's website and counsel be permitted to directly notify class members who asked to be kept informed of the approval; and

g. Directing that a further motion will be brought for approval of the claims process and the notice program for that process within 30 days of settlement approval.

Background

[2] This action was commenced on July 25, 2016. Motions for certification and partial summary judgment were filed May 3, 2017. Affidavits were exchanged for those motions including from experts. Cross-examinations were conducted. The motions were argued April 8-11, 2019 inclusive. The action was certified as a class proceeding but the motion for partial summary judgment was dismissed (2019 ONSC 6432 (CanLII)).

[3] After the claim was certified as a class proceeding and the summary judgment motion dismissed, the usual notice and opt-out regimen was delayed at the request of all counsel to permit discussions aimed at resolution to continue. The negotiations started well before the motions were argued and continued after the decision was released.

[4] Those discussions ultimately bore fruit. A settlement agreement was signed March 29, 2021 and the process of notifying class members and seeking court approval began.

[5] Before I address the settlement reached, it is important to briefly outline what the action is about.

Nature of the Action

[6] On August 1, 2014, Hugh Cullaton (now deceased) entered into a Rental and Maintenance Agreement with MDG Newmarket Inc. (hereafter "MDG") for a high efficiency furnace, an air conditioner and chimney liner. He is one of thousands of Ontario residents who entered into rental agreements for HVAC equipment from MDG during the claim period.

[7] The agreement signed by Mr. Cullaton was a standard form agreement used by MDG. The agreement was executed at his residence. All or virtually all the agreements signed by class members were signed at their residences.

[8] MDG is a company based in Mississauga, Ontario. Eugene Farber is the directing mind of MDG. He is its sole shareholder, officer, and director. MDG is in the business of renting and servicing, *inter alia*, gas furnaces, air conditioners, water heaters and water softeners to residential consumers in Ontario (referred to herein as "the equipment" or "the HVAC equipment").

[9] Once a rental agreement was entered into with a consumer, MDG removed the old equipment, if any, and installed the new rented HVAC equipment. As part of the agreement, MDG was to service the equipment during its useful life. It was conceded that

MDG is a "supplier" as defined in s. 1 of the *Consumer Protection Act, 2002*, S.O. 2002, c. 30 (Sch. A).

[10] The standard form contract with consumers used by MDG was vetted and approved by Home Trust Company (hereafter "Home Trust") and could not be amended without prior agreement by Home Trust.

[11] Home Trust is a federally regulated trust company. Its head office is in Toronto. Home Trust is in the business of lending money to consumers and businesses like MDG.

[12] In 2012, Home Trust and MDG entered into agreements ("Program Agreements") by which Home Trust agreed to advance funds to MDG for the purchase of HVAC equipment for consumers with whom MDG had contracted. In return, Home Trust received an assignment of the rental revenue stream for consumer contracts for a period of 60 months, and Home Trust registered its interest in the equipment against the title to the consumer's property.

[13] The amount of the security interest registered on title was determined by the Program Agreements between Home Trust and MDG based on the equipment rented. Consumers were not privy to the Program Agreements and were not told the amounts that would be specified in the documents registered against their title.

[14] If an individual consumer wished to discharge the registered security interest from title, he/she contacted Home Trust. A buyout option was available although not disclosed in the contract signed by the consumer. Home Trust dealt with consumers for buyouts.

[15] In my reasons on the certification and summary judgment motions, I observed the following with respect to the consumer agreement terms,

a. The term of the agreement is the useful life of the equipment which is estimated to be "about 15 years". There is no fixed end date to the lease.

b. The agreement is for both rental of equipment and provision of ongoing service and maintenance by MDG.

c. Subject to disqualifying events, MDG is responsible for the cost of preventative maintenance, servicing, and repairs throughout the term of the agreement.

d. The amount of the monthly payment is not broken down between equipment rental and servicing. The annual or aggregate value of the servicing component is also not estimated.

e. The monthly amount payable can increase annually by up to 3.8%. The exact monthly amount payable in the future is uncertain.

f. The value of the equipment if purchased is not set out. The implicit finance charge is not disclosed.

g. The agreement is between MDG and the customer. There is no reference to Home Trust anywhere in the agreement.

h. MDG retains ownership of the equipment throughout the term of the lease.

i. The agreement provides for termination at the end of the term and early termination by the consumer. In either case, MDG attends at the property and removes the equipment at the consumer's expense.

j. There is no provision for buying out the lease or buying the equipment during or at the end of the term of the agreement.

k. The agreement is silent as to any buyout program available.

l. The consumer covenants to keep the equipment free from any encumbrance and to inform any purchaser of the residence that the equipment is owned by MDG.

m. MDG is entitled to register its ownership interest in the equipment on the title of the consumer.

n. MDG is entitled to assign its right, title, and interest in the equipment to a third party.

o. MDG is entitled to grant a security interest in its right, title, or interest in the equipment or in the agreement with the consumer.

p. The agreement does not indicate that MDG had an agreement in place with Home Trust to assign the first 60 monthly payments and that Home Trust would be registering a security interest against the consumer's real property.

q. The agreement does not expressly indicate that if MDG grants a security interest in the equipment or agreement, that security interest may be registered against title to the consumer's property.

r. The agreement contains the usual entire agreement provision.

s. The rights indicated to be available pursuant to the *Consumer Protection Act, 2002* focus on cancellation although there is a general statement in the midst of that provision that indicates the consumer may have other rights, duties and remedies at law.

[16] In this action, the plaintiff claims for himself and the class, *inter alia*, the following relief:

a. General damages calculated on an aggregate basis or otherwise;

b. Special damages for out-of-pocket expenses incurred;

c. Punitive and exemplary damages;

d. A declaration that the standard form agreements used with consumers did not comply with the *Consumer Protection Act, 2002*;

e. Relief from amounts alleged owed or owing to the defendants;

f. Rescission and a declaration that the consumer contracts with class members are unenforceable;

g. Relief and damages under the *Personal Property Security Act*, R.S.O. 1990, c. P.10;

h. Relief under s. 160 of the *Land Titles Act*, R.S.O. 1990, c. L.5; and

i. A permanent injunction restraining the defendants from taking any further action in contravention of the *Consumer Protection Act, 2002* and its Regulations or the *Competition Act*.

[17] The plaintiff asserts, *inter alia*, the following causes of action:

- Breach of the *Consumer Protection Act, 2002*, and its Regulations, O.Reg. 17/05 and O.Reg. 3/15
- Breach of the *Competition Act*
- Civil conspiracy
- Unconscionable contract
- Unjust enrichment
- Waiver of tort.

[18] In broad terms, the plaintiff alleges, *inter alia*, that MDG rental agreements do not comply with disclosure requirements found in the *Consumer Protection Act, 2002* and its Regulations, and constitute unfair practices. Once signed by the consumer, a security interest or lien was registered against title to the consumer's property by Home Trust. That lien in favour of Home Trust was not authorized by the rental agreement and was itself misleading and deceptive. There is an expensive buyout program that should have been but was not disclosed to consumers when they entered into the agreement with MDG.

[19] The agreement signed by the consumer is with MDG. MDG has separate Program Agreements with Home Trust. The plaintiff asserts that Home Trust dealt directly with consumers who entered into the agreements, held liens against their properties, and administered accounts into which payments were received. It was jointly engaged with MDG in the business of renting HVAC equipment to consumers and, as such, it was a "supplier" of a product or service with MDG and was thereby bound by the disclosure requirements under the *Consumer Protection Act, 2002.* Alternatively, MDG was its

agent and/or Home Trust is an assignee and is liable to consumers under the Act as such. In the further alternative, the defendants conspired with each other to circumvent the legislation and to take advantage of consumers.

[20] Home Trust vigourously disagrees with the plaintiff's characterization of its role, its obligations, and whether its conduct gives rise to any liability. Those positions were forcefully advanced on the motions for certification and summary judgment. I note that the defendants successfully resisted the plaintiff's motion for partial summary judgment.

[21] The defendant, MDG, likewise denies any wrongdoing. Its position on the summary judgment motion is instructive. It contended that this is anything but a straightforward application of settled law to a contract. The context for the changes made to the Regulations was crucial to a proper understanding of the legislative scheme. Because the buyout privilege is not found in the consumer agreement, it must be read into the agreement for the *Consumer Protection Act, 2002* and Regulations to apply. Doing so is a question of fact very much in dispute.

[22] Counsel for MDG also submitted, *inter alia*:

1. The exercise of statutory interpretation of the Act and Regulations is more nuanced that it appears at first blush. The history of the amendments must be considered in light of the practice of the Ministry before and after. The court needs a fuller factual context for the legislation and its development;

2. The plaintiff claims that the contract is unconscionable. The law as to what is required to establish an unconscionable contract in this context is unsettled;

3. There are no decisions on point applying and interpreting the provisions of *Consumer Protection Act, 2002* and its Regulations relied upon by the plaintiff, some of which are relatively new. This issue would make new law and the outcome was far from certain; and

4. Correctly interpreted, many of the provisions relied upon by the plaintiff had no application or their application was far more limited than the plaintiff contended.

[23] I observe that if this settlement is not approved, all the issues outlined above and more will remain. The action will proceed as if no settlement ever happened. Although five years old, this action faces years of hard-fought litigation that will follow.

Class Definition

[24] On May 28, 2021, I signed an order containing the terms for certification found in my earlier decision. The order also provided for notice to the class which contained the right to opt out, to oppose the settlement, and/or to oppose class counsel fees.

[25] The Class in this action is defined as:

> "Class Members" means all persons in Ontario who are or were at anytime party to a lease agreement for Equipment with MDG Newmarket Inc O/A Ontario Energy Group entered into between May 1, 2012 and December 31, 2016, except Excluded Persons.
>
> "Equipment" means furnaces, air conditioners, water heaters, water softeners, water purification systems, boilers, air cleaners, humidifiers, chimney liners, filters, and other equipment or services offered under the Consumer Agreements.

[26] The class includes those who continue to lease equipment from MDG and those who bought out their leases and paid a buyout fee. The settlement agreement recognizes that dichotomy and provides potential benefits for those in each scenario.

Law – Settlement Approval

[27] Settlement of a class proceeding requires court approval: s. 29 *CPA.* Once approved, the settlement binds all class members: s. 29(3) *CPA.*

[28] On a motion for court approval of a settlement of a class proceeding, the applicable test is whether, in all the circumstances, the settlement is fair, reasonable and in the best interests of those affected by it. The following principles apply to the consideration of a proposed settlement:

- the resolution of complex litigation through compromise of claims is encouraged by the courts and is consistent with public policy
- a settlement negotiated at arms' length by experienced counsel is presumptively fair
- to reject the terms of the settlement and require that litigation continue, a court must conclude that the settlement does not fall within a range of reasonable outcomes
- a court must be assured that the settlement secures appropriate consideration for the class in return for the surrender of litigation rights against the defendants. The court must recognize that there are a number of possible outcomes within a range of reasonableness
- it is not the court's function to substitute its judgment for that of the parties or to attempt to renegotiate a proposed settlement
- it is also not the court's function to litigate the merits of the action or simply rubber stamp a settlement.

(See *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598 (Ont. C.J. (Gen. Div.)) at para.9; *Nunes v. Air Transat AT Inc.* (2005), 20 C.P.C.

(6th) 93 (Ont. S.C.) at para. 7; *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2643 at para. 31.)

[29] There are several factors which the courts have considered to assess the reasonableness of a proposed settlement. These factors include:

- the likelihood of recovery or likelihood of success, sometimes referred to as litigation risk
- the amount and nature of discovery, evidence or investigation
- the proposed settlement terms and conditions
- the recommendation and experience of counsel
- the likely duration of the litigation
- the number of objectors and the nature of the objections
- the presence of arms' length bargaining and the absence of collusion
- the positions taken by the parties in the litigation and during negotiations.

(See *Marcantonio v. TVI Pacific Inc.* (2009), 82 C.P.C. (6th) 305 at para. 12; *Parsons v. Canadian Red Cross Society* (1999), 40 C.P.C. (4th) 151 at paras. 71 – 73.

[30] The court must be satisfied that there is both substantive and procedural fairness. Procedural fairness deals with the manner by which the settlement has been reached. It requires a consideration of the process followed. Hard-fought arms' length negotiations go a long way to satisfy the requirement of procedural fairness.

[31] The burden of satisfying the court that a settlement should be approved is on the party seeking approval: *Nunes*, para. 7 citing *Ford v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1118 (S.C.J.).

History of Negotiations

[32] The settlement negotiations in this matter took place over four years starting in 2018. They involved the assistance of an experienced class action mediator. The negotiations broke off more than once. They were at arms length and adversarial.

[33] There were three parties to the negotiations, each represented by experienced counsel. The parties had very distinct interests and perspectives that made the negotiation of even minor issues more challenging and difficult. On the motion for settlement approval, plaintiff's counsel emphasized the brittle nature of the tri-partite negotiations.

[34] There is no doubt on the evidence filed that procedural fairness is present for this settlement agreement. I am satisfied that throughout the negotiations, class counsel put the interests of class members first and pushed as far as was possible in discussions with counsel for the defendants. This is no "quick and dirty" deal done that primarily benefits plaintiff's counsel. The settlement was reached only after release of my decision on the certification and summary judgment motions which were, as indicated, hard-fought. It followed years of difficult, sensitive negotiations that teetered on the brink of no deal whatsoever for much of those discussions.

The Settlement Terms

[35] Pursuant to the settlement agreement, the defendants will pay $14,950,000 (the settlement amount) for the benefit of the plaintiff class. In addition, 225 consumer agreements will be terminated, arrears forgiven, security registrations discharged, and the equipment gifted to the class members who received them. The aggregate value of the cancelled consumer agreements shall not exceed $1,750,000.

[36] Ninety (90) of the 225 cancelled consumer agreements will be selected by MDG. The remainder (135) will be selected by the plaintiff. If there is a dispute over the arrears, the issue will be determined in writing by retired Justice Warren Winkler or his designate. If the value of the forgiven agreements exceeds the cap of $1,750,000, the amount forgiven for any specific consumer agreement(s) may be reduced to a fraction so as to fit within the cap.

[37] Section 2.2(2) of the settlement agreement states:

> Notwithstanding of the described allocation of agreements as between the Plaintiff and MDG Newmarket Inc., in 2.2(1) above, the Plaintiff and MDG Newmarket Inc. agree to work cooperatively to implement this benefit for the benefit of Class Members. In doing so they may allocate cancelled agreements in value under the aggregate cap in any mutually agreed manner. Unless otherwise agreed however, neither the Plaintiff or MDG Newmarket Inc. will be allocated less than a prorated share of the aggregate cap against the cancelled Consumer Agreements, namely MDG Newmarket Inc. shall have $700,000 to allocate to the ninety (90) Consumer Agreements it selects and the Plaintiff shall have $1,050,000 to allocate to the remaining one-hundred and thirty-five (135) Consumer Agreements. any disputes between the Plaintiff an MDG Newmarket Inc. in respect of this benefit shall be submitted to Warren Winkler for final resolution.

[38] The settlement agreement contains no criteria for the selection of the 90 consumer agreements to be chosen by MDG for cancellation save that MDG cannot select a contract with someone who opted out of this action.

[39] Section 2.2(1) contemplates that the plaintiff's selection of 135 consumer agreements for cancellation will be done under a court approved distribution and administration protocol ("the Distribution Protocol"). That protocol is one conceived by plaintiff's counsel.

Counsel for MDG has reviewed the protocol and is supportive of it. That said, the Distribution Protocol was not the subject of negotiation between the parties and its terms are not part of the bargain struck. I am asked to approve that protocol as part of the plaintiff's motion, but approval of the settlement does not depend on approval of the Distribution Protocol as proposed. I will deal with the Distribution Protocol in more detail below.

[40] In addition to the cash payment and cancelled agreements, the settlement agreement also contains the following settlement benefits:

1. The consumer agreements are amended on a go forward basis as follows:

    a. The annual increase to the rental payment amount is capped at 2.5%; and

    b. The rental term ends with: (i) the failure of the equipment if the class member chooses to end it, (ii) on termination, or (iii) on buyout. (see section 2.2(3))

2. MDG confirms its service commitments under the consumer agreements as follows:

    a. Prompt provision of all lifetime service and repairs including parts and labour for the duration of the rental term; and

    b. Annual preventative maintenance and servicing appointment at the request of the class member for the duration of the rental term.

3. The security registration process is revised for every class member. On the renewal date, a Notice of Security Interest will be registered that is expressly limited to an ownership right in the equipment affixed to the property. The amount secured will be valued at the amount owing as at the renewal date under the revised buyout program in the settlement agreement (see section 2(5).

4. Further, the defendants will provide a letter upon request that says any security interest registered on title is limited to the equipment and is not a mortgage on the property.

5. Any security interest will be postponed on request within five business days (or 10 days if necessary) with no fee charged for doing so. If there are arrears owing, the defendant may seek payment of those arrears or come to an arrangement for same with the consumer. The defendants cannot force a buyout of the lease unless the class member wants to do so.

6. The termination provisions in the consumer agreements will operate as follows:

a. There will be no other charges made on a termination other than any correctly calculated arrears, installation charges (if within the first 5-7 years of the rental term), the expressly stated and applicable removal charges listed in the consumer agreement, and reasonable travel costs per the consumer agreement; and

b. MDG will fully cooperate with the collection of unpaid IESO rebates and failing recovery of them, the class member will be credited with same against arrears, buyout or termination expenses.

7. The buyout costing schedule will be reduced by 20% across all equipment buyout tables as they decline over time.

8. The security registration discharge fee on a buyout is reduced to $150.

9. No other charges shall be charged for any buyout except for correctly calculated arrears, NSF fees and interest at rates mandated by the Court.

10. The buyout tables will be made available to all current customers.

[41] Thus, those class members still in ongoing consumer agreements with MDG are eligible to be one of the 225 cancelled agreements **or** to get a single cash payment that represents a refund of a portion of their monthly rental payments paid, and receive improvements to the lease agreement on a go forward basis. There is also a commitment by the defendants to a reasonable management of debts and arrears.

[42] Class members who are no longer in an ongoing lease agreement because they bought out or terminated their lease agreement are eligible for the single cash payment representing a portion of the amount they paid for monthly rental payments and the buyout or termination amount paid.

[43] The Distribution Protocol put forward by plaintiff's counsel contemplates that a portion of the $14,950,000 will be set aside to enhance the single payment for those consumers who experienced egregious conduct at the hands of the defendants or are in dire circumstances but their contract was not selected for cancellation. That proposed "bump up" is not a term of the settlement agreement and is best addressed in the consideration of the Distribution Protocol below.

[44] In return for the payment to be made, the 225 cancelled contracts, and the changes to the lease agreements going forward etc., the settlement agreement provides that the action against the defendants will be dismissed with prejudice and without costs. The defendants also get a full and complete release that is spelled out in the settlement agreement and will be part of the order issued if the settlement is approved. That provides the defendants with certainty and closure.

Reasonableness of the Settlement

[45] This settlement reflects compromise on both sides. It provides significant financial benefit for class members. It improves the contractual terms by which the defendants must operate for the balance of the term of the consumer agreements. It caps and reduces future costs for class members. It provides certainty regarding MDG's ongoing servicing obligations. The settlement provides real, tangible benefits for class members and does so now, not many years hence if at all.

[46] The settlement was negotiated at arms length and is recommended by experienced counsel who had significant contact with and input from class members. The settlement was achieved after a contested summary judgment motion in which there were multiple cross-examinations, expert evidence exchanged, and significant documentary discovery. If not approved, the action faces years of contested litigation with the prospect of one or more appeals depending on the outcome of the common issues.

[47] The plaintiff's claim is based first in provisions found in consumer protection legislation and the regulations for same. The applicability of those provisions and the interplay between them in this context is novel. The plaintiff also sues in civil conspiracy, a difficult cause of action to prove. There is no wealth of decided cases that offers comfort or predictability as to the eventual outcome of the common issues trial. There is risk here on both sides.

[48] The issues certified include whether damages can be determined on an aggregate basis. That is a determination to be made by the trial judge. If she or he determines that aggregate damages cannot be determined in that manner, then individual assessments of the appropriate remedy and quantum will be needed. For more than 14,000 customers.

[49] Regardless the outcome of the common issues trial, the prospect of an appeal seems high. The amount at stake and the novel issues raised by this claim make that more likely. Again, there is risk.

[50] The class period covered by this action concerns contracts made between May 1, 2012 and December 31, 2016. A class member who entered into his or her contract with MDG in May 2012 has already paid for nine years and faces ongoing payments for the years it will take for this litigation to get through trial, appeals, and any individual assessment of remedy if necessary. During that period, MDG is contractually entitled to increase the annual rental payment by up to 3.8%, not the maximum 2.5% limit in this settlement. The buyout amounts are not circumscribed and reduced. The uncertainty surrounding the scope of MDG's ongoing service obligations continues.

[51] I expect that many of the customers who entered into these agreements were then or are now seniors. How many will die before this litigation runs its course? How many will suffer illnesses that may later prevent them from providing their evidence? How many will lose the documents needed to prove their claim? Evidence may be lost forever with the result that some may never receive any relief if this action runs the full course.

[52] The risks inherent in this action also include the possibility that at the end of the day, even if successful, the judgment will not be collectible. Will MDG and Home Trust still be operating? What if the claim succeeds only as against MDG?

[53] As part of the motion materials, Plaintiff's counsel provided a comparison of the value of the monetary payment and cancelled contracts under the settlement on the one hand and estimated trial damages on the other. The estimate is predicated on evidence from experts to date and assumptions made by counsel. It is necessarily speculative but provides insight into class counsel's economic perspective.

[54] Could the plaintiff class recover more than the amount being paid in the settlement if the action proceeded to trial? Yes, but, by the same token, the class could recover less, and it would have to wait years to find out what recovery, if any, is achieved.

[55] This is not a case settled on the eve of the common issues trial where expert reports have been prepared calculating the damages. Such evidence would undoubtedly hold greater weight than counsel's estimate; however, even that evidence, if available, would still have to be discounted to account for risk and other contingencies.

[56] I am also mindful that the settlement herein provides other benefits that would likely be beyond the purview of the trial judge; for example, the change to the registration of the security interest and letter available from Home Trust. Some of the benefits obtained through the settlement agreement are difficult to quantify but nevertheless add value to the settlement achieved.

[57] There are no objections filed to the settlement. Approximately 125 consumers have opted out of the action. Most of those had already commenced Small Claims Court actions which they can continue. Thus, anyone who felt the settlement was inadequate had a full opportunity to either put on record their concerns or exit the action and preserve their right to sue by opting out.

[58] One of the advantages achieved in this case by the deferral of the opt out notice is class members ultimately could make that decision knowing what the terms of the settlement were. Such deferral is not appropriate in all cases but made sense here.

[59] Having regard to the factors enumerated above, I am satisfied that the settlement in this case falls withing the range of reasonable outcomes. It is fair, reasonable, and in the best interests of the class. Accordingly, the settlement is approved.

Distribution Protocol

[60] As mentioned, plaintiff's counsel has submitted a proposed Distribution Protocol to deal with the 225 cancelled contracts and the funds received from the defendants (net of counsel fees, disbursements, and administration expenses). The issue of the appropriateness of counsel fees and disbursements is the subject of a separate motion and will be addressed in my decision on that motion.

[61] I preface my comments regarding the proposed Distribution Protocol with the following: it is evident to me that plaintiff's counsel has put in substantial thought and effort to try to develop an approach and formulas that are fair, balanced, and allow for flexibility. To the extent my comments express concerns, they should not be taken as criticism of counsel.

[62] In assessing the proposed Distribution Protocol, I am mindful that many of the benefits under the settlement agreement will apply to every class member who has an ongoing contract with MDG whether or not they submit a claim to a share of the net settlement funds. Every such class member will automatically be entitled to:

1. The guaranteed reduced cost buyout schedule;
2. The clarified termination option which prohibits undisclosed fees;
3. The ability to apply unpaid IESO rebates to termination and buyout payments;
4. A correction to lodgements registered on title upon registration renewal;
5. Access to a letter, on demand, clarifying the proper scope of the lien held by the defendant;
6. A clarified maintenance and repair commitment from MDG;
7. A modification to the process for calculating arrears - allowing for a maximum NSF fee of 35% and reducing interest to the *Courts of Justice Act* rate;
8. Access to a postponement of the lien in commercially reasonable circumstances such as a home mortgage refinancing; and
9. The reduction in annual increases to the rental payment amount from a maximum of 3.8% to a maximum of 2.5%.

[63] The Distribution Protocol focuses on two aspects of the settlement:

1. Selecting the contracts to be cancelled including the criteria for same; and
2. How to calculate how much each class member who applies will receive from the net settlement amount.

I will deal with these matters in the same order.

a. Cancelled Agreements

[64] The section dealing with cancelled agreements is found in Part "G" of the draft Distribution Protocol. I will not recite it in its entirety, but the following require particular scrutiny:

> 11. Through the claims process, Settlement Class Members with Active Lease Agreements will have the option to request to the Claims Administrator (which will be directed to Class Counsel) that their Lease Agreement be considered for cancellation, and to provide their reasons for the request. Class Counsel and OEG (*) may also independently consider and refer Lease Agreements for cancellation based on information known to them outside the claims process.
>
> (* MDG is referred to in the settlement agreement as OEG.)

[65] Counsel advise that they contemplate that counsel for MDG and the plaintiff class will work cooperatively to identify and agree on the 225 contracts that will be cancelled. They may, but are not required to, agree on those contracts such that if they agree on the 225 contracts, which contract is allocated to which party's total will be moot. If they cannot agree, however, then the split in number of contracts and dollar value provided for in the settlement agreement will apply. They are hopeful that they will be able to find common ground.

[66] I am troubled by the following:

1. Class counsel decides who, among thousands of class members, will have their contract cancelled, all arrears forgiven, and the equipment gifted to them. It strikes me that class counsel is in an untenable position of conflict in that exercise.

2. Class counsel can identify and consider individual class members who are known to counsel but who may not have applied for the benefit. Will those put forward by counsel have a better chance of being selected than someone who comes forward with a request during the claims process? The old adage that justice must not only be done but also be seen to be done leaps to mind.

3. There is no provision for court approval of the final list of those chosen for contract cancellation. A class member not selected has no means to object or to even know why he or she was not chosen, and another was. They have no comfort that the 225 or 135 selected by class counsel have, at a minimum, been selected fairly or considered by a neutral party.

[67] It is not clear from the language used in the Protocol what the governing principles are for cancellation of the consumer contract. Section 6(iii) indicates that the availability of contract cancellations of existing agreements "provides a remedy to recognize acute problems… not otherwise fully addressed by the other elements of the Protocol". That statement fails to convey in a concrete and meaningful way what circumstances are intended to be redressed by this remedy. A class member reading this Protocol is left in the dark as to whether his or her contract might be appropriate for cancellation.

[68] Section 13(b) of the draft Distribution Protocol states:

> "13. b) Where Cancelled Agreements are selected by the Plaintiff (through Class Counsel), the following non-exhaustive factors shall apply:
>
> i. Cancelled Agreements shall broadly be selected on the merits of the respective claim, and/or the severity of the problems faced by the Settlement Class Member as a result of the defendants' alleged conduct;
>
> ii. The Plaintiff (through Class Counsel) may consider whether extenuating circumstances (including but not limited to mental incapacity, vulnerability, defective equipment, problems associated with the "lien", significant outstanding arrears, interest and NSF fees, and/or unhonored cancellation or termination requests) resulted in hardship to the Settlement Class Member that is disproportionate, and must best be adequately rectified by cancellation.
>
> iii. …

[69] In addition to those concerns already identified, I am troubled by some aspects of the proposed criteria in section 13(b); specifically:

1. No information is set out to provide context to "the merits of the respective claim". What does that capture? What kinds of wrongdoing by the defendant or personal circumstances of the class member are relevant?

2. The timing for mental incapacity and vulnerability is not linked to when the contract was made. Someone who was competent at the time the contract was made but has since become mentally incapable surely should not be given special priority.

3. There is no reference to language barriers present when the contract was made although, in fairness, that may be covered by the words "non-exhaustive factors".

4. Emphasis appears to be placed on those who have accrued "significant outstanding arrears". Why? Why should those who chose not to or were unable to pay be advantaged over those who scrimped and went without to make their payments? On its own, non-payment strikes me as an odd criterion. It may be that counsel sought to capture those for whom these contract obligations are a significant hardship which may be evidenced by their inability to pay. Hardship is, however, broader than having arrears.

b. Sharing the Money

[70] The settlement agreement requires the defendants to pay $14,950,000. That amount will be reduced by:

1. Class counsel's court approved fees, disbursements, and applicable taxes; and

2. The Administrator's approved fees and expenses for the administration of the settlement.

The net amount after those deductions is to be allocated among eligible class members who apply.

[71] The proposed Distribution Protocol contemplates that 85% of the net settlement amount (the Input Value Fund) will be shared between class members who submit their applications with the required proof.

[72] The remaining 15% is to be used to deal with what are described as "acute" problems (Acute Problem Management Fund) which will bump up or increase the amount paid to those who experienced egregious conduct or significant hardship but were not among the 225 consumers whose contracts were cancelled. The Claims Administrator, in consultation with Class Counsel, will have the discretion to determine who gets the increase and how much. If there is money left over in the Acute Problem Management Fund, it will be distributed to those who received the 85% provided it makes sense to do so.

Input Value Fund

[73] The Distribution Protocol establishes a formula for calculating the input credits for each class member who submits a claim to share in the net settlement amount. These are referred to as Claimant Input Values or CIVs. The 85% component of the net settlement amount is shared by eligible class members who submit claims with the required proof proportionate to the number of CIVs each member has. By way of a simple example, if A has 100 CIVs and B has 300 CIVs, then B should expect to receive three times (3x) what A gets.

[74] At Section F, the Distribution Protocol contains a chart setting out the formulas to be used to calculate CIVs for class members. The following features are present:

1. Every dollar paid for regular monthly payments counts as one CIV during the term of an ongoing lease or an exited lease. If A is in an ongoing lease paying $100/month, his or her CIV amount is equal to whatever he or she has paid to date under the lease. For example, if A has paid $100/month for five years, his or her CIV total is 6,000 (5 years x 12 months x 100/month).

2. If the consumer terminated or bought out the lease (an exited lease), he or she gets the CIVs accrued to the date they bought out the lease at the same rate as above, and they get three (3) CIVs for every dollar paid for the termination or buyout including for arrears, interest, NSF fees, discharge fees etc. By way of example, if A bought out the lease at the end of three years and paid a buyout fee of $5,000, he or she would have 18,600 CIVs (3 years x 12 months x 100/month = 3,600 + 5,000 x 3= 15,000).

3. Consumers who made a request for service to MDG that was not attended to within three (3) days and who then paid another HVAC contractor to address

that service issue or equipment failure, get additional CIVs. Those additional CIVs are calculated at the rate of three times (3x) whatever amount was paid to the contractor. In addition, if the MDG equipment was not operational for a minimum of a week, the regular rental payment made is likewise increased by multiplying the points for that week by three (3). For example, A contacted MDG because his furnace was not working. MGD did not respond and A hired another HVAC contractor to fix it. That contractor charged A $400. A gets 1200 CIVs (400 x 3) for that payment. The equipment was not operational for two weeks. A get 150 points for that period (100 x .5 months x 3).

4. A two times multiplier will be applied to all the CIVs for a class member if any of the following are present:

    a. Mental incapacity or significant vulnerability when the lease was signed. This includes an inability to understand English where no translator was present;

    b. Documented material misrepresentation from a salesman or other MDG representative made when the lease was signed or during the ten (10) day statutory cooling-off period;

    c. Removal by MDG of brand-new functioning equipment (less than three years old at the time the lease was signed);

    d. Documented unhonoured cancellation request during the cooling-off period or documented unreasonable withholding of the contractual termination option by MDG.

    For example, if A has 6,000 CIVs (see #1 above) but can also establish that the furnace he had was only two years old when MDG took it out and replaced it, he would have 12,000 CIVs (6,000 x 2). If he was also mentally incapable when he signed the lease, he would still receive only 12,000 CIVs even though he has two of the above aggravating factors.

[75] The proposed Distribution Protocol provides that the Claims Administrator, in consultation with Class Counsel, will have the discretion to include other analogous conduct, if appropriate, to ensure a fair distribution.

[76] The above sets out the fundamentals of the formulas for determining each class member's CIV. The 85% of the net settlement amount is paid out to class members as a proportion of the total CIV figure. For example, if the total of CIVs for all eligible class members who apply and are accepted is 5,000,000 and A has 6,000, his share is 6,000/5,000,000.

Acute Problem Management Fund

[77] The Acute Management Fund is addressed in section H of the Distribution Protocol. Paragraphs 14 and 15 state:

> 14. At the discretion of the Claims Administrator and/or Class Counsel, up to 15% of the Net Settlement Fund shall be available to address acute problems faced by Settlement Class Members which cannot fairly be addressed through formulaic payment from the Input Value Fund or through the Cancelled Agreement benefit. Payment from the Acute Problem Management Fund shall be made only as necessary to achieve the goals of the Settlement Agreement and this Protocol for the benefit of Settlement Class Members. Criteria for eligibility for payment from this fund include but are not limited to:
>
> a. Settlement Class Member would otherwise qualify for a Cancelled Agreement, but the number of Cancelled Agreements has been used up
>
> b. Settlement Class Member with economic outcomes (termination, buyout or other costs) that are disproportionally punitive; and
>
> c. Settlement Class Member demonstrating other equitable circumstances which are or were to their unique prejudice.
>
> 15. Where eligibility for the Acute Problem Management Fund is demonstrated, money from that fund may be used to refund payments made to OEG [MDG] and/or Home Trust, to assist Settlement Class Members with the cost of exiting their Lease Agreement(s), or other analogous circumstances. Settlement money, however, cannot be paid to compensate for legal fees or expenses incurred in respect of any individual or other litigation against the defendants outside of this Proceeding.

Concerns

[78] From the oral submissions made by plaintiff's counsel, I gather that the creation of the two funds, the broad discretion given to the Claims Administrator and counsel, and the multipliers for aggravating circumstances are designed to provide flexibility given the different personal circumstances and experiences of the many members of the class who could apply. In addition, the apparent premium afforded to buyout amounts over regular monthly payments is intended to recognize that those still in leases will get the other benefits negotiated. These choices made by plaintiff's counsel are informed by the considerable contact with class members and an understanding of the range of issues faced by class members.

[79] Nevertheless, I have the following concerns:

1. It strikes me as odd that arrears paid as part of the buyout get a three times multiplier. The arrears are presumably overdue monthly payments that, if they had been paid when they should have, would get no multiplier. The same applies to interest charged on the arrears and any NSF charges.

2. Buyout payments get a three times multiplier. It could be argued that a dollar is a dollar regardless whether paid as a monthly lease payment or as a buyout. By the same token, a multiplier of some sort may be justified since, unlike

monthly payments, the consumer did not get the corresponding use of the equipment where the buyout was done to close the sale of the home. Why a three times multiplier and not simply a two times multiplier?

3. The CIVs can double if any of the aggravating factors are proven. On its face, that includes doubling all CIVs to which the class member may be entitled. That means that if they bought out their contract, the doubling leads to an effective six times multiplier on the buyout amount. That seems excessive and unfair to other class members. Similarly, someone who paid another HVAC contractor because MDG failed to attend to do the repair already gets that amount doubled. Does that get bumped to four times that payment because one of the aggravating factors was present?

4. The Input Value Fund already recognizes and adjusts for inequities like misrepresentations, vulnerability, and egregious conduct by MDG at the time of sale or buyout/termination. What more is needed to be entitled to the bump up through the Acute Problem Management Fund? Is that Fund really needed at all if the multipliers are applied in the Input Value Fund?

5. Again, it strikes me that the qualifications to be entitled to a share of the Acute Problem Management Fund are vague and the discretion given the Claims Administrator and Class Counsel is unchecked and extremely broad.

[80] I am not prepared to approve the proposed Distribution Protocol as drafted given my concerns above. I direct that a further hearing take place to address these concerns. Counsel should arrange same through the Trial Coordinator at the earliest opportunity.

Appointment of Claims Administrator

[81] The plaintiff proposes that Epiq Class Action Services Canada Inc. (“Epiq”) be appointed as the Claims Administrator and that this court approve Epiq’s fee proposal for such services to be paid from the settlement. Plaintiff’s counsel filed a supplementary motion record containing an affidavit sworn by a representative of Epiq at my request. Based on that evidence, I am satisfied that Epiq has the experience, resources, and skills to properly carry out its role as Claims Administrator.

[82] Further, Epiq is one of three well-established class action administration firms canvassed by plaintiff’s counsel. Their cost bid to do the work appears reasonable and consistent with that charged in other class proceedings.

[83] Epiq is hereby appointed as the Claims Administrator. The amount agreed upon to perform those services is likewise approved and shall be paid from the settlement funds. A further motion will be required should Epiq seek to charge any amount in excess of that which is before this court at this time.

Counsel Administration Disbursements

[84] Class counsel seeks approval to be paid up to $10,000 from the settlement funds for anticipated disbursements to be incurred in the administration of the settlement. They propose being able to return to court in future for additional amounts if necessary.

[85] I am not prepared to approve that disbursement request at this time. The Distribution Protocol must first be finalized. I will reconsider the request when that is done.

Notice of Settlement Approval

[86] The relief requested as set out in para. 1 (f) and (g) above is granted. There should be a link to this decision on plaintiff's counsel's website in case any class member wishes to see on what basis the settlement was approved.

Conclusion

[87] For the reasons above, the settlement is approved, and the ancillary terms approved above should be included in the order. Counsel will schedule a hearing for the Distribution Protocol as directed.

Justice R. Raikes

Date: October 21,2021