SUPERIOR COURT OF JUSTICE – ONTARIO

CV-12-00448301-00CP

RE: Emam, Plaintiff

AND:

Bay Grenville Properties Inc., Defendants

AND BETWEEN: CV-12-00455627-00CP

Krishna, Plaintiff

AND:

Bedford at Bloor Realty Inc., Defendants

BEFORE: Glustein J.

COUNSEL: *T. Charney & C. Edwards & H. Strosberg KC*

T. Alexander

N. Brankley

HEARD: June 14, 2023

TRANSCRIBED ENDORSEMENT

Nature of motion and overview

[1] The plaintiffs in CV-12-00448301-00CP (the "Murano Action") and in CV-12-00455627-00CP (the "One Bedford Action") bring motions for orders (i) approving the settlement agreements in both actions (ii) approving the distribution program in both actions (iii) approving the fees and disbursements sought by class counsel in both actions (iv) approving honoraria of $5,000 each to (a) the representative plaintiffs Waseem Emam ("Emam") and Lynn Ellwood ("Ellwood") in the Murano Action and (b) the representative plaintiff Wayne Goodman ("Goodman") in the One Bedford Action. The representative plaintiff Vern Krishna in the One Bedford Action does not seek an honorarium.

[2] For the reasons I discuss below, I approve of the settlement agreements, distribution programs, and fees and disbursements in both actions. I do not approve the request for honoraria from any of the representative plaintiffs (Emam, Ellwood or Goodman) who sought that relief.

Background

[3] These actions arise out of falling glass incidents at the "Murano" and "One Bedford" condominium buildings, which took place in or around 2010 or 2011.

[4] The Murano is a condominium building in Toronto which consists of a North Tower with 316 units and a South Tower with 415 units. All of the units have a balcony.

[5] One Bedford is a condominium building in Toronto which has 254 units. Of those units, 218 have a balcony and the remaining 36 units have a "Juliette balcony" which allows for fresh air but is not accessible to be used as a traditional balcony.

[6] In response to the falling glass episodes at the Murano, One Bedford, and other newly-built condominium towers, the provincial government made amendments to the Ontario Building Code (OBC) on July 1, 2012 which required developers to use heat-strengthened laminated glass when glass is close to the edge of a balcony and to use heat-strengthened laminated glass or heat-soaked tempered glass where glass balcony guards are inset from the edge of the balcony.

[7] As a result of the falling glass, residents at Murano and One Bedford did not have access to their balconies. Residents of the Murano were also not able to access outdoor common areas such as the barbeque area or the swimming pol. Residents in the Murano North Tower lost the use of their balconies in a range of 14-20 months, with an average unit out 16 months. Residents in the Murano South Tower lost the use of their balconies in a range of 8-15 months, with an average unit out 10 months. When averaged together, Murano residents were locked out of their balconies for an average of 13 months.

[8] Residents in One Bedford were all locked out for the same period of about 13 months.

The claims and certification

[9] The plaintiffs in both actions advanced claims in negligence, breach of contract and breach of warranty. Damages sought included loss of use and enjoyment of the property (for occupants who could not use the balconies or common areas), rent abatements provided by landlords, or diminution in value of the property (for owners who alleged that resale value would be affected by the falling glass incidents).

[10] On October 3, 2013, Justice Belobaba certified common issues in negligence and breach of contract. Certification was granted after cross-examinations and the hearing. Notice was provided to class members. Only seven individuals chose to opt of the Murano class action. 61 individuals chose to opt out of the One Bedford class action, but class counsel is not aware whether those individuals were occupying units at the time of the lockout.

Steps taken in the action following certification

[11] Extensive documentary discovery was provided by the defendants (in the tens of thousands of pages) with additional production from non-parties including the files of the City of Toronto.

Examinations for discovery of all parties took place, and the plaintiffs delivered their expert reports in each action.

Mediation and settlement agreements

[12] After two days of mediation before Joel Wiesenfeld, an experienced class action mediator, the parties reached a settlement agreement in each action. The settlements in both actions are based primarily on a lumpsum payment for each condominium unit to be distributed as discussed in more detail below. For landlords who provided tenants with an abatement, the award will be apportioned between the landlord and the occupants with the landlord recovering the abatement in priority to the tenant's claim. If more than one claim is filed by occupants of a unit, the award will be apportioned amongst the occupants.

[13] Under the settlement agreement in the Murano Action, the defendants will pay $2.7 million (inclusive of costs and disbursements) to settle the matter. Under the settlement agreement in the One Bedford Action, the defendants will pay $1 million (inclusive of costs and disbursements) to settle the matter.

[14] In addition, the defendants will pay $70,000 towards the cost of claims administration in both matters.

Distribution of the settlement funds

[15] If fees and disbursements are approved in the Murano Action (as I order below), but the proposed $10,000 in honoraria for Emam and Ellwood are not approved (as I order below), a "Net Claim Fund" of $1,654,047.85 is available to be distributed amongst the class members in the Murano Action.

[16] Each claimant in the Murano Action (subject to multiple claimants or abatement issues) will receive a minimum payment of $3,000 if an occupant of the North Tower (average time without a balcony of 16 months) and $1,600 if an occupant of the South Tower (average time without a balcony of 10 months). The combined minimum amounts are $1,312,000, leaving $342,047 to be distributed (the "Murano Excess").

[17] The Murano Excess will be distributed in a manner proportional between the towers, leaving a total for each unit in the North Tower of slightly more than $3,759 (as the plaintiff's calculation of the Net Settlement Fund included a $10,000 deduction for honoraria), or on a monthly basis slightly more than $235 per month. Class members in the South Tower would receive a total of slightly more than $2,005 per unit, or on a monthly basis slightly more than $200 per month. If the take-up rate is 60%, a reasonable estimate since a number of the units are no longer occupied by the same tenants, the average net recovery would increase significantly.

[18] For One Bedford, if fees and disbursements are approved but the $5,000 honorarium is rejected (as I find below), the "Net Claim Fund" will be $551,176.64. Under the One Bedford settlement agreement, a lump sum of $500 will be paid for each of the 36 units with a Juliette balcony to compensate occupants for the loss of amenities in the building which was impacted by

the balcony repairs. After payment of that amount of $18,000, the balance of $533,176.64 will be available for the 218 units with a balcony, for a net amount of $2,445.76 or $188 per month. Again, the net recovery for One Bedford will increase substantially if the take-up rate is 60%.

Notices and objections

[19] RicePoint, the claims administrator, disseminated the notices and will implement the claims program in each calculation in accordance with the settlement agreements. There is no evidence of any objections to the settlements in either matter.

Legal Fees and Disbursements

[20] The representative plaintiffs entered into contingency fee retainer agreements which provided that class counsel will be paid 30% plus HST and disbursements of any recovery in the actions. The amounts owing to class counsel will be paid from the Settlement Funds after the approval order becomes final.

[21] Class counsel seeks legal fees in the Murano Class Action of $810,000 (30% of the $2.7 million settlement) plus HST on fees, and disbursements of $63,504.51 for Charney Lawyers & Co (inclusive of HST) and $67,147.64 for Strosberg Sasso Sutts LLP (inclusive of HST).

[22] Class counsel seeks legal fees in the One Bedford Action of $300,000 (30% of the $1 million settlement) plus HST on fees, and disbursements of $41,145.90 for Charney Lawyers PC (inclusive of HST) and $68,677.46 for Strosberg Sasso Sutts LLP (inclusive of HST).

[23] The total dedicated time collectively in both actions is $1,087,784.50, with class counsel seeking a total of $1,110,000 collectively for both actions.

Honoraria claims

[24] In the Murano Action, Emam and Ellwood each seek a $5,000 honorarium. Ellwood was a tenant who lost the use and enjoyment of the balcony. Emam owned a unit, and claimed damages for diminution of value based on the submission that he would obtain less on resale of his unit since it would be linked to the falling glass incident. Emam rented his unit during the material time without any abatement.

[25] In the One Bedford Action, Goodman seeks a $5,000 honorarium. Goodman has a Juliette balcony and is a member of the class that would receive $500 for loss of amenities in the building, which were impacted by balcony repairs.

[26] All of the representative plaintiffs who sought an honorarium filed affidavits setting out their involvement in the action and supporting payment of honoraria to other representative plaintiffs.

Analysis

A. Approval of the Settlement Agreements

[27] The settlement agreements in both actions are fair, reasonable and in the best interests of the class. I rely on the following:

(i) The settlements were reached as a result of good faith, arms' length bargaining and the absence of collusion, conducted with an experienced mediator.

(ii) The settlements were reached after extensive certification records, cross-examinations, voluminous production, and discovery.

(iii) The amounts to be paid are consistent with "loss of use" cases and in particular are significantly higher than the only directly comparable case involving loss of use of a balcony.

(iv) There have been no objections to the settlement.

(v) There was a real risk that the defendants could establish compliance with the standard of care in effect at the dates of the falling glass incidents, including prior versions of the Ontario Building Code.

(vi) There was a real risk the defendants could establish that the falling glass incidents arose from unforeseen contamination of the glass by nickel sulfide, and not from any design or installation defects.

(vii) There was a real risk that the claims could be denied as unrecoverable pure economic loss, as the balconies were repaired at the developer's expense and there was no property damage.

(viii) The damages claimed by the class members for loss of use of the balconies could have been found to be de minimus.

(ix) If aggregate damages could not be established, each class member would be required to prove their own damages, which would then take into account the extent to which class members used the balconies or whether they would be away for the winter months or not use their balconies in the winter.

(x) Experienced class counsel endorse the settlement as fair and reasonable.

(xi) The cost and risk of further litigation is avoided, with immediate payment instead of years of litigation.

[28] For the above reasons, the settlement agreements are fair and reasonable. They obtain a result within a "zone of reasonableness" and are the product of compromise reflecting the risks of the litigation. I approve the settlement agreements.

B. Approval of the Distribution Programs

[29] The proposed distribution program in the Murano Actions fairly considers the distinction between residents of the North Tower (who lost the use of their balconies for an average of 16 months) and residents of the South Tower (who lost the use of their balconies for an average of 10 months). The proposed minimum payment and distribution of the excess reflects that reasonable distribution.

[30] The proposed distribution program in the One Bedford Action is fair and straightforward, as all residents lost the use of their balconies for the same time period and are thus treated identically.

[31] For the above reasons, I approve the distribution programs.

C. Counsel fee and disbursements

[32] The retainer agreements comply with s. 32 (1) of the *Class Proceedings Act*, 1992, S.O. 1992, c. 6 and are approved.

[33] The fees sought are fair and reasonable, and consistent with the presumption of reasonableness. The fees sought are almost identical to the fees incurred. Further, given the risk of the litigation as discussed above, class counsel is entitled to the fees sought. The amount of disbursements claimed is reasonable, particularly in light of the three expert reports filed in each action.

[34] Consequently, in the One Bedford Action, I approve the request for legal fees of $300,000, plus $39,000 in HST on legal fees, with disbursements at $41,145.90 (inclusive of HST) for Charney Lawyers PC and $68,677.46 (inclusive of HST) for Strosberg Sasso Sutts LLP.

[35] In the Murano Action, I approve the request for legal fees of $810,000, plus $105,300 in HST on legal fees with disbursements at $63,504.51 (inclusive of HST) for Charney Lawyers PC and $67,147.64 (inclusive of HST) for Strosberg Sasso Sutts LLP.

D. Honoraria

[36] I do not grant the honoraria as requested.

[37] In *Doucet v. Royal Winnipeg Ballet*, 2023 ONSC 2323, the Divisional Court reviewed the law on granting an honorarium to a representative plaintiff in a class action. Matheson J. (speaking for the court) held that an honorarium could only be paid in "exceptional circumstances" and should be "rare" (at para. 92). The court then set out factors to assist in determining if such

"exceptional" or "rare" circumstances exist. On the facts of the present case, I do not find the evidence to support any of these factors.

[38] In particular, the only evidence from Emam, Ellwood and Goodman in their affidavits that is relevant to the request for an honorarium is that they were highly involved in the action, working with counsel throughout the various stages of the litigation. However, there is no evidence of "exceptional" involvement beyond the scope of a role of any representative plaintiff to work with counsel to assist in the pleadings, discovery, or mediation/settlement stages. Active participation in a class action, without particular evidence of "exceptional" participation, does not suffice.

[39] Class counsel sought to rely on the second factor set out at para. 92 of *Doucet*, i.e. that at least Emam (who rented his premises without abatement) and possibly Goodman (who would only obtain $500 since he had a Juliette balcony) would have been class members who would receive "only a tiny monetary remedy" or "none at all". I do not agree.

[40] First, the exception under par. 92(2) applies only when "the nature of the remedies available for the cause of action…would lead to only a tiny monetary remedy for each class member or none at all". In the present class actions, the members were not seeking a "tiny" monetary remedy or "none at all". They sought, and obtained, several thousands of dollars each for the loss of use of the balconies, and $500 each even if they had no balconies but lost the use of common amenities. Such a loss is not "tiny" in the sense of a few dollars. It is a real loss which is best served by a class action as it is not financially feasible to litigate each claim of several thousand dollars.

[41] Second, Emam brought his claim seeking damages for diminution of value of his unit as a result of the falling glass incidents. While such damages were not part of the settlement as negotiated by the parties, the claim made by Emam was not one for a "tiny" or no monetary remedy. If he had been able to establish such damages, the loss on a potential resale would have been much more than a "tiny" claim.

[42] Similarly, Goodman's claim for loss of use of common amenities, which resulted in a $500 settlement is not a "tiny" claim in the context of the exception set out in paragraph 92(2) of *Doucet*.

[43] Without any evidence to support the *Doucet* factors, and given the "exceptional" and "rare" nature of honorarium payment to a representative plaintiff, I follow the principles set out in *Doucet* and deny the request for payment of honoraria to Emam, Ellwood or Goodman. As I note above, the representative plaintiff Krishna in the One Bedford Action did not make a claim for an honorarium.

<u>Conclusion and orders</u>

[44] For the above reasons, I approve the settlement agreements, distribution programs, and fees and disbursements in both actions. I do not approve the request for honoraria for any of the representative plaintiffs who sought that relief.

[45] Counsel will provide the court with draft orders for its review in both class actions. Further, any other orders related to the dismissal of related third party or other actions shall also be forwarded to the court for my review.

[46] Counsel may also provide the court with transcribed reasons for my review. I reserve the right to make any minor grammatical, typographical or other changes if required.

____

Glustein J.

Date: June 14, 2023