

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Sipos v. Netlink Computer Inc.*,
2021 BCSC 183

Date: 20210205
Docket: S1810486
Registry: Vancouver

Between:

Brett Sipos

Plaintiff

And

**Netlink Computer Inc. dba NCIX, Able Solutions Inc.,
and Wing Quon Properties and Investments Ltd.**

Defendants

And

**Pearl West Investments Ltd., Able Solutions Inc., Wing Quon Properties and
Investments Ltd., Jackie Yuen Lung Chong, Herman Chong, Steve Wu and
John Doe**

Third Parties

Brought under the *Class Proceedings Act*, RSBC 1996, c. 50

Before: The Honourable Madam Justice Horsman

Reasons for Judgment

Counsel for the Plaintiff:

M. Good
A. Klein

Counsel for the Defendant Able Solutions
Inc.

H. Doi

Counsel for the Third Party Pearl West
Investments Ltd.

M. Funt

Counsel for the Third Party, Wing Quon
Properties and Investments Ltd., Jackie
Chong and Herman Chong:

G. Fraser

Place and Date of Hearing:

Vancouver, B.C.
January 20, 2021

Place and Date of Judgment:

Vancouver, B.C.
February 5, 2021

INTRODUCTION

[1] The plaintiff applies for the following relief pursuant to the *Class Proceedings Act*, RSBC 1996, c. 50 [CPA]:

- i. an order certifying the action as a class proceeding, by consent;
- ii. court approval of a settlement agreement;
- iii. court approval of class counsel fees and disbursements, and an honorarium for the representative plaintiff;

[2] The orders sought by the plaintiff are not opposed.

BACKGROUND

[3] This action concerns an alleged data breach at the defendant Netlink Computer Inc. dba NCIX (“Netlink”). Netlink was bankrupt at the time of the material events alleged in the notice of civil claim and was under the administration of The Bowra Group Inc. (“Bowra”) as the trustee in bankruptcy. It is alleged that the private information of customers and employees of Netlink was disclosed to third parties without their consent in the course of the sale of Netlink’s assets.

[4] In September 2018, Klein Lawyers LLP and Mathew P. Good Law Corporation (“Class Counsel”) filed two actions in relation to these events. In the present action (the “*Sipos* action”), the plaintiff sought to represent a class of former employees of Netlink who suffered the alleged privacy breaches. In a related action, SCBC Action No. S-1810304 (the “*Warner* action”), the plaintiff sought to represent a class of former customers of Netlink. The underlying claims in the two actions are identical.

[5] In October 2018, Class Counsel sought leave in the bankruptcy proceeding to pursue a claim against Bowra. The application was refused: *Netlink Computer Inc. (Re)* 2018 BCSC 2309, as was an application for leave to appeal the refusal of leave: 2019 BCSC 283. Class counsel paid Bowra’s costs arising from these applications in the amount of \$3,790.84.

[6] The *Warner* action was drafted, filed, and prosecuted by Class Counsel up until November 2019, when a falling out occurred between Mr. Warner and Class Counsel. Mr. Warner filed a Notice of Intention to Act in Person and later appointed new counsel. No steps have been taken in the *Warner* action since the change in counsel.

[7] The *Sipos* action, by contrast, did move forward. Various responses to civil claim and third party notices and responses have been filed. Class Counsel have carried out factual investigations including retaining an expert to conduct a forensic examination of computer hardware and interviewing non-party witnesses. In January 2020, Class Counsel delivered comprehensive certification application material to the defendants and third parties.

[8] A mediation was subsequently conducted pursuant to a Notice to Mediate served by the plaintiff. The plaintiff, defendants, and third parties reached a comprehensive settlement in October 2020, subject to court approval. The settlement includes the following terms:

- i. The defendants and third parties will, severally, make a full and final payment in the total amount of \$350,000 in exchange for a release of all claims;
- ii. A distribution protocol will be established to compensate class members with substantiated claims, to be administered by Class Counsel;
- iii. Any funds remaining on the conclusion of the administration will go cy-pres to the Law Foundation of British Columbia;
- iv. The defendants and third parties will consent to the certification of the *Sipos* action;
- v. As part of a consent certification application, the defendants and third parties will consent to the amendment of the Further Amended Notice

of Civil Claim in the *Sipos* action to include claims advanced in the *Warner* action;

vi. Class Counsel will obtain a stay of the *Warner* action.

[9] Mr. Warner, through counsel, filed an application response to the present application which indicates his consent to all orders sought, including an order staying the *Warner* action.

ISSUE 1: CERTIFICATION OF THE ACTION

Amendment of the pleading and stay of the *Warner* action

[10] The plaintiff seeks to certify, by consent, a class action on behalf of all customers and employees of Netlink. The proposed class definition presumes that the plaintiff is given leave to amend his Further Amended Notice of Civil Claim, filed March 13, 2019, as set out in the proposed Second Further Amended Notice of Civil Claim. The effect of the amendment is to combine the claims of former Netlink employees (the *Sipos* action) and customers (the *Warner* action) into a single claim.

[11] I am satisfied that it is in the interests of justice to grant the order sought by the plaintiff to amend his pleading as set out in the proposed Second Further Amended Notice of Claim and to order, pursuant to s. 13 of the *CPA*, that the *Warner* action is stayed. These orders are necessary to facilitate the settlement terms. All parties, including Mr. Warner, consent to the orders.

The test for certification

[12] I turn now to the application to certify this action as a class proceeding by consent. Section 4(1) of the *CPA* requires the court to certify a proceeding as a class proceeding if all of the following requirements are met:

- (a) the pleadings disclose a cause of action;
- (b) there is an identifiable class of 2 or more persons;
- (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;

- (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
- (e) there is a representative plaintiff who
 - (i) would fairly and adequately represent the interests of the class,
 - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
 - (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

[13] The parties seek to certify the action as a class proceeding solely for the purpose of implementing the terms of their settlement agreement. The authority of the court to certify a claim for settlement purposes is well established: *Tietz v. BridgeMark Financial Corp.*, 2021 BCSC 25 at para. 20.

[14] I am satisfied the plaintiff has established that the requirements in s. 4(1)(a)-(e) of the *CPA* are met. In particular, I conclude:

- i. Section 4(1)(a): the Second Further Amended Notice of Civil Claim discloses a clause of action. The plaintiff pleads breaches of the *Privacy Act*, RSBC 1996, c. 373, and also common law causes of action, including negligence, that are well established in law.
- ii. Section 4(1)(b): there is an identifiable class of two or more persons. The class definition permits the identification of class membership by stated, objective criteria. The plaintiff is a class member.
- iii. Section 4(1)(c): the plaintiff proposes to certify an issue as to whether the privacy of customers and employees was breached by the wrongful conduct of the defendants and third parties during the dissolution of NetLink. This issue is a suitable common issue for the purposes of a consent certification.
- iv. Section 4(1)(d): the preferable procedure criterion is viewed through the lens of the principal objectives of class proceedings. Certification of

this case as a class proceeding will facilitate the goals of access to justice, judicial economy, and behaviour modification.

- v. Section 4(1)(e): the evidence supports that Mr. Sipos is an appropriate representative plaintiff, has no conflict of interest with class members, and has proposed a settlement that is a workable method of resolving their claims.

[15] Accordingly, I grant the orders sought by the plaintiff certifying this case as a class proceeding for settlement purposes, and appointing Mr. Sipos as the representative plaintiff.

ISSUE 2: SETTLEMENT APPROVAL

Approval of the settlement

[16] Pursuant to s. 35(1) of the *CPA*, a class proceeding may be settled only with the approval of the court and on the terms the court considers appropriate. Once approved, the settlement binds every class member who has not opted out or been excluded from the class proceeding.

[17] The *CPA* does not set out a test for settlement approval. The legal principles applicable to the approval of settlement are set out in *Bodnar v. The Cash Store Inc.*, 2010 BCSC 145 at paras. 17-21 [*Bodnar*], and may be summarized as follows:

- i. The standard for approval of settlement is whether, in all the circumstances, the settlement is fair, reasonable, and in the best interests of the class as a whole;
- ii. A class action settlement need not be perfect; rather the settlement must fall within a range or zone of reasonableness to be approved;
- iii. The court must consider the risks and benefits of continuing in the litigation, and also consider whether there are any disadvantages to the settlement that justify its rejection;

- iv. The court cannot modify the terms of the parties' negotiated settlement, it can only approve or disapprove the settlement reached;
- v. The recommendation and experience of counsel are significant factors for consideration on an approval application as there is a presumption of fairness where a settlement has been negotiated at arm's length by class counsel;
- vi. The court may take into account evidence of expected participation in the settlement by class members.

[18] In the present case, there are significant litigation risks to the plaintiff in proceeding given the complexities of the claims. There are also challenges with respect to the prospect for recovery against the remaining defendants and third parties. It is the assessment of Class Counsel that the claims are strongest as against Netlink and Bowra. However, Netlink is bankrupt and has insufficient funds to satisfy existing creditors. Class Counsel was unsuccessful in their attempt to add Bowra as a defendant. The remaining defendants and third parties are not insured in respect of the claims in the action and have limited assets to satisfy any judgment.

[19] The proposed settlement provides a measure of certain recovery for class members, who otherwise face delay and uncertainty in the prosecution of the action and their ultimate recovery if successful. The distribution protocol provides an expeditious and relatively low cost means of distributing the settlement funds to class members with viable claims. Class Counsel will administer the claims process without charging further fees. It appears from the material that this settlement is the best that could reasonably be achieved in the circumstances. There are no disadvantages to the settlement that would justify its rejection.

[20] Class Counsel advise that since the start of the *Sipos* and *Warner* actions, they have maintained website and telephone contact points for class members. To date, approximately 120 class members have contacted Class Counsel. This provides some assurance of a high rate of expected participation in the settlement.

[21] The settlement is recommended by Class Counsel, who have well-recognized expertise in the specialized area of class action litigation. The settlement is the culmination of efforts by Class Counsel that included factual investigation, retaining of a forensic expert, an unsuccessful application to add the trustee in bankruptcy as a defendant, preparation of comprehensive certification material, and a multi-party mediation with the assistance of an experienced commercial mediator. The settlement is supported by the plaintiff.

[22] Taking into account all of the relevant circumstances, I am satisfied that the settlement is fair, reasonable, and in the best interests of the class as a whole. I am therefore prepared to make the orders sought by the plaintiff approving the settlement, and giving effect to its terms.

Approval of notice

[23] Section 35(5) of the *CPA* provides that in approving a settlement the court must consider whether notice should be given and its form and content. Pursuant to s. 19(1), the plaintiff must give notice of the certification of a proceeding to class members, unless the court dispenses with notice under s. 19(3).

[24] In the present case, the plaintiff's proposed form of notice is clear and concise. It conveys the necessary information about the certification of the action for settlement purposes, the court's approval of the settlement, and the method of opting out for those who do not wish to participate. The notice includes a dedicated contact email address for Class Counsel. The proposed method of notice is by direct email contact from Class Counsel for class members who have already been in contact, and otherwise by way of posting of the notice on Class Counsel's website and social media. The notice plan does not include newspaper advertisement given its prohibitive cost as compared to the amount of the settlement.

[25] In my view, the notice proposed by the plaintiff is sufficient. It is informative, intelligible, and conveys the necessary information to class members. The plan for posting and publication of the notice should ensure sufficient exposure to class members in the circumstances of this case.

ISSUE 3: FEES, DISBURSEMENTS AND HONORARIUM

Legal fees and disbursements

[26] Section 38(1) of the *CPA* provides that an agreement respecting fees and disbursements is not enforceable unless approved by the court.

[27] The object of the fee approval requirement is to ensure that the fee charged is fair and reasonable and class counsel is appropriately compensated. Given the objectives of the *CPA*, the court should ensure that class counsel who take on risky actions on a contingency fee basis are adequately rewarded for their efforts. There should be a principled basis for any reduction in fees: *Bodnar* at paras. 24-25.

[28] Class Counsel in the present case are entitled under their retainer agreement with Mr. Sipos to seek a fee of up to 35% of any recovery. However, they are only asking for an approval of a fee of 30% plus tax and disbursements. As of November 2020, Class Counsel's disbursements totalled \$56,936. A significant portion of the disbursements relates to the retainer of the forensic expert.

[29] Mr. Good, of Mathew P. Good Law Corporation, estimates that he has spent more than 150 hours across the *Sipos* and *Warner* actions, which amounts to at least \$64,000 in fees at Mr. Good's prevailing rate. Counsel at Klein Lyons LLP estimate that they have invested a similar number of hours in the prosecution of the claim, including at David Klein's higher hourly rate. I take from this that value of Class Counsel's time on this action is at least \$130,000, and likely more. The proposed fee is \$105,000 (30% of \$350,000).

[30] Class Counsel devoted significant financial and internal resources to the prosecution of this action. They took on a significant litigation risk in doing so. As I have already noted, Class Counsel are highly experienced in class action litigation, which no doubt assisted in the favourable outcome that was achieved through the mediation. Given the expense and complexity of the litigation, I accept that there was no feasible way that class members could have retained counsel on a fee-for-

service basis. A contingency fee of 30% in this case is reasonable. The plaintiff has approved it.

[31] I therefore conclude that the fees and disbursements sought are fair and reasonable and I approve them.

Honorarium to the representative plaintiff

[32] Class Counsel seeks an order for payment of an honorarium to the representative plaintiff in the amount of \$3,500 in recognition of his contributions to a successful result in this case.

[33] Although the *CPA* makes no provision for an honorarium, such payments have been made in a number of cases. The rationale is that a modest award is justified on restitutionary principles for a representative plaintiff who has expended time and effort in fulfillment of their duties and who risks exposure to costs in doing so: *Parsons v. Coast Capital Savings Credit Union*, 2010 BCCA 311 at para. 26; *Steele v. Toyota Canada Inc.*, 2015 BCSC 1014 at paras. 37-39; *Cantlie v. Canadian Heating Products Inc.*, 2015 BCSC 1225 at paras. 49-53.

[34] Mr. Sipos deposes, and I accept, that he assisted Class Counsel throughout the litigation. He facilitated contact between Class Counsel and other potential witnesses, performed his own research into Netlink that he then passed on to Class Counsel, provided instructions and discussed mediation strategy with Class Counsel, and approved the final version of the settlement agreement. The evidence supports that Mr. Sipos diligently discharged his responsibilities as representative plaintiff on behalf of the class and assisted in the achievement of a financial settlement that benefits all class members.

[35] In my view, it is appropriate to order that Mr. Sipos is entitled to an honorarium in the amount of \$3,500, payable from the settlement funds as a first charge.

CONCLUSION/ORDER

[36] I grant the order in the form sought by the plaintiff in Schedule A to his notice of application.

“Horsman J.”