IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Stanway v. Wyeth Canada Inc.,*
2014 BCSC 931

Date: 20140528
Docket: S111075
Registry: Vancouver

Between:

Dianna Louise Stanway

Plaintiff

And

Wyeth Canada Inc., Wyeth Pharmaceuticals, Inc., Wyeth Holdings Canada Inc., Wyeth Canada, Wyeth-Ayerst International Inc., and Wyeth

Defendants

Before: The Honourable Madam Justice Gropper

Reasons for Judgment
Re: Approval of Litigation Financing Agreement

Counsel for the Plaintiff:	D. Lennox N. C. Hartigan
Counsel for the Defendants:	R. Sutton N. D. W. Daube
Place and Date of Hearing:	Vancouver, B.C. April 17, 2014
Place and Date of Judgment:	Vancouver, B.C. May 28, 2014

Introduction

[1] In my directions regarding litigation funding agreements (LFA) indexed at 2013 BCSC 1585, I determined that a LFA may be approved in British Columbia. I invited the defendants' submissions in respect of the particular aspects of the LFA. I determined that the LFA is subject to privilege on matters relating to litigation strategy, litigation budget and other "highly sensitive" aspects.

[2] This decision concerns the plaintiffs' application to approve the LFA between Ms. Stanway and Catherine Willis (the representative plaintiffs) and BridgePoint Global Litigation Services Limited Partnership V (BridgePoint). The representative plaintiffs, through their counsel, have negotiated an LFA with BridgePoint. They have signed the LFA as has the principal of BridgePoint.

[3] At para. 4 of my directions I outlined the terms upon which the representative plaintiffs would enter a LFA:

> (a) Court approval: the LFA must be subject to court approval;
>
> (b) Notice: the LFA must be described in the notice of certification so that class members can choose whether or not to accept it by opting in/out of the class;
>
> (c) Contingency: the LFA must be payable only in the event of success;
>
> (d) Disbursements: the purpose of the LFA is to cover disbursements only…
>
> (e) Independence: the private lender shall have no say in the conduct of the lawsuit. All decisions remain the preserve of the representative plaintiffs;
>
> (f) Qualifications: the only private lenders to be considered are those which have already been approved by Canadian courts in other cases involving LFAs;
>
> (g) Confidentiality of Canadian Documents: the representative plaintiffs will not provide to the private lender any documents produced by the Canadian Defendants in this lawsuit which are subject to the implied undertaking rule. …Canadian documents which are publicly available may be shared with the private lender. This would include documents which have already been filed as exhibits on motions in this proceeding.
>
> (h) Confidentiality of American documents: the representative plaintiffs will not provide the private lender any documents originating from the American Defendants which are subject to the Access Order of May 24, 2006. For greater clarity … American documents which are publicly available may be shared with the private lender. This would include documents which have been filed as trial exhibits in American proceedings, or which have been

posted on the internet by the University of Southern California Drug Industry Document Archive.

[4] Ms. Stanway has provided an affidavit that demonstrates that these terms have been met. The only difference is that the notice of the class action has been issued. It refers to an LFA but does not include the incremental cost of it.

Position of the Parties

The Representative Plaintiffs

[5] The representative plaintiffs say that they investigated all the Canadian companies in the business of litigation financing. The only Canadian company that would agree to finance a class action for personal injury is BridgePoint. BridgePoint has obtained court approval in four class actions in Alberta, Nova Scotia, Ontario and British Columbia.

[6] The plaintiff describes the LFA as superior to other LFAs negotiated by plaintiffs in other cases. The LFA negotiated by the representative plaintiffs provides that BridgePoint may advance funds in three separate instalments; the funds available under the LFA are substantial; and the funding mechanism under the LFA is structured to ensure that each instalment bear some relationship to the remaining stages of the lawsuit yet to be completed. Each instalment has an increased base charge: the amount advanced and the rate depends on how the litigation proceeds.

The Defendants

[7] The defendants do not take a formal position on the application but provided comments as contemplated in my directions. The defendants refer to:

1. the requirements of an LFA to be fair and reasonable and not champertous or contrary to public policy;

2. whether the representative plaintiffs maintain sufficient control; and

3. does the LFA meet the requirements of the access agreement entered into between the parties on May 24, 2006?

[8] Specifically, the defendants point out that the LFA guarantees BridgePoint a minimum of 150% return on its investment. There is no cap on BridgePoint's potential recovery, which the defendants say provides greater benefit to BridgePoint under this LFA than has been acceptable for funders in other Canadian cases. They suggest that the representative plaintiffs have a better arrangement with their counsel, who are currently charging interest on disbursements at 10% per annum, not compounded. The high return on BridgePoint's loan may be unjustified given that British Columbia's no cost regime means that BridgePoint faces less risk than funders in other jurisdictions: BridgePoint does not have to indemnify the representative plaintiffs for an adverse costs award.

[9] The defendants say that the LFA imposes certain restrictions on the ability of the plaintiff to control the litigation: BridgePoint has a right to terminate the LFA if the representative plaintiffs change counsel or to terminate, dismiss, or otherwise continue legal claims that materially change the prospects of success in prosecuting the Action (section 10); BridgePoint is entitled to full payment of the Contingent Value Right as well as immediate repayment of all disbursements previously loaned (section 10); BridgePoint has an obligation to release disbursements contingent on continuing compliance with the litigation plan (section 2); and BridgePoint will provide advice in the litigation (section 9) which may interfere with the representative plaintiffs ability to maintain independence over the litigation.

[10] The defendants raise concerns that the confidentiality and privacy protections which are agreed to in the Access Order may be compromised. They also suggest that the LFA should include a term regarding the plaintiffs' ability to seek independent legal advice.

Legal Framework

[11] British Columbia courts have not considered LFAs in the context of class proceedings. The authorities in respect of LFAs emanate primarily from Ontario. I addressed the differences between the class action regimes in Ontario and British Columbia in my direction at paras. 11 and 12:

> [11] British Columbia is a “no costs” jurisdiction pursuant to s. 37 of the *CPA*, as are Alberta and Nova Scotia. Ontario and Quebec are costs regimes and have public agencies that provide litigation funding to class action plaintiffs. In Ontario, a class proceeding fund was established under s. 59.1 of the *Law Society Act*, R.S.O. 1990, c. L.8, which is administered by the Law Foundation of Ontario. It assists Ontario plaintiffs with disbursement expenses and indemnifies plaintiffs against adverse costs awards. In Quebec, the Fonds d’aide aux recours collectifs was established by *An Act Respecting the Class Action*, R.S.Q. c. R-2.1. It is an independent agency with board members appointed by the Quebec Ministry of Justice after consultation with the Barreau du Quebec (s. 8). It may assist a Quebec plaintiff with legal fees and disbursements in exchange for a percentage of the recovery in accordance with the regulations.
>
> [12] There is no public agency to assist class action plaintiffs with disbursements in British Columbia.

[12] Mr. Justice Strathy (as he then was), considered the “practical concerns” in class actions that may be addressed by a LFA in *Dugal v. Manulife Financial Corp*., 2011 ONSC 1785. While he was clearly addressing the impact of an adverse cost awards on a representative plaintiff, some of his comments are apposite in a no-costs regime, most importantly to provide access to justice to large groups of people who have claims that cannot be economically pursued individually” (at para 27).

[13] While British Columbia class action plaintiffs do not face that risk, they still face the obligation for the payment of disbursements even if they are successful. In a claim such as this one where there will be an intense battle of experts, the disbursements can be several thousands of dollars. As Strathy, J. points out: “The grim reality is that no person in their right mind would accept the role of representative plaintiff if he or she were at risk of losing everything they own. No one, no matter how altruistic, would risk such a loss over a modest claim” (at para 28). One of the “responses to this reality” is the availability of LFAs:

> …indemnities given by class counsel are commonplace - they have been recognized as "part of the landscape in class proceedings": Holmes v. London Life Insurance Co. (2007), 40 CPC (6th) 167, [2007] O.J. No. 158 at para. 2 (S.C.J.); Bellaire v. Daya (2007), 49 C.P.C. (6th) 110, [2007] O.J. No. 4819 at para. 81 (S.C.J.). Such agreements impose onerous financial burdens on counsel and risk compromising the independence of counsel, which is such a valued part of our legal tradition.

[14] In his reasons for approving the LFA, Strathy, J. comments at para. 33:

33 In this case, subject to the concerns expressed below, I have decided to approve the funding agreement for the following reasons:

> (a) The funding agreement helps to promote one of the important goals of the *CPA*- providing access to justice. … Just as contingency fee agreements have been recognized as providing access to justice, so too third party indemnity agreements can avoid the unfortunate result that individuals with potentially meritorious claims cannot bring them because they are unable to withstand the risk of loss: see *McIntyre Estate* at para. 55.
>
> (b) There is no evidence that [the litigation funder] stirred up, incited or provoked this litigation, within the meaning of the term "moved" in s. 1 of the *Champerty Act*: see *McIntyre Estate* at para. 41. On the contrary, the plaintiffs demonstrated a clear intention to proceed with this litigation before [the litigation funder] came on the scene.
>
> (c) The indemnification agreement leaves control of the litigation in the hands of the representative plaintiff - it does not permit officious intermeddling in the conduct of the litigation by the funder, but allows it to receive appropriate information about the progress of the litigation, consistent with its need to manage its own financial affairs, such as posting reserves.
>
> (d) The commission payable (7%) is, in general, reasonable and consistent with the commission (10%) that would be payable to the only other available source, the Fund.
>
> (e) The commission cap ($5 million prior to pre-trial and $10 million thereafter) is also reasonable and is a fair reflection of the potential downside risk facing the funder ($10 million in costs)…
>
> (f) The commission is acceptable to the representative plaintiffs…
>
> (g) While it is true that one may not be able to say, with absolute certainty, that there is no possibility that the funding agreement might result in a "windfall" recovery to [the litigation funder], the possibility of such a recovery, when balanced against the probability of protracted litigation and a somewhat speculative result, is a factor that a commercial risk-taker must take into account in determining the amount of its compensation…
>
> (h) In the existing state of affairs, in which the defendants profess every intention of mounting an aggressive and expensive defence, it is my assessment that the financial terms of the indemnification agreement are a fair reflection of risk and reward.
>
> (i) The plaintiffs are represented by experienced and highly reputable counsel who can be expected to discharge their duties to the plaintiffs, the class and the court without being influenced by the funder.
>
> (j) There will be court supervision of the parties to the agreement.

[15] In *Bayens v. Kinross Gold Corporation*, 2013 ONSC 4974, Mr. Justice Perell outlined the principles to consider in to approving a LFA at para. 41. I refer particularly to the following:

…

- … the third party agreement must not compromise or impair the lawyer and client relationship and the lawyer's duties of loyalty and confidentiality or impair the lawyer's professional judgment and carriage of the litigation on behalf of the representative plaintiff or the class members.
- … the third party funding agreement must not diminish the representative plaintiff's rights to instruct and control the litigation.
- … the court must be satisfied that the representative plaintiff will not become indifferent in giving instructions to class counsel in the best interests of the class members…

…

- … the court must be satisfied that the agreement is necessary in order to provide the plaintiff and the class members' access to justice.

…

- .. the court must be satisfied that the agreement is fair and reasonable to the class. The court must be satisfied that the access to justice facilitated by the third party funding agreement remains substantively meaningful and that the representative plaintiff has not agreed to overcompensate the third party funder for assuming the risks…
- … the third party funding agreement must contain a term that the third party funder is bound by the deemed undertaking and is also bound to keep confidential any confidential or privileged information.

<u>Analysis</u>

[16] The defendants suggest that the court may wish to consider amendments to the LFA, rather than approving it. A significant consideration in this context is that the representative plaintiffs have access to only three companies engaged in litigation financing which have been approved by a Canadian court. Only BridgePoint provides litigation funding in a personal injury claim. It is not a broad marketplace where the plaintiff can chose from an array of lenders or attempt to strongly negotiate where there are no other alternatives.

[17] As the Ontario jurisprudence points out, the LFA must be fair and reasonable and provide the representative plaintiffs with access to judgment, without

compromising the principles of independence of counsel, confidentiality agreements between the parties be observed and, not to the disadvantage of the representative plaintiffs.

[18] First, in respect of fees and the lack of a commission cap, I find the LFA to be reasonable and fair. The commission outlined in the LFA appears to be consistent with commissions that have been approved in other cases. The lack of a cap does not undermine my conclusion in this regard. I accept that plaintiffs' counsel are discharging their duties to the plaintiffs' class and the court; the market for litigation financing is limited; and it is acceptable to the representative plaintiffs. Even though the funding agreement may result in a "windfall" recovery, there is every probability of a protracted litigation and the result is speculative. BridgePoint will be providing disbursement funding even if the plaintiff is successful in this litigation. Those are factors that BridgePoint must take into account when it determines its risk and its compensation.

[19] I do not find that the independence of plaintiff's counsel is compromised by the termination clause set out in section 10 of the LFA relating to BridgePoint's ability to terminate the agreement following a decision to change counsel or otherwise alter the strategic course of litigation (section 10); to make release of disbursements contingent on continuing compliance with the agreed upon litigation plan (section 2); or BridgePoint providing advice in the litigation (section 11(f)). I agree that the termination clause is triggered in circumstances such as where the representative plaintiffs abandon the case, which counsel for the representative plaintiffs describes as "dire circumstances". The litigation plan has been approved by the court and must be followed unless the court determines a different litigation plan. While BridgePoint has the ability to provide advice, plaintiff's counsel is not obliged to follow the advice.

[20] In relation to the defendants' suggestions concerning the Access Order, I am satisfied that the plaintiffs and their counsel understand their obligations thereunder and will abide by them in their dealings with BridgePoint. BridgePoint is obliged to

sign the confidentiality undertaking before it has access to any documents covered by the Access Order.

[21] Finally, in respect of independent legal advice, the defendants' suggestion has some attraction. Contingency agreements in this province are required to include such a term. However, the representative plaintiffs in this class action cannot enter into the LFA without court approval which is not the case in contingency agreements generally. Having had the input of counsel for both the representative plaintiffs and the defendants, I consider independent legal advice, particularly at this stage of the litigation, to be of little benefit.

Conclusion

[22] I approve the LFA between the representative plaintiffs and BridgePoint.

"Gropper J."