

CITATION: Gordon v. 837690 Ontario Limited, 2025 ONSC 6148
COURT FILE NO.: CV-19-00028402-A1CP
DATE: 20251031

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Timothy Gordon, Angela Thomson, John Ng-Lun, John Sitter and Fadiya Shamasha, Plaintiffs

AND

837690 Ontario Limited, Defendant

AND

Tyco Integrated Fire & Security Canada, Inc. o/a Johnson Controls, Troy Life & Fire Safety Ltd., MK Electric Ltd. and A.P.I. Alarm Inc., Third Parties

BEFORE: Justice S. Nicholson

COUNSEL APPEARING:

Harvey Strosberg, Stephen Marentette and Justin Smith for the Plaintiffs

Chris Stribopolous, Christine Galea and Zanab Ali for the Defendant

Lindsay Lorimer for the Third Party, Tyco Integrated Fire & Security Canada, Inc. o/a Johnson Controls

Christina Galea for the Third Party, Troy Life & Fire Safety Ltd.

Jennifer Cosentino for the Third Party, MK Electric Ltd.

Christina Calalang for the Third Party, A.P.I. Alarm Inc.

Ian Katchin for the City of Windsor

B. Clint Cadden, proposed Protector of the Funds

Michael DiSchavia, self-represented

HEARD: March 6, 2025

Proceedings under the Class Proceedings Act, 1992

REASONS ON MOTION TO APPROVE SETTLEMENT

NICHOLSON J.:

[1] I have been case managing this class proceeding that arises out of a fire that occurred on November 12, 2019, in the parking garage of Westcourt Place, an apartment building located in downtown Windsor. The defendant, 837690 Ontario Limited (the “Defendant”), owns and manages Westcourt Place.

[2] The occupants of Westcourt Place were displaced, and remain displaced, from the building and sued the Defendant for damages arising out of the fire. In a decision dated February 14, 2022, I granted the certification motion (*Gordon et al. v. 837690 Ontario and Tyco et al.*, 2022 ONSC 1028).

[3] The parties reached a settlement of the class proceeding, subject to the approval of the Court. The parties also reached a settlement of the third party claims. Those third party claims were dismissed without costs.

[4] Westcourt Place contained approximately 150 residential apartments and 80,000 square feet of commercial space.

[9] Some of the residential tenants and the City of Windsor object to the proposed settlement. It is fair to characterize the City’s objection as the most notable.

The Proposed Settlement:

[10] The parties achieved the proposed settlement after a mediation and considerable hard fought, protracted and arms-length negotiations between Class counsel and the Defendant. They signed Minutes of Settlement on April 4, 2024. Ultimately, they signed the Settlement Agreement on January 9, 2025.

[11] The most significant issue during the negotiations was whether the leases were frustrated at law, and as a result, terminated.

[12] The amount of the proposed settlement is \$7,300,000.00, to be paid in full and final settlement of all claims that were made or could have been made by the class members, family class members, subrogated claimants and insurers.

[13] As part of the settlement, a declaration will provide that each commercial lease, entered into by a class member, is terminated with no right to re-occupy the leased space. It will also provide that each class member, except those who delivered a valid election, terminated their residential tenancy agreement. This means that some class members who exercise the election will have the ability to reoccupy the same apartment after Westcourt Place is deemed fit for occupancy.

[14] The proposed settlement includes a claim process involving a retired Superior Court judge who has agreed to adjudicate certain claims (the “Referee”). His decision on class members’ claims will be final. A Protector of the Funds shall assist claimants in adjudicating the claims.

[15] Various amounts are allocated to various groups of claimants. For example, the sum of \$800,000 is allocated to the Subrogated Claims Fund to pay all adjudicated claims of Subrogated Claimants. Commercial Tenants are allocated the sum of \$500,000 for their losses. Personal Injury Claimants have the sum of \$250,000 allocated to address their injuries.

[16] There are four categories of Residential Tenants who are entitled to present claims. Two of those categories have fixed recoveries. Another category can elect to prove their damages to the Referee. The final category can claim long term displacement expenses for up to 40 months.

[17] In terms of the residential tenancies, Residential Tenants could choose not to surrender or terminate their lease. If they choose this option, they are entitled to re-occupy their apartment when Westcourt Place is deemed safe and fit for occupancy. Those not making a formal election to return would be deemed to terminate their lease and entitled to claim \$5,500. I am advised that 17 tenancies have been continued under this procedure.

[18] \$3,000,000 was allocated to the Residential Tenants Fund.

[19] Counsel for the plaintiffs deposes that each category of claimant will recover a substantial portion of their losses from the settlement funds. The objectors dispute this.

The Applicable Legal Principles:

[20] Section 29(2) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the “CPA”), requires that any settlement of a class proceeding be approved by the court to be binding. An approved settlement binds all class members.

[21] The test for approval is whether, in all of the circumstances, the settlement is fair, reasonable and in the best interests of the class as a whole, taking into account the claims and defences in the litigation and any objections to the settlement. A settlement need not be perfect but must merely fall “within a zone or range of reasonableness” (see: *Mancinelli v. Royal Bank of Canada*, 2017 ONSC 2324, at paras. 38-39).

[22] The Court considers a number of factors in determining whether a settlement falls within this zone of reasonableness. This includes the following:

- (i) The likelihood of recovery or success;
- (ii) The amount and nature of discovery evidence;
- (iii) Settlement terms and conditions;
- (iv) The recommendation and experience of counsel;
- (v) Future expense and likely duration of litigation;
- (vi) Recommendation of neutral parties, if any;
- (vii) The number and nature of objections;
- (viii) Presence of good faith and the absence of collusion;
- (ix) Degree and nature of communications by counsel and plaintiff with class members;
- (x) The dynamics of, and positions taken during, the negotiations; and
- (xi) The risks of not unconditionally approving the settlement.

(see: *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.), at paras. 71, 72 and 92; *Dine v. Biomet Inc.*, 2024 ONSC 5949, at para. 89)

[23] Where a settlement has been achieved through arm's length negotiations among parties with experienced counsel, there is a presumption of fairness and reasonableness of the settlement terms (see: *Przybylska v. Gatos Silver, Inc.*, 2024 ONSC 3740, at para. 12).

[24] As Winkler J. stated in *Parsons, supra*, at para. 79, settlements need not achieve a standard of perfection. The fact that a settlement is less than ideal for any particular class member is not a bar to approval for the class as a whole.

[25] The jurisprudence stresses that compromise is necessary to reach any settlement (see: *Cass v. WesternOne Inc.*, 2018 ONSC 4794, at para. 87, citing *Ontario New Home Warranty Program v. Chevron Chemical Co.*, [1991] O.J. No. 2245 (S.C.), at para. 92).

[26] In *Johnson v. Ontario*, 2022 ONCA 725, the Court of Appeal described the benefits and perils of opting out, and failing to opt out, of a class proceeding. A class member who has not opted out may benefit from, and will be bound by, any judgment on the common issues or any settlement of the class proceeding. A class member who has not opted out may also be prohibited from pursuing an independent action relating to the same subject matter as the class proceeding. Further, a class member who wishes to forego the benefits and binding effects and retain the ability to pursue an independent action, has an unfettered right to do so. Those class members must simply opt out before the deadline set by the court when the proceeding is certified.

[27] The Court of Appeal described that the test for extending the time for opting out must balance the finality of court-imposed deadlines, which are meant to be treated seriously and intended to have consequences, with the flexibility to account for unfairness. A class member's decision to participate in or abstain from a class proceeding must be an informed and voluntary one, free from undue influence.

The Objectors:

The City of Windsor:

[28] The City of Windsor leased approximately 14,173 square feet on the third floor of Westcourt Place starting on January 10, 2001, from which it operated the *Provincial Offences Act* Court. The lease ran until December 31, 2004, with an option to renew for an additional year. On October 11, 2005, the City and the Defendant amended the lease by adding additional space. They extended the lease over the years. As of the date of the fire, the City only had 49 days left on the existing lease to renew. Although there was an option to renew the lease to December 31, 2021, the City had not formally exercised it.

[29] However, after the fire, the City and the Defendant agreed to an extension of the lease to March 31, 2020. The City provided an affidavit in which its representative deposed that the City would have renewed the lease, as it had done historically, absent the fire. I note that the City took

no steps to secure other premises and I accept that there was a reasonable possibility that, absent the fire, the lease would have been extended.

[30] As a result of the fire, the City relocated the Provincial Offences Court operations, including its administrative and office services, to a temporary location at City Hall and City Hall Square East. There is no doubt that the City incurred significant costs associated with this relocation.

[31] The opt-out period for class members expired on July 29, 2022. No class members opted-out. In particular, the City did not opt out.

[32] On November 9, 2021, the City sued its insurers as a result of the fire. The insurers delivered the Statement of Defence in that action on June 24, 2022, and the City delivered a reply on June 29, 2022. That action remains outstanding. The insurers are defending that action vigorously.

[33] The City sought leave and was permitted to make submissions at the approval motion.

[34] The City asserts that its damages exceed \$4 million. Under the proposed settlement, the City's recovery would be less than 12% of its claim, should it receive the entirety of the \$500,000 allocated to the Commercial Tenants Fund. Accordingly, the City argues the settlement is improvident with respect to its claims.

[35] Furthermore, the City asserts that the settlement is unfair to its 236,700 residents. The fire caused substantial damage to the City's Provincial Offences Court, impacting the administration of justice and the public. The taxpayers may otherwise bear these costs.

[36] The City argues that Class counsel had a duty to consider its interests and failed to adequately do so.

[37] Finally, the City argues that its claim against its insurers may be prejudiced by the settlement, since it could interfere with the insurers' rights of subrogation.

[38] Both Class counsel and the City submitted substantial correspondence between them. The City clearly advised Class counsel of the potential size of its claim. It is equally clear that Class counsel was of the view that its losses would be met with significant legal hurdles and resistance in any settlement negotiations. Class counsel described the City's recoverable losses as modest because the lease was set to expire and had not been renewed. The City pushed back on that position.

[39] Notably, all of this correspondence takes place long after the opt-out date.

[40] The City takes the position that between the date of my certification order, February 14, 2022, and the opt-out date of July 29, 2022, it had no reason to believe that its interests would not be reasonably pursued and thus, it should not be blamed for failing to opt out.

[41] However, I have been provided with no correspondence between the City and Class counsel *prior* to the opt out date in which any discussion occurred with respect to the alleged quantum of the City's claim. By the time the City advised Class counsel of its potential damages, it was too late to opt out, absent leave of the court and establishing the test set out in *Johnson, supra*. Even if Class counsel intimated that it would seek higher damages for the City in its September 2022 correspondence, this occurred after the opt out deadline.

[42] Applying the test in *Johnson, supra*, whether the City's neglect to comply with the court-imposed deadline is excusable and that an extension will not result in prejudice to the class, the Defendant or the administration of justice, I would not grant an extension of the time to opt out. I have no evidence before me to justify why the City did not opt out before the deadline expired. I have only discussions between the City and Class counsel after the opt out deadline. In other words, I have only the City's hindsight, which in my view, is not excusable neglect.

[43] Furthermore, the correspondence between Class counsel and the City indicates that from as early as March 2023, Class counsel expressed doubt that the City's claim was as large as it asserted. The City did not move before this Court until the approval motion for leave to extend the time to opt out. Again, that is not excusable neglect in my opinion.

[44] The decision to opt out of a class proceeding is that of the individual, or in this case, the City. A notice was posted pursuant to my certification order advising parties of the right to opt out by the July 29, 2022, deadline and the consequences of doing so, or not doing so. In my view, the City must be held to its decision not to opt out. At the relevant time, the City had counsel and was in the best position to understand its losses. The City is a far more sophisticated claimant than any of the Residential Tenants. The City also has the financial wherewithal to advance litigation, such as this, outside the *CPA*. Given the alleged size of its claim relative to those of the other class members, it is hard to consider that the City was in the same disadvantaged position as the other class members such that advancing its claim through class proceedings was its only, or best, option. Not opting out was the City's decision.

[45] It is my opinion that rejecting this settlement at the behest of the City, when it could have opted out, subjects the individual tenants to further litigation risk and does not promote the access to justice, behaviour modification and judicial economy that the *CPA* seeks to achieve. As noted in *Kidd v. The Canada Life Assurance Company*, 2013 ONSC 1868, at para. 120, the most important goal of class proceedings is access to justice. The City simply does not have the same access to justice concerns that individual citizens have.

[46] The City's position on this approval motion neglects that the Defendant was also a party to the settlement negotiations and was entitled to take a hard line, as it did. The Defendant made clear that the City's claims would have ended the negotiations and resulted in ongoing litigation with attendant risks of being unsuccessful.

[47] Furthermore, it would not be appropriate to direct that the City be excluded from the Settlement Approval Order and that its damages be tried as an individual issue. That is prejudicial to the Defendant who is asserting a significant defence of frustration in this proceeding, yet

agreeing to a settlement of the other claims. Absent the benefits of settling this case in its entirety, imposing a partial settlement upon the Defendant in these circumstances would be unfair.

[48] I am also not persuaded, although I do not decide the point, that this proposed settlement will preclude the City's action from proceeding against its insurers. Clearly the City, by opposing this settlement, is not voluntarily thwarting its insurers' rights of subrogation. The settlement is being forced upon the City. In a different context, I note *Somersall v. Friedman*, 2002 SCC 59, [2002] 3 S.C.R. 109, where an insured's settlement of a claim that interfered with the insurer's right of subrogation did not prevent the insured from proceeding against the insurer. Again, I am not deciding this issue as the insurers did not participate in the hearing, but I am not persuaded by the City's arguments.

Mr. DiShiavo and Other Residential Tenants:

[49] Mr. DiShiavo was a tenant in one of the residential units. He appeared on Zoom and addressed the Court with his concerns about the settlement. I also reviewed his written objections. He did a good job expressing himself and I appreciate his comments.

[50] He is of the view that the quantum to be received by each tenant is simply too low, and described it as a "horrible settlement". The settlement does not cover all of the extra expenses that were incurred as a result of the fire. It does not compensate him for the impact on his life that this fire caused.

[51] Mr. Cadden, whose responsibility it was to receive objections, provided other objections from some tenants in writing. There were concerns about the trigger clause, should 31 tenants wish to return to the premises, that might permit the Defendant to terminate the Settlement Agreement. However, only 17 tenants have elected to return to their apartment such that this right of termination was not triggered. Accordingly, this concern is moot.

[52] One objector wished to resolve the dispute out of court with the Defendant. However, he did not avail himself of the opt out procedure and remains a class member.

[53] These types of objections are harder for the Court to address because I accept the objectors' concerns and am not unsympathetic to them. Again, the difficulty is that any settlement involves compromise. When a class proceeding involving many different people is considered, it will undoubtedly not make everyone whole or satisfy everyone.

[54] But the Court cannot conclude that success in this case was a foregone conclusion. The Defendant aggressively maintained its defences. Taking those defences into account, experienced counsel successfully negotiated.

Should the settlement agreement be approved?

[55] I conclude that the settlement agreement in this case should be approved for the following reasons:

- a. Having case managed this class proceeding, it is clear that complex, contentious and adversarial settlement negotiations, including with third parties, occurred between experienced counsel on all sides over a lengthy period of time, including with the assistance of a strong and experienced mediator, former Goudge J.A. of the Court of Appeal for Ontario.
- b. Furthermore, while I am persuaded that there is significant evidence to establish the cause of the fire, the Defendant had available to it the doctrine of frustration which could have been a substantial barrier to recovery by members of the class.
- c. Class counsel deposed that the proposed settlement provides full, if not substantially full, compensation to each class member. Obviously, the City disagrees, but I have already addressed its failure to opt out. Some of the individual Residential Tenants obviously disagree as well. Nevertheless, I accept that given the risks of any class action litigation, the \$7.3 million settlement is within the zone of reasonableness. Not all of the individual claims will be the same and they are difficult to estimate. Furthermore, a settlement is a two-way street and the Defendant did not have to agree to pay any settlement at all.
- d. The Distribution Plan is sensible and involves persons with experience to carry it out, such as the proposed Referee, former Gates J.
- e. I am satisfied that Class counsel have been in substantial contact with many members of the class and are aware of the individual circumstances of the class members to a reasonable degree.
- f. Should this matter not resolve, I give significant consideration to the future expense and duration of litigation. The tenants have been displaced for almost six years and this brings about some finality to the situation. Otherwise, this case would be likely to drag on for several more years.
- g. There is no indication of any collusion in this case. To the contrary, Class counsel threatened a summary judgment motion on the eve of settlement. There is no reversion to the Defendant of any of the settlement funds.
- h. Not approving the settlement does not mean that there will be a larger settlement in the future or guarantee a greater recovery after trial. The Court cannot order the Defendant to settle for more. The Defendant is perfectly entitled, should the proposed settlement not proceed, to have its day in court. The Defendant compromised too.
- i. The proposed settlement promotes access to justice to those that would be unlikely to otherwise advance their claims. Individually, the claims of the Residential Tenants were unlikely to be prosecuted at all.

[56] Although not perfect, I find that the proposed settlement is fair, reasonable and in the best interests of the class.

Counsel Fees:

[57] Counsel seeks fees in accordance with the 30% contingency fee agreement entered into with the representative plaintiffs. That amounts to \$2,190,000 plus disbursements and taxes.

[58] I note that Class counsel incurred a total of \$204,315.46 in disbursements.

[59] Class counsel also will apply a credit for the costs received from the certification motion to the proposed fees.

[60] The Court is required to approve fee agreements in class proceedings and will do so if they are “fair and reasonable”.

[61] In *Westwood v. TD Asset Management Inc.*, 2024 ONSC 6872, at paras. 48-51, Akbarali J. summarized the law with respect to approving counsel fees in class proceedings.

[62] She noted that the starting point is the amount payable under the contract. Here, the parties agreed to a contingency fee of 30%, which is not unreasonable in class proceedings. Class proceedings are inherently risky and access to justice favours contingency fee agreements.

[63] She also referred to *MacDonald v. B.M.O. Trust Company et al.*, 2021 ONSC 3726, at para. 21, where Belobaba J. held that a contingency fee agreement up to one third is appropriate in most class action settlements, but not in settlements that are in the range of \$100 million or higher. Here, the 30% sought by counsel is presumptively valid.

[64] Furthermore, I find that this case involved considerable complexity and a significant degree of responsibility by Class counsel. Class counsel exercised skill and competence (as did counsel for the Defendant and Third Parties). The amount for fees is in the range that the Class should have anticipated paying.

[65] I also note that this Class proceeding involved substantial time and effort. Counsel conducted examinations for discovery, retained experts and appeared in court several times. Furthermore, the Class counsel’s work is not finished with the approval of the settlement, as the settlement still needs to be implemented.

[66] To date, Class counsel has incurred time totalling approximately \$2.03 million. There is not a substantial premium being sought in this case.

[67] Accordingly, I approve the contingency fee agreement(s) and fix Class counsel’s fees in the amount of \$2,190,000 plus disbursements and taxes.

Honoraria:

[68] Class counsel argues that this is an exceptional case where an honorarium should be paid to both of the Representative Plaintiffs, Timothy Gordon and Angela Thomson.

[69] Honoraria should be reserved for exceptional cases where such an award will serve access to justice (see: *Fresco v. Canadian Imperial Bank of Commerce*, 2024 ONCA 628, at para. 106). They should not be awarded as a matter of course but are reserved for cases where the contribution of the representative plaintiff has gone well above and beyond the call of duty (see: *Baker Estate v. Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105, at para. 95).

[70] *Fresco, supra*, provides an example of where an honorarium may be appropriate. In *Fresco*, a representative plaintiff in an abuse proceeding was required to put their personal experience forward, thereby reliving their trauma, and relieving other class members from having to do so.

[71] In this case, Timothy Gordon was trapped in a smoke filled elevator for over an hour. He was hospitalized with severe smoke inhalation and near fatal levels of carbon monoxide in his blood. Angela was on the telephone with Timothy while he was trapped and unable to assist him. This was traumatizing to her as well.

[72] I reviewed *Doucet v. The Royal Winnipeg Ballet*, 2023 ONSC 2323, a decision of the Divisional Court affirming the test for awarding honoraria. I have little doubt that Timothy's experience within that elevator was terrifying and that there has been some measure of re-traumatization. Nonetheless, I cannot equate his experience with being re-traumatized by recounting sexual abuse. His affidavit does not address his re-traumatization.

[73] I decline to award honoraria in this case.

Order to be Issued:

[74] My apologies for the delay in releasing this decision, particularly to the class members.

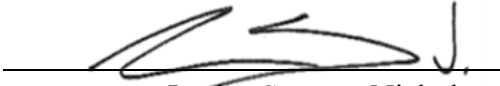
[75] That delay necessitates the alteration of some of the dates in the draft order provided.

[76] Paragraph 7 should amend the Claims Bar Date and I would propose January 31, 2026.

[77] Paragraphs 8 and 9 require dates to be inserted.

[78] I would ask Class counsel and counsel for the Defendant to confer and provide me with an order with suitable dates inserted.

[79] Furthermore, if the passage of time has impacted the ability of the Referee or Protector of the Funds to act, I would ask counsel to advise.


Justice Spencer Nicholson

Date: October 31, 2025