

2021 ONSC 4968
Ontario Superior Court of Justice

Lilleyman v. Bumble Bee Foods LLC

2021 CarswellOnt 10367, 2021 ONSC 4968, 335 A.C.W.S. (3d) 486

VANESSA LILLEYMAN (Plaintiff) and BUMBLE BEE FOODS LLC, CLOVER LEAF HOLDINGS COMPANY, CONNORS BROS. CLOVER LEAF SEAFOODS COMPANY, TRI-UNION SEAFOODS LLC o/a CHICKEN OF THE SEA INTERNATIONAL INC., THAI UNION GROUP PUBLIC COMPANY LIMITED, STARKIST COMPANY, DONGWON INDUSTRIES COMPANY LIMITED and DEL MONTE CORPORATION n/k/a BIG HEART PET BRANDS INC. (Defendants)

VANESSA LILLEYMAN (Plaintiff) and LION CAPITAL LLP, LION CAPITAL (AMERICAS) INC., and LION/BIG CATCH CAYHMAN LP (Defendants)

Perell J.

Heard: July 9, 2021

Judgment: July 14, 2021

Docket: CV-17-585108-00CP, CV-18-00607471-00CP

Counsel: Kyle R. Taylor, Annie (Qurrat-ul-ain) Tayyab, for Plaintiff

Eliot Kolers, Chantelle Cseh, Agatha Suszek, Jeremy Dacks, Gavin Finlayson, Patrick Gajos, for Defendants

Subject: Civil Practice and Procedure

Related Abridgment Classifications

Civil practice and procedure

V Class and representative proceedings

V.2 Representative or class proceedings under class proceedings legislation

V.2.e Costs, fees and disbursements

V.2.e.v Class proceedings funding

Headnote

Civil practice and procedure --- Class and representative proceedings — Representative or class proceedings under class proceedings legislation — Costs, fees and disbursements — Class proceedings funding

Applicant was representative plaintiff in class action suit — Class sued defendants for alleged illegal conspiracy to fix price of tuna — Applicant could not bear financial burden of funding expert evidence — After multiple failed attempts at securing funding, third-party funder was found — Applicant brought motion to approve litigation funding agreement — Motion granted Agreement was necessary for access to justice — Access to justice facilitated by third-party funding was substantially meaningful — Agreement was fair and reasonable — Third-party funder was not overcompensated for assuming risks of adverse costs award.

Table of Authorities

Cases considered by *Perell J.*:

David v. Loblaw (2018), 2018 ONSC 6469, 2018 CarswellOnt 17950, 43 C.P.C. (8th) 418 (Ont. S.C.J.) — referred to

Difederico v. Amazon.com, Inc. (2021), 2021 FC 311, 2021 CarswellNat 1053 (F.C.) — referred to

Drynan v. Bausch Health Companies Inc. (2020), 2020 ONSC 4379, 2020 CarswellOnt 10854, 53 C.P.C. (8th) 297 (Ont. S.C.J.) — referred to

Dugal v. Manulife Financial Corp. (2011), 2011 ONSC 1785, 2011 CarswellOnt 1889, 105 O.R. (3d) 364, 18 C.P.C. (7th) 105 (Ont. S.C.J.) — referred to

Flying E Ranche Ltd. v. Canada (Attorney General) (2020), 2020 ONSC 8076, 2020 CarswellOnt 19021, 62 C.P.C. (8th) 114 (Ont. S.C.J.) — referred to

Houle v. St. Jude Medical Inc. (2017), 2017 ONSC 5129, 2017 CarswellOnt 13215, 9 C.P.C. (8th) 321 (Ont. S.C.J.) — referred to

Houle v. St. Jude Medical Inc. (2018), 2018 ONSC 6352, 2018 CarswellOnt 17713, 429 D.L.R. (4th) 739, 29 C.P.C. (8th) 409 (Ont. Div. Ct.) — referred to

Hoy v. Expedia Group (2021), 2021 ONSC 2840, 2021 CarswellOnt 5429, 67 C.P.C. (8th) 313 (Ont. S.C.J.) — referred to

JB & M Walker Ltd / 1523428 Ontario Inc. v. TDL Group (2019), 2019 ONSC 999, 2019 CarswellOnt 1750, 48 C.P.C. (8th) 199 (Ont. S.C.J.) — referred to

Jensen v. Samsung Electronics Co., Ltd. (2019), 2019 FC 373, 2019 CF 373, 2019 CarswellNat 5517, 2019 CarswellNat 5518 (F.C.) — referred to

Marriott v. General Motors of Canada Company (2018), 2018 ONSC 2535, 2018 CarswellOnt 6254, 37 C.P.C. (8th) 429 (Ont. S.C.J.) — referred to

Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp. (2013), 2013 ONSC 4974, 2013 CarswellOnt 11197, 117 O.R. (3d) 150, 55 C.P.C. (7th) 437, 6 C.C.P.B. (2nd) 82 (Ont. S.C.J.) — referred to

Statutes considered:

Bankruptcy Code, 11 U.S.C.
Chapter 11 — referred to

Class Proceedings Act, 1992, S.O. 1992, c. 6
Generally — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

Law Society Act, R.S.O. 1990, c. L.8
s. 59.1 [en. 1992, c. 7, s. 3] — referred to

Regulations considered:

Law Society Act, R.S.O. 1990, c. L.8
Class Proceedings, O. Reg. 771/92
Generally — referred to

MOTION for approval of third-party funding agreement.

Perell J.:

- 1 This is a motion in two proposed class actions under the *Class Proceedings Act, 1992*,¹ for approval of third-party funding agreements.
- 2 On October 24, 2017, the Plaintiff Vanessa Lilleyman, represented by the partners now of Orr Taylor LLP, commenced an action bearing court file number CV-17-585108-00CP against:
 - (a) Bumble Bee Foods LLC; Clover Leaf Holdings Company, and Connors Bros. Clover Leaf Seafoods Company (the "Clover Leaf Defendants");
 - (b) Tri-Union Seafoods LLC o/a Chicken of the Sea International Inc. and Thai Union Group Public Company Limited (the "Thai Union Defendants"); and,
 - (c) StarKist Company, Dongwon Industries Company Limited, and Del Monte Corporation n/k/a Big Heart Pet Brands Inc. (the "StarKist Defendants").
- 3 In the 2017 action, Ms. Lilleyman proposes to act as the representative plaintiff on behalf of a class of people consisting of:

All persons or entities in Canada who, from July 1, 2004 to the present (the "Class Period"), purchased canned tuna (including shelf-stable packaged tuna products sold in cans, pouches, or other packages). Excluded from the Class are the defendants and their parent companies, subsidiaries, and affiliates.

4 The cause of action in the 2017 action is that the Defendants entered and maintained an illegal conspiracy to fix the price of canned and packaged tuna. The claim in the 2017 action alleges that the conspiracy operated in and impacted Canada, and that members of the proposed class suffered damages of \$250 million.

5 On October 23, 2018, Ms. Lilleyman commenced another action, bearing court file number CV-18-00607471-00CP, proposing to represent the same class. The defendants are Lion Capital LLP, Lion Capital (Americas), Inc., and Lion/Big Catch Cayman LP. (the "Lion Capital Defendants").

6 The 2018 action was issued as a result of additional information coming to light that indicated the involvement of the Lion Capital Defendants in the alleged illegal conduct of the 2017 action.

7 Ms. Lilleyman will not be able to bear the financial burden of funding the expert evidence that will be required to prosecute the 2017 and 2018 actions.

8 In 2019, Ms. Lilleyman's counsel approached two litigation funders to obtain disbursement and adverse costs funding. However, neither of those funders offered terms that counsel determined were in the best interests of the class.

9 While the search for a third-party funder continued, on November 21 and 22, 2019, the Clover Leaf Defendants and their affiliates filed voluntary petitions for relief under Chapter 11 of the U.S. Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware, and obtained a corresponding initial order under the [Companies' Creditors Arrangement Act](#) ("CCAA") in Canada. As a result of the CCAA proceeding, the litigation as against the Clover Leaf Defendants was stayed.

10 On January 28, 2020, the CCAA Court approved an asset purchase agreement that resulted in all of the Clover Leaf Defendants' assets being sold.

11 On January 29, 2021, Justice Hainey issued a discharge, distribution, and termination order in the CCAA proceeding. According to the terms of that order, the CCAA stay as against the Clover Leaf Defendants is still in effect, and is expected to remain in effect until mid- to late-July, 2021.

12 Meanwhile Ms. Lilleyman's counsel met with six possible third-party funders. In early 2021, counsel decided that the proposal by Lake Whillans Fund I LP and Tunny Finance LLC (hereinafter collectively referred to as "Lake Whillans Fund") was in the best interests of the class.

13 Lake Whillans Fund I LP is an investment fund managed by Lake Whillans Capital Partners LLC. Tunny Finance LLC is a wholly owned subsidiary of Lake Whillans Fund I LP. Lake Whillans Capital Partners LLC, the parent, is an established litigation funder that has been operating since 2013. Lake Whillans Fund has over US \$100 million in assets under management and has committed the capital necessary to fund Ms. Lilleyman's two actions.

14 On May 26, 2021, after months of due diligence and negotiations, Ms. Lilleyman, her counsel, and Lake Whillans Fund entered a Litigation Funding Agreement. Before entering the agreement, Ms. Lilleyman obtained independent legal advice.

15 Under the Litigation Funding Agreement, Lake Whillans Fund will provide disbursement funding and an adverse costs indemnity up to an agreed maximum amount. The amount of funding is based on counsel's judgment of the amounts required to fund the two actions.

16 Under the Litigation Funding Agreement, if there is recovery, Lake Whillans Fund will receive repayment of any amounts that it has paid out in disbursement funding, plus a percentage of the litigation proceeds after the payment of lawyer fees and administrative costs, capped at specific amounts based on the stage of the proceeding at which the recovery occurs. Under the

Litigation Funding Agreement, the percentage return that Lake Whillans Fund will receive is within the range of returns in other funding agreements that have been approved in comparable cases in Ontario and in Federal Court.² The caps on the funder's return are at the low end of the caps that have been approved in comparable cases. The terms of the Litigation Funding Agreement are as favourable or in some instances more favourable than the terms available from the Class Proceedings Fund pursuant to the regulations of the *Law Society Act*.³

17 Under the Litigation Funding Agreement, Lake Whillans Fund agrees to be bound by the implied undertaking rule as it would normally apply to the parties. If Lake Whillans Fund receives confidential information, it will ensure that it does not divulge the information to anyone unless expressly authorized to do so in writing by the disclosing party.

18 Further, under the Litigation Funding Agreement, Lake Whillans Fund has also agreed to provide an undertaking for the sole benefit of the defendants, providing among other things that it attorns to the jurisdiction of this Court in relation to an order by the Court that requires it to pay costs to the defendants.

19 The Litigation Funding Agreement confirms that Class Counsel are to be instructed by and owe their obligations solely to Ms. Lilleyman and the class and that Ms. Lilleyman has the sole and exclusive right to direct the conduct of the proceedings and to settle the proceedings, subject only to notifying Lake Whillans Fund of any settlement offers made or received. Any entitlement of Lake Whillans Fund to documents and information is explicitly made subject to the solicitor-client relationship between Ms. Lilleyman and Class Counsel.

20 Under the Litigation Funding Agreement, Lake Whillans Fund's termination rights are narrowly prescribed to avoid any interference with the litigation through threat of termination. Lake Whillans Fund can terminate the Agreement only in specified circumstances, most of which require court approval. More specifically, Lake Whillans Fund can terminate the Agreement without Court approval only if Ms. Lilleyman terminates her retainer with Orr Taylor LLP or materially amends the economic terms of her retainer with Orr Taylor LLP. Lake Whillans Fund can terminate subject to Court approval only if:

- (a) Ms. Lilleyman breaches a material provision in the Agreement;
- (b) Class Counsel withdraws from the case;
- (c) Ms. Lilleyman is no longer able to act as representative plaintiff because of bankruptcy or insolvency; or,
- (d) Lake Whillans Fund reasonably considers that the proceedings are no longer commercially viable, in which case: (1) if Lake Whillans Fund seeks to terminate before the certification decision, the consent of class counsel is required; and (2) if Lake Whillans Fund seeks to terminate after a certification decision, it must provide adequate notice to class counsel and Ms. Lilleyman.

21 The Defendants have been provided with a redacted copy of the Litigation Funding Agreement. I was provided with an unredacted copy under seal.

22 The issue to be determined on this motion is whether to approve the Litigation Funding Agreement. In this regard, third-party litigation funding is acceptable as promoting the important objectives of class proceedings, including promoting access to justice and behaviour modification, and may be justified in class proceedings as a matter of necessity.⁴ The general test for approval of a third-party funding agreement is that the agreement should not be champertous or illegal and it must be a fair and reasonable agreement that facilitates access to justice while protecting the interests of the defendants.⁵

23 Ontario Courts have developed a four-factor test to approve a third-party litigation funding agreement, which requires that the court be satisfied that: (a) the agreement must be necessary in order to provide access to justice; (b) the access to justice facilitated by the third-party funding agreement must be substantively meaningful; (c) the agreement must be a fair and reasonable agreement that facilitates access to justice while protecting the interests of the defendants; and (d) the third-party

funder must not be overcompensated for assuming the risks of an adverse costs award because this would make the agreement unfair, overreaching, and champertous.⁶

24 Ontario Courts consider a variety of factors in determining whether to approve a third-party agreement including: (a) whether the procedural and evidentiary steps have been satisfied; (b) whether the agreement is necessary to provide access to justice; (c) whether access to justice would be substantively and meaningfully facilitated by the agreement; (d) whether the agreement is fair and reasonable, and does not overcompensate the funder; (e) whether the agreement protects the legitimate interests of the defendants, including the confidentiality of the parties' information; and (f) whether the lawyer and client relationship between the plaintiff and his or her lawyer has been compromised.⁷

25 In the immediate case, I am satisfied that the Litigation Funding Agreement should be approved.

26 Order to go as asked.

Motion granted.

Footnotes

1 S.O. 1992, c. 6.

2 Hoy v Expedia Group, 2021 ONSC 2840; Difederico v Amazon.com, Inc, 2021 FC 311; Drynan v Bausch Health Companies Inc., 2020 ONSC 4379; JB & M Walker Ltd./1523428 Ontario Inc. v TDL Group, 2019 ONSC 999; Jensen v Samsung Electronics Co., Ltd. (2019), Docket T-809-18 (Fed. Ct.); David v Loblaw, 2018 ONSC 6469; Houle v St. Jude Medical Inc, 2018 ONSC 6352 (Div. Ct.), aff'd 2017 ONSC 5129.

3 Law Society Act, R.S.O. 1990, c. L-8, s. 59.1, Ont. Reg. 771/92 (*Class Proceedings Regulation*).

4 Drynan v Bausch Health Companies Inc., 2020 ONSC 4379; David v. Loblaw, 2018 ONSC 6469; Houle v. St. Jude Medical Inc., 2017 ONSC 5129, aff'd 2018 ONSC 6352 (Div. Ct.); Bayens v. Kinross Gold Corp., 2013 ONSC 4974; Dugal v. Manulife Financial Corp, 2011 ONSC 1785.

5 Flying E Ranche Ltd. v. Canada (Attorney General), 2020 ONSC 8076; Drynan v Bausch Health Companies Inc., 2020 ONSC 4379; JB & M Walker Ltd./1523428 Ontario Inc. v. TDL Group, 2019 ONSC 999; David v. Loblaw, 2018 ONSC 6469; Marriott v General Motors of Canada Company, 2018 ONSC 2535; Houle v. St. Jude Medical Inc., 2017 ONSC 5129 aff'd 2018 ONSC 6352 (Div. Ct.); Bayens v. Kinross Gold Corp., 2013 ONSC 4974; Dugal v. Manulife Financial Corp, 2011 ONSC 1785.

6 Drynan v Bausch Health Companies Inc., 2020 ONSC 4379; JB & M Walker Ltd./1523428 Ontario Inc. v. TDL Group, 2019 ONSC 999; Houle v. St. Jude Medical Inc., 2017 ONSC 5129 aff'd 2018 ONSC 6352 (Div. Ct.).

7 David v. Loblaw, 2018 ONSC 6469.