CITATION: Kaplan v. PayPal CA Limited, 2021 ONSC 1981
COURT FILE NO.: CV-17-CV-587236CP
DATE: 20210317

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: LEONID KAPLAN, Plaintiff

AND:

PAYPAL CA LIMITED, PAYPAL CANADA CO., PAYPAL, INC. and PAYPAL HOLDINGS, INC., Defendants

BEFORE: Justice Glustein

COUNSEL: *Odette Soriano and Paul Davis*, for the Plaintiff

Christine Lonsdale, Adam Ship, and Adam Goldenberg, for the Defendants

HEARD: February 26, 2021

REASONS FOR DECISION

Nature of motion and overview

[1] The plaintiff, Leonid Kaplan (Kaplan) brings two motions pursuant to the *Class Proceedings Act 1992*, S.O. 1992, c. 6 (the "*CPA*"):

(i) In the first motion, Kaplan seeks an order, on consent, to approve the settlement of this action in accordance with the terms of the settlement agreement executed on December 3-4, 2020 (the "Settlement Agreement"), along with ancillary relief; and

(ii) In the second motion, Kaplan seeks an order to approve the payment of fees and disbursements for Class Counsel (Paliare Roland Rosenberg Rothstein LLP),[1] and to approve the payment of a $10,000 honorarium to Kaplan, along with ancillary relief. The defendants PayPal CA Limited, PayPal Canada Co., PayPal, Inc. and PayPal Holdings, Inc. (collectively, PayPal) do not oppose this motion.

[1] The approval is sought on behalf of Paliare Roland for total fees, both as counsel in the present action and as co-counsel in the Quebec Action (as defined below), including (i) any fees of IMK, Paliare Roland's co-counsel in the Quebec Action, and (ii) payment from Paliare Roland to Aiden Tirosh & Co., a law firm based in Israel that assisted Paliare Roland in this matter.

[2] Similar relief will be sought before the Superior Court of Quebec in Court File No. 500-06-000910-188, a companion action commenced on February 28, 2018 in Montreal (the Quebec Action).

[3] Kaplan challenges PayPal's currency conversion practices on behalf of Canadian-resident PayPal users. The present action and the Quebec Action advance two claims relating to these practices:

(i) **The overcharge claim**: Kaplan alleges that PayPal imposed an undisclosed fee on users' foreign exchange transactions by inflating the exchange rate PayPal applied to the users' transactions between January 14, 2017 and August 8, 2018; and

(ii) **The authorization claim**: Kaplan alleges that PayPal performed currency conversions when it lacked authorization to do so for certain types of transactions and certain time periods between 2006 and August 8, 2018.

[4] At the hearing, I granted the relief sought. I signed the orders with reasons to follow.

Facts

Foreign currency transactions under the PayPal payments processing platform

[5] PayPal operates a global mass payments processing platform known as "PayPal". PayPal processes online payment transactions around the world and facilitates online global commerce, including transactions across international borders and in different currencies.

[6] PayPal accountholders in Canada can hold foreign (and Canadian) currency in their accounts.

[7] When an accountholder transacted using their PayPal account, the transaction was funded in one of three ways: (i) by a cash balance, if any, in the accountholder's PayPal account, (ii) through a bank account linked to the accountholder's PayPal account, or (iii) through a credit card linked to the accountholder's PayPal account.

[8] When an accountholder's transaction involved foreign currency and was funded by either an account balance in another currency, a bank account, or a linked credit card, PayPal undertook the currency conversion automatically. Similarly, when accountholders withdrew foreign currency from their PayPal accounts, PayPal automatically converted those funds to Canadian dollars.

[9] There is no requirement to open a PayPal account in order to use the PayPal platform. Transactions by non-accountholders were funded by credit or debit cards, with PayPal conducting the currency conversions.

[10] Consequently, the class includes both accountholders and non-accountholders.

The User Agreement

[11] The use of a PayPal account and all transactions using PayPal are subject to a "user agreement" published on PayPal's website. By its express terms, the user agreement is a contract between the user and PayPal.

[12] The user agreements were standard form contracts of adhesion. PayPal drafted the agreements, directed users to the agreements, and periodically updated the agreements. Users had to accept the terms of the user agreement if they wanted to use PayPal.

The claims

[13] On November 24, 2017, Kaplan commenced this action.

[14] The class consists of individuals resident in Canada (outside of Quebec) who used PayPal during the proposed class period and who transacted in currencies other than Canadian dollars.

[15] There are likely over 12 million total class members in this action and in the Quebec Action.

[16] The claims of the class are based on the provisions addressing currency conversions in the various standard form user agreements during the relevant time periods.

[17] The overcharge claim asserts that in addition to the Currency Conversion Fee charged to a customer under the user agreement (which the plaintiff does not challenge), between January 14, 2017 and August 8, 2018, PayPal adjusted the exchange rate it obtained from the financial institutions before adding the Currency Conversion Fee, resulting in a relatively modest increase in the exchange rate, calculated in basis points, with each basis point equal to a hundredth of a percent.

[18] The authorization claim asserts that PayPal was not authorized under the applicable user agreements to charge conversion fees on certain transactions for various periods before August 8, 2018. Those transactions include (i) withdrawals from a user's PayPal account, (ii) transactions funded by a user's credit card, (iii) transactions funded by a user's linked bank account, and (iv) transactions funded by a user's PayPal account balance.

The Quebec Action

[19] On February 28, 2018, the proposed representative plaintiff Jennifer Balabanian commenced the Quebec Action. Class Counsel is co-counsel (with IMK) to the plaintiff in the Quebec Action. The plaintiffs in both the Ontario and Quebec actions advance substantially similar allegations relating to PayPal's foreign exchange practices, and counsel have coordinated strategy in the two proceedings.

Settlement negotiations

[20] The motion for authorization in Quebec was initially scheduled for the spring of 2020. In connection with the motion, the parties exchanged records, conducted written and oral cross-examinations, and delivered written argument for the motion. Through this process the plaintiffs' claims were narrowed and refined. The motion was adjourned due to the COVID-19 pandemic and re-scheduled to be heard in the fall of 2020.

[21] The parties had settlement discussions beginning in August 2018 and continuing periodically into early 2020. The discussions included an exchange of information about the claims and anticipated defences. In addition, PayPal provided information to Class Counsel about its currency conversion processes and practices, and the quantum of potential damages.

[22] The litigation continued while settlement discussions were ongoing. As part of the litigation, PayPal brought a motion for leave to deliver evidence in response to the motion for authorization in the Quebec Action. That motion was contested, and included the exchange of further written and oral argument. Through this motion, Class Counsel obtained additional information about the claims and the details of PayPal's currency conversion process.

Mediation

[23] In the spring of 2020, the parties exchanged further settlement offers to determine whether a contested authorization motion in Quebec followed by a contested certification motion in Ontario could be avoided. All of the offers were premised on a national settlement of both the Ontario and Quebec actions. By the spring of 2020, the parties believed that they had made sufficient progress in their negotiations that a facilitated mediation would be productive.

[24] In August 2020, the parties held a two-day mediation before Max Mendelsohn, a senior and highly-regarded lawyer and mediator in Montreal. Prior to the mediation, the parties exchanged comprehensive mediation briefs setting out their positions on the claims in the actions, both on the certification/authorization issues and on the merits. PayPal also provided information about the potential quantum of the overcharge claim.

[25] The parties negotiated extensively at the mediation. At the end of the second day of mediation, the parties (i) agreed to settle both actions for an all-inclusive amount of $10 million and (ii) negotiated in principle the process for distribution of settlement funds and provision of notice to the Class Members.

[26] Distribution and notice were challenging in these actions because of the enormous size of the Class and their very small individual alleged damages.

[27] The mediator strongly recommended the settlement to Class Counsel.

[28] Over the next three months, the parties negotiated a comprehensive settlement agreement which was signed on December 3-4, 2020.

The Settlement Agreement

[29] Under the Settlement Agreement, PayPal will pay an all-inclusive, non-reversionary amount of $10 million in exchange for a full and final release of the claims relating to its currency conversion practices.

[30] Subject to court approval, the following payments will be made out of the settlement fund:

(i) payment of fees, disbursements, and taxes to Class Counsel,

(ii) expenses of third-party administration (*i.e.*, notice and communications with Class Members),[2]

(iii) 10% of the portion of the settlement fund for Class Members in the Ontario action will be paid to the Class Proceedings Fund, and

(iv) an honorarium to Kaplan.

[31] After the payment of these amounts, the remaining monies in the Settlement Fund will be distributed by direct deposit into the PayPal accounts of over three million Class Members who fall into the "Active Group" as defined in the distribution protocol. PayPal is distributing the funds directly to those Class Members at its own expense.

[32] A Class Member is a member of the Active Group if they satisfy all of the following criteria:

(i) they are Canadian residents who purchased goods or services between January 14, 2017 and August 8, 2018, using PayPal in a currency other than the currency in which the goods or services were offered for sale;

(ii) they are PayPal accountholders;

(iii) their PayPal account was still open as of August 2020;

(iv) they completed at least one transaction with their PayPal account between August 9, 2019 and January 1, 2021; and

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[2] As I discuss below, PayPal is distributing the funds directly to members of the Active Group. No expenses associated with these payments will be deducted from the settlement fund. The only administration expenses are costs payable to the administrator for its limited role in providing notices, communicating with class members, and handling taxes and reporting.

(v) their account is not restricted as of the date of payment.

[33] Active Group members have overcharge claims and may also have authorization claims. Active Group members will not need to take any action to obtain a payment. The money will be deposited in their PayPal accounts to use as they see fit (including withdrawing the funds) and will not revert to PayPal. There will be a note in the account explaining that the funds are being provided as part of a class action settlement.

[34] Each Active Group member will be entitled to an equal share of the settlement fund. The process of providing payments to Class Members is expected to take several months given that there are expected to be over three million Active Group members. PayPal will provide monthly progress reports regarding the number of payments completed and amounts distributed.

[35] It is currently estimated that each Active Group member will receive an amount in the range of $1.85 to be added to their account (from the net settlement amount after payment of fees, disbursements, and the honorarium).

[36] The parties negotiated the distribution protocol to provide payments to the subset of Class Members most likely to use and benefit from the funds. The following factors were relevant to the decision to not provide a payment to each of the 12 million Class Members, but instead design a distribution protocol to provide funds to some Class Members (the Active Group):

(i) There are likely in excess of 12 million Class Members;

(ii) Each Class Member's likely damages are very small—most with potential overcharge claims are less than $5 (before any deduction for risks of litigation, payment of fees and disbursements, and payment of an honorarium);

(iii) The contact information for Class Members who used PayPal before August 2019 is less reliable than the information for more recent users;

(iv) It would consume a substantial portion of the settlement fund to locate and distribute funds to Class Members who do not have active PayPal accounts, thus reducing the individual recovery even further; and

(v) The overriding preference is to distribute funds to Class Members rather than employ a *cy-près* distribution, particularly given the aggregate size of the settlement fund.

Certification, notice, and objections

[37] On December 16, 2020, this court certified the action as a class proceeding for settlement purposes. PayPal consented to certification for settlement purposes only—it denies liability and the truth of the allegations.

[38] This court also approved notice of certification to the Class Members. Notice was provided in late-December 2020 in accordance with the notice plan.

[39] Since notice of certification and the settlement approval hearing was published in late-December, only three individuals have contacted Class Counsel to suggest that they have lost more than the anticipated *pro rata* distribution. One of these individuals has opted out of the action.

[40] No Class Members objected to the settlement or Class Counsel's fees.

Class Counsel fees and disbursements

[41] In July 2017, Kaplan and Class Counsel entered into a contingency fee retainer agreement (the Retainer Agreement) under which Class Counsel would prosecute the action. The Retainer Agreement provides that Class Counsel will be paid a 33% contingency fee of any amounts recovered in a judgment or settlement. Nevertheless, Class Counsel is seeking a 25% contingency fee.

[42] The Retainer Agreement further provides that Class Counsel will be reimbursed for the disbursements it incurred to prosecute the action.

[43] Paliare Roland incurred time with a value in excess of $665,000 to prosecute this action and the Quebec Action. The lawyers who had primary responsibility for carriage of the matter spent over 900 hours working on the case from the initial investigation until the end of January 2021. Co-counsel in Quebec—IMK—incurred time with a value of approximately $325,000 to prosecute the Quebec Action. Accordingly, class counsel have incurred approximately $1,000,000 in docketed time prosecuting the claims nationally since they were commenced.

[44] The class counsel firms also have combined outstanding disbursements of $38,107.54.

[45] Consequently, Class Counsel requests approval from the court for the following payments out of the settlement proceeds: (i) disbursements of $38,107.54 (inclusive of taxes), and (ii) fees of $2,824,071.99.[3]

Kaplan's involvement in the class action

[46] The relevant evidence is set out in Kaplan's affidavits filed in support of the motions for both settlement approval and fee approval and an honorarium.

[47] Kaplan seeks an honorarium of $10,000 to be paid out of the settlement funds.

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[3] The amount is calculated by first determining the amount of settlement funds remaining after payment of disbursements, and then applying 25% to that amount plus applicable taxes.

[48] Kaplan's evidence is that he was the person who became aware of the impugned foreign currency transactions and conducted his own investigation into the issue. He states (quoted *verbatim*):

(i) I use PayPal to buy goods online, sometimes from companies based in other countries that sell their products in currencies other than Canadian dollars. When I purchase products in other currencies, PayPal undertakes a foreign currency conversion;

(ii) I was concerned that cost of these currency conversions was high. My concern was based, in part, on my understanding of how PayPal carried out foreign currency conversions in Israel where I used to reside and where I was a representative plaintiff in a class action;

(iii) Therefore, on four days in April 2017, I investigated the cost of these conversions by purchasing items on eBay (which uses PayPal) in U.S. dollars. On the same day, I made four identical purchases from the same website using my credit card. I noticed that the total cost of the purchases using PayPal was higher than when using my credit card…;

(iv) Whenever I withdrew foreign currency from my PayPal account, PayPal automatically converted the currency into Canadian dollars before sending it to my linked bank account. Although PayPal required me to link a Canadian dollar-denominated bank account to my PayPal account, I did not understand any reason why my bank could not have converted the currency when it was received into my account. I never authorized PayPal to convert the currency to Canadian dollars when I made withdrawals; and

(v) On November 18, 2017, I withdrew US$50 from my PayPal account to my linked Canadian dollar bank account. Upon withdrawal, PayPal automatically converted those funds to Canadian dollars, imposed an exchange rate, and charged me a fee. As noted above, I did not authorize PayPal to convert the U.S. dollars, and I was not aware of any requirement for PayPal to do so.

[49] Kaplan's uncontested evidence as to his role in initiating the class action was as follows (quoted *verbatim*):

(i) My contact with Paliare Roland was the critical factor for commencing this case;

(ii) I approached Paliare Roland and spent many hours discussing the case and its merits with lawyers from the firm at the outset of the retainer;

(iii) [I] retained the law firm of Paliare Roland, experienced class action counsel, to act in this case, and instructed them to commence this proceeding;

(iv) [I] provided background to Paliare Roland about the alleged currency conversion practices which form the basis of the claim;

(v) [I] assisted in the translation of public court documents in Israel from the case involving PayPal's currency conversion practices in that country in which I was the representative plaintiff;

(vi) [I] reviewed and approved the claim;

(vii) [I] provided information to support, and approved, a successful application for funding of this action from Ontario's Class Proceedings Fund;

(viii) [I] provided information for this settlement and fee approval motion;

(ix) [I] aided in the drafting of [this] affidavit [for fee approval and for his honorarium request];

(x) [I] reviewed the offers to settle with my lawyers, considered the settlement strategy, and provided my views on the proposed mechanism of distributing the settlement and notice; and

(xi) [I] reviewed and approved the Settlement Agreement.

Analysis

[50] There are three issues before the court:

(i) **Settlement approval**: is the proposed settlement fair, reasonable, and in the best interests of the Class?

(ii) **Fee approval**: should Class Counsel's retainer agreement with the representative plaintiff be approved, and, as a result, Class Counsel's fees, disbursements, and taxes be paid out of the Settlement Fund?

(iii) **Honorarium**: should the representative plaintiff be paid an honorarium of out of the Settlement Fund?

[51] I address each of these issues below.

Issue 1: Settlement Approval

1. The applicable law

[52] I rely on the test for settlement approval which I set out in *Robinson v. Medtronic*, 2020 ONSC 1688, 150 O.R. (3d) 328, at paras. 63-68, in which I held:

> In deciding whether to approve a proposed settlement, the court must determine whether the settlement is fair, reasonable, and in the best interests of the class. Consideration must be given to the totality of the circumstances, including the factual context and the prevailing legal issues (See *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598 (Gen. Div.), at para. 9 (*"Dabbs II*"); *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.), at paras. 68-73 ("*Parsons I*"); and *Waldman v. Thomson Reuters Canada Limited*, 2016 ONSC 2622, 131 O.R. (3d) 367 (Div. Ct.), at para. 21 ("*Waldman*")).
>
> In undertaking this analysis, the following principles are to be used as a guide *(*see *Nunes v. Air Transat A.T. Inc.*, 2005 CarswellOnt 2503, at para. 7; and *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2643, 5 C.P.C. (7th) 341 ("*Osmun*"), at paras. 31 and 34):
>
> (i) The resolution of complex litigation through the compromise of claims is encouraged by the courts and favoured by public policy;
>
> (ii) There is a strong initial presumption of fairness when a proposed settlement, which was negotiated at arm's-length by counsel for the class, is presented for court approval;
>
> (iii) To reject the terms of the settlement and require the litigation to continue, a court must conclude that the settlement does not fall within a zone of reasonableness;
>
> (iv) A court must be assured that the settlement secures appropriate consideration for the class in return for the surrender of litigation rights against the defendants. However, the court must balance the need to scrutinize the settlement against the recognition that there may be a number of possible outcomes within a zone or range of reasonableness. All settlements are the product of compromise and a process of give and take, and settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection.

Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and costs obligation;

(v) It is not the court's function to substitute its judgment for that of the parties or to attempt to renegotiate a proposed settlement. Nor is it the court's function to litigate the merits of the action or to simply rubber-stamp a proposal;

(vi) The burden of satisfying the court that a settlement should be approved is on the party seeking approval; and

(vii) The court cannot modify the terms of a proposed settlement. The court can approve or reject the settlement. In deciding whether to reject a settlement, the court should consider whether doing so would derail the settlement. The parties are not obligated to resume discussions and it is possible that the parties have reached their limits in negotiations and will backtrack from their positions or abandon the effort. This result would be contrary to the widely held view that the resolution of complex litigation through settlement is encouraged by the courts and favoured by public policy.

The court may also weigh the following factors, keeping in mind that they are not to be applied mechanically and that in any given case, some factors will have greater significance than others (*Dabbs* II, at para. 13; *Osmun*, at paras. 32-33; and *Waldman*, at para. 22):

(i) the presence of arm's-length bargaining and the absence of collusion,

(ii) the proposed settlement terms and conditions,

(iii) the number of objectors and nature of objections,

(iv) the amount and nature of discovery, evidence or investigation,

(v) the likelihood of recovery or likelihood of success,

(vi) the recommendations and experience of counsel,

(vii) the future expense and likely duration of litigation,

(viii) information conveying to the court the dynamics of and the positions taken by the parties during the negotiations,

(ix) the recommendation of neutral parties, if any, and,

(x) the degree and nature of communications by counsel and the representative plaintiff with class members during the litigation.

Of the guiding principles, one of the most significant is whether "the settlement falls within a zone of reasonableness" (*Dabbs II*, at para. 30).

The court must balance the need to scrutinize the settlement against the recognition that there may be a number of possible outcomes within the range of reasonableness.

The parties have an obligation to provide sufficient information to allow the court to exercise its function of independent approval, although it is not necessary that discovery be complete at the time of settlement (*Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 2811 (Gen. Div.), at para 40 ("*Dabbs I*").

[53] I also rely on the following principles:

(i) The factors "must not be applied in a mechanical way," and it "is not necessary for all factors to be present, nor is it necessary that the factors be given equal weight". The circumstances of the case shape the analysis: *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2643, at para. 33; and

(ii) There is no requirement that a settlement treat all class members equally. The test is whether the settlement is fair and reasonable for the class as a whole: *Hodge v. Neinstein*, 2019 ONSC 439, at para. 41; *McCarthy v. Canadian Red Cross Society*, 2007 CarswellOnt 3735 (S.C.), at para. 17.

[54] I now review the above factors based on the evidence on this motion.

2. Application of the law to the evidence

(i) Presence of arm's length bargaining and absence of collusion

[55] Settlement negotiations began in August 2018 and continued periodically into early 2020. The negotiations were adversarial, leading to a two-day mediation before an experienced mediator who recommended the settlement. The parties bargained at arm's length.

[56] After agreeing in principle to the financial terms of the settlement, the parties spent several months exchanging further information and negotiating over the terms of the Settlement

Agreement, including the distribution protocol and the notice program. The negotiations were free of collusion.

(ii) Amount of evidence, discovery, and investigation

[57] For the motion for authorization (the equivalent of certification in Ontario), the parties exchanged records, conducted written and oral examinations, and delivered written argument. Class counsel also obtained additional information about the claims and the details of PayPal's currency and conversion process in the course of PayPal's contested motion in Quebec for leave to deliver evidence in response to the motion for authorization.

(iii) Zone of reasonableness and likelihood of success

[58] The terms of the Settlement Agreement fall within the zone of reasonableness, having regard to all of the circumstances, particularly in view of the litigation risks in this case. The action had potential weaknesses which may have resulted in certification being denied or the action being unsuccessful if tried on the merits on a class-wide basis.

a. Terms of the settlement

[59] PayPal amended the terms of the user agreement shortly after the action was commenced. Thus, the monetary compensation to the Class is the most important part of the settlement. The $10 million settlement fund is approximately 50% of PayPal's maximum potential liability on the overcharge claim and is a meaningful amount which is a good result in the circumstances.

[60] If PayPal's argument were accepted that the September 29, 2017 amendments to the user agreement addressed the alleged overcharge issue, then the settlement represents essentially full recovery on the overcharge claim.

[61] Importantly, the distribution protocol maximize the funds going to Class Members, while minimizing administration expenses and avoiding a *cy-près* payment. Active PayPal class members (i) with unrestricted accounts open as of August 2020, (ii) who purchased goods in a currency other than the currency in which the goods or services were offered for sale, (iii) who completed and were allegedly overcharged for goods purchased in the relevant class period, and (iv) who completed at least one transaction in their PayPal account between August 9, 2019 and January 1, 2021, will receive direct payment.

[62] The distribution protocol avoids the cost that would be incurred if the claims administrator was required to locate all 12 million Class Members (which would reduce individual recovery even further), particularly as contact information for Class Members who used PayPal before August 2019 is less reliable than the information for more recent users. The process allows the distribution of funds to Class Members, rather than a *cy-près* distribution, when those Active Group members who most frequently use PayPal would benefit by PayPal placing the funds directly into their account.

[63] While *cy-près* distribution may be appropriate under certain circumstances (see *Cass v. WesternOne Inc.*, 2018 ONSC 4794, at para. 91), *cy-près* distributions are "not the ideal mode of distribution" because they are "inherently a departure from the objective of compensation": *Sun-Rype Products Ltd. v. Archer Daniels Midland Co.*, 2013 SCC 58, at paras. 25-27; *Chartrand v. Google LLC*, 2021 BCSC 7, at para. 47.

[64] The proposed settlement in this case compares favourably to recent class action settlements that employed entirely *cy-près* distributions of settlement proceeds: see *Cappelli v. Nobilis Health Corp.*, 2019 ONSC 4521, at para. 42; and *Cass*, at para. 111.

[65] Rather than propose a *cy-près* distribution, the parties identified a group of Class Members who most recently used PayPal and are therefore most likely to receive and use the settlement funds. These individuals will receive a direct payment of cash which can be withdrawn and used for any purpose and will not revert to PayPal.

[66] Consequently, the quantum of the settlement fund and structure of the settlement distribution support approval.

b. Likelihood of success

[67] The following are risks associated with the (i) overcharge claim and (ii) authorization claims.

i. The overcharge claim

[68] Kaplan alleges that PayPal charged Class Members a hidden fee on currency conversions between January 14, 2017 and August 8, 2018. Kaplan alleges that PayPal, without a contractual basis, adjusted the exchange rate before adding the disclosed Currency Conversion Fee, thus inflating the price Class Members paid PayPal for currency conversions.

[69] Kaplan seeks damages in the amount of this hidden fee, reflecting the difference between (i) the amount Kaplan submits the user agreement permitted PayPal to charge for the currency conversion and (ii) the amount that PayPal actually charged. Based on the transactions in which Kaplan participated, he submits that on his foreign currency transactions, he paid from 0.55% to 1.24% more per transaction (55 to 124 basis points) in foreign currency fees.

[70] PayPal made the following arguments in response to the overcharge claim:

(i) It disclosed the exchange rate it offered for transactions before the Class Members completed the transactions, enabling users to compare the exchange rate to the rate offered by competitors;

(ii) The express language of the user agreement provided that PayPal reserved the right to adjust the PayPal exchange rates based on market conditions;

(iii) Providers of international foreign currency are not required to quote costs to users. PayPal submits that providers may set rates taking into account various factors; and

(iv) PayPal's fees and exchange rates were consistent with market competitors.

[71] During the settlement negotiations, PayPal quantified the overcharge claim assuming that the Class was fully successful. PayPal calculated the maximum potential recovery for the overcharge claim for all Canadian users at US$16 million (approximately CAD$20 million).

[72] Consequently, there were risks that PayPal could have successfully defended the litigation. On that basis alone, a settlement representing approximately 50% recovery for Class Members on the overcharge claim is well within the zone of reasonableness, particularly for a pre-certification settlement.

[73] Also, if PayPal's argument were accepted that the September 29, 2017 amendments to the user agreement addressed the alleged overcharge issue, then the settlement represents essentially full recovery on the overcharge claim.

b. The Authorization Claims

[74] Kaplan submits that PayPal converted users' currencies when it lacked contractual (or other) authorization to do so. Consequently, Kaplan submits that PayPal should return the Currency Conversion Fee.

[75] PayPal strenuously opposes the authorization claims, based on the following submissions:

(i) **No or nominal damages:** Given that Class Members were making purchases in a different currency or withdrawing funds in a different currency from their PayPal accounts, PayPal argues that some entity needed to perform a currency conversion to effect the transactions. Accordingly, PayPal argues that damages should be the difference between (a) the price PayPal charged and (b) the amount that a different financial institution would have charged for the conversion.

PayPal obtained expert evidence which PayPal argues shows that, in many instances, PayPal would have charged less than other financial institutions and the Class Members would therefore have suffered no loss.

(ii) **Express or implied authorization:** PayPal further submits that the issue of whether PayPal had authorization to convert users' currencies will depend on the checkout screens Class Members clicked through to complete their purchases or make their withdrawals. PayPal submits that it had explicit (or implicit) authorization from most (if not all) Class Members to perform the impugned currency conversions as a consequence of users' conduct.

(iii) **Lack of commonality:** PayPal contends that the issues of (a) whether PayPal had users' authorization and (b) if not, whether users suffered any damages are individual issues that are not suitable to resolution on a class-wide basis.

(iv) **Limitations:** PayPal submits that the authorization claims arising prior to 2015 or 2016 are statute-barred.

[76] PayPal raised these and other arguments during the mediation. While the Class raised arguments in response, the mediator expressed skepticism to Class Counsel about the authorization claims.

[77] Taken together, there are significant risks with the overcharge claim and, particularly, with the authorization claims. PayPal intended to oppose certification of these claims and denies their validity on the merits. Class Counsel took these risks into account in recommending the settlement.

[78] Notably, PayPal has already amended its user agreement, which Kaplan believes addressed the issues raised in the claims.

(iv) Duration and extent of litigation

[79] If the settlement is approved, some Class Members will receive compensation in 2021 rather than having to await the outcome of years of further litigation.

[80] PayPal's consent to certification is conditional on court approval of the settlement. If the settlement is not approved, contested motions for authorization and certification will not be scheduled until at the earliest in late 2021. If the actions are certified and authorized (and subject to appeals), they will then move into discovery. Class Counsel do not expect a hearing on the merits in either jurisdiction for several years.

[81] The prospect of lengthy litigation to achieve a result that may be less favourable than the settlement supports approval.

[82] This early settlement converts an uncertain result for all parties into certainty, provides an immediate benefit to active PayPal members, and encourages the early resolution of disputes under the *CPA*.

(v) Support of the representative plaintiffs, neutral party and objections

[83] Kaplan supports the Settlement Agreement. Its terms were also supported by the parties' experienced mediator.

[84] There are no objections to the settlement. As noted above, only three individuals have contacted Class Counsel to advise that they believe they would be entitled to more than the

anticipated *pro rata* payment for members of the Active Group. One of those individuals has since opted out.

(vi) Conclusion

[85] The settlement is fair and reasonable and in the best interests of the Class Members. The settlement was achieved through an arms' length and adversarial process. At various times, the parties took conflicting views which, had they not resolved, would have resulted in termination of the negotiations. The settlement fulfills all of the objectives of the *CPA*, and provides immediate, direct benefits to Class Members with eligible claims, while protecting them from serious risks of litigation. The settlement falls within the zone of reasonable outcomes in the case and should be approved.

Issue 2: Approval of class counsel fees and disbursements

[86] Class Counsel are seeking approval for the payment of legal fees in the amount of $2,824,071.99 (inclusive of applicable taxes) and disbursements of $38,107.54 (inclusive of taxes).

1. The applicable law

[87] I rely on the applicable law I set out in *Cass*, at paras. 117-26, which I set out below:

> Class counsel fees are to be approved on the basis of whether they are "fair and reasonable" in all of the circumstances (*Parsons v. Canadian Red Cross Society* (2000), 49 O.R. (3d) 281 (S.C.J.) ("*Parsons 2*"), at para. 13-14 and 56; *Lefrancois v. Guidant*, 2014 ONSC 1956 ("*Lefrancois*"), at para. 52).
>
> The courts in *Lefrancois*, at para. 52, and in [*Silver v. Imax Corp.*, 2016 ONSC 403] (at para. 41), set out the following factors which may be considered by the court when determining whether class counsel's fees are fair and reasonable:
>
> (i) the factual and legal complexities of the matters,
>
> (ii) the risks assumed in pursuing the litigation, including the risk that the matter might not be certified, and the risk of loss at trial,
>
> (iii) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement,
>
> (iv) the amount in issue,
>
> (v) the result achieved,
>
> (vi) the importance of the matter to the class members and to the public,

(vii) the degree of responsibility assumed and the skill and competence demonstrated by class counsel,

(viii) the ability of the class to pay, and

(ix) the expectations of the representative plaintiffs, the class and class counsel as to the basis for calculating fees and the amount of fees.

An agreement to make a contingent payment, on the basis of a percentage of a settlement or recovery, is contemplated by the word "otherwise" in s. 32(1)(c) of the *CPA*, and has often been awarded (*Nantais v. Telectronics Proprietary (Canada) Ltd.* (1996), 28 O.R. (3d) 523 (Gen. Div.) at pp. 528-29; *Crown Bay Hotel Ltd. Partnership v. Zurich Indemnity Co. of Canada* (1998), 40 O.R. (3d) 83 (Gen. Div.) ("*Crown Bay*"), at 86).

Contingency fee arrangements are an "important means" to provide "enhanced access to justice to those with claims that would not otherwise be brought because to do so as individual proceedings would be prohibitively uneconomic or inefficient". Similar to a multiplier, a contingency fee retainer "gives the lawyer the necessary economic incentive to take the case in the first place and to do it well" and, as such, "that opportunity must not be a false hope" (*Gagne v. Silcorp Limited* (1998), 41 O.R. (3rd) 417 (C.A.), at 422-23).

The policy of the *CPA* is to provide an incentive to class counsel to pursue class actions in order to increase access to justice. Class counsel fees have been awarded and are intended to compensate law firms for the risk that they may never be paid for their time or reimbursed for their disbursements. In *Parsons 2*, Justice Winkler (as he was then) stated (at para. 56, see also para. 14):

> […] The legislature has not seen fit to limit the amount of fees awarded in a class proceeding by incorporating a restrictive provision in the *CPA*. On the contrary, the policy of the *CPA*, as stated in *Gagne*, is to provide an incentive to counsel to pursue class proceedings where absent such incentive the rights of victims would not be pursued. It has long been recognized that substantial counsel fees may accompany a class proceeding. […]

In *Crown Bay*, Winkler J. commented on the benefits of a contingency fee in class actions to encourage settlement (at 88):

> […] On the other hand, where a percentage fee, or some other arrangement such as that in *Nantais*, is in place, such a fee arrangement encourages rather than discourages settlement […] Fee arrangements which reward efficiency and results should not be discouraged.

Similarly, in *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2752, Strathy J. (as he then was) endorsed contingency fee arrangements in class actions. He held (at paras. 21 and 22):

> There is much to be said in favour of contingent fee arrangements. Litigants like them. They provide access to justice by permitting the lawyer, not the client, to finance the litigation. They encourage efficiency. They reward success. They fairly reflect the considerable risks and costs undertaken by class counsel, including the risk that they will never be paid for their work, the risk that their compensation may come only after years of unpaid work and expense, and the risk that they will be exposed to substantial cost awards if the action fails. Effective class actions simply would not be possible without contingent fees. Contingent fee awards serve as an incentive to counsel to take on difficult but important class action litigation.
>
> […] in my respectful view, courts should not be too quick to disallow a fee based on a percentage simply because it is a multiple – sometimes even a large multiple – of the mathematical calculation of hours docketed times the hourly rate.

In *Abdulrahim v. Air France*, 2011 ONSC 512, Strathy J. (as he then was) approved a "one-third" contingency fee, referring to it as "standard in class action litigation". He held (at para. 13):

> A contingency fee of one-third is standard in class action litigation and has been common place in personal injury litigation in this province for many years. It has come to be regarded by lawyers, clients and the courts as a fair arrangement between lawyers and their clients, taking into account the risks and rewards of such litigation. Fees have been awarded based on such a percentage in a number of class action cases.

In *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686 ("*Cannon*"), Justice Belobaba also approved a one-third contingency fee and held that there was a presumption that such arrangements are valid and enforceable provided that they are "fully understood and accepted by the representative plaintiffs". He held (*Cannon*, at para. 8):

> What I suggest is this: contingency fee arrangements that are fully understood and accepted by the representative plaintiffs should be presumptively valid and enforceable, whatever the amounts involved. Judicial approval will, of course, be required but the

> presumption of validity should only be rebutted in clear cases based on principled reasons.
>
> In *Cannon*, Justice Belobaba provided "examples of clear cases where the presumption of validity could be rebutted" which included (*Cannon*, at para. 9):
>
> (i) "Where there is a lack of full understanding or true acceptance on the part of the representative",
>
> (ii) "Where the agreed-to contingency amount is excessive", and
>
> (iii) "Where the application of the presumptively valid one-third contingency fee results in a legal fees award that is so large as to be unseemly or otherwise unreasonable".

[88] I further rely on the principle that the risks of an action should be assessed at the time the action was commenced and include risks of certification as well as those on the merits: *Robinson*, at para. 89, citing *Gagne v. Silcorp Ltd.* (1998), 41 O.R. (3d) 417 (C.A.), at para. 16.

[89] I apply the above principles to the present case.

2. Application of the law to the facts of this case

[90] There is no basis to rebut the strong "presumption of validity" of the contingency fee arrangement, let alone the reduction of the fees sought to 25% of the settlement proceeds instead of the 33% provided under the Retainer Agreement: *Cannon*, at para. 9.

[91] I rely on the following factors:

(i) **The result achieved for the class:** As discussed above, the proposed settlement is a good result for the Class with a pre-certification settlement of approximately 50% of the best potential outcome of the overcharge claims. If PayPal's argument were accepted that the September 29, 2017 amendments to the user agreement addressed the alleged overcharge issue, then the settlement represents essentially full recovery on the overcharge claim. Under the proposed settlement, over three million Class Members will automatically receive compensation, while avoiding the risks of contested, protracted litigation.

(ii) **Risks incurred by Class Counsel, the complexity of the action, and skill and competence of Class Counsel:** This was a complex case in which Class Counsel took on significant risk and obtained a good result for the Class.

In this case, the risks are connected with the legal and factual complexities of the case. The primary risk Class Counsel incurred was that the case would be unsuccessful and counsel would receive no compensation of any kind for their

hundreds of hours of work, while being out of pocket tens of thousands of dollars in disbursements.

The risks on the merits of the action are set out above. While Class Counsel have experience with foreign exchange class actions, the complexity of the action is such that Class Counsel had to spend substantial time investigating this action and litigating pre-authorization issues in the Quebec Action, which had direct application to the present action as well. In addition, negotiating the settlement agreement, including the distribution protocol, was far more complex than in many cases due to the enormous size of the Class and the small alleged losses of each Class Member.

With an appreciation of the risks and complexity that it takes to prosecute a foreign exchange class action on the merits through protracted proceedings, Class Counsel secured a strong settlement at an early stage in the litigation;

(iii) **Expectations of the class:** Kaplan had (and has) a clear understanding of how Class Counsel would be compensated for this litigation. The retainer agreement provides for 33% of the total amounts recovered plus the applicable taxes. However, Class Counsel is only seeking a 25% contingency fee in recognition of the fact that Class Counsel negotiated the Settlement Agreement at a relatively early stage in the litigation.

The work undertaken in Ontario and Quebec contributed to the prosecution of both cases, and counsel are seeking approval of a 25% contingency fee in both jurisdictions;

(iv) **Reasonable multiplier**: The total value of the docketed time for all class counsel on the two actions was approximately $1,000,000. Awarding fees of 25% would therefore be equivalent to a multiplier in the range of 2.5, which is well within the range accepted in the case law: see *Fantl v. Transamerica Life Canada* (2009), 83 C.P.C. (6th) 265, 81 C.C.L.I. (4th) 18 (S.C.), at para. 92.

[92] Having regard to the factors identified above, including the risk assumed by Class Counsel, as well as the complexities of the proceeding, Class Counsel's request for legal fees is fair and reasonable.

[93] For the above reasons, I approve the fees and disbursements requested by Class Counsel, as well as the ancillary relief in the draft order provided to the court.

Issue 3: Approval of honorarium for Kaplan

1. The applicable law

[94] I reviewed the applicable law governing the award of an honorarium to a representative plaintiff in *Robinson*, at paras. 96-98. I rely on those comments, and do not repeat my lengthy analysis in these reasons.

2. Application of the law to the evidence

[95] I find that the evidence supports the "exceptional" order of the payment of an honorarium to Kaplan.

[96] Class Counsel fairly acknowledged at the hearing that Kaplan's conduct as a representative plaintiff in being involved in the litigation was not exceptional and was consistent with the conduct expected of a representative plaintiff.

[97] However, Class Counsel relied on the evidence discussed above to submit that the class action would not have been brought except for Kaplan's personal investigation of the issues and his decision to approach Paliare Roland and retain them as class counsel for litigation.

[98] I agree that Kaplan was the driving force of this litigation. None of the class members would have received any recovery if not for his diligence in discovering the foreign currency issues and seeking counsel for a class action. On that basis, I am satisfied that his conduct was of an "exceptional" nature justifying an honorarium.

[99] I do not find that the mere initiation of the litigation and retainer of counsel is automatically a basis for an honorarium. Each case must be assessed on its own facts to determine the importance of that factor.

[100] However, in the present case, the evidence supports the conclusion that the class action would not have been brought but for the exceptional efforts of Kaplan. He was the individual who became aware of the issues, conducted his own investigations by making purchases and engaging in transactions on PayPal, and then approached Paliare Roland with the matter.

[101] The foreign currency issues were not obvious, and it was only through Kaplan's due diligence that he could discover that on foreign currency transactions, he was paying from 0.55% to 1.24% more per transaction in foreign currency fees. While such an amount may have been very small in actual dollar terms for Kaplan, it reflected a $20 million difference for PayPal, and raised an issue which was properly brought to the court for the purposes of a class proceeding.

[102] On the basis of Kaplan's exceptional diligence in discovering the claim and bringing it to Class Counsel, I award him the requested honorarium of $10,000.

Order

[103] For the above reasons, I grant the relief as set out in the order signed on February 26, 2021.

GLUSTEIN J.

Date: 20210317

CITATION: Kaplan v. PayPal CA Limited, 2021 ONSC 1981
COURT FILE NO.: CV-17-CV-587236CP
DATE: 20210317

ONTARIO

SUPERIOR COURT OF JUSTICE

LEONID KAPLAN

Plaintiff

AND:

PAYPAL CA LIMITED, PAYPAL CANADA CO., PAYPAL, INC. and PAYPAL HOLDINGS, INC.

Defendants

REASONS FOR DECISION

Glustein J.

Released: March 17, 2021