

CITATION: Kozlovic v. Oy, 2022 ONSC 6080
COURT FILE NO.: CV-19-80810-CP
DATE: 2022/10/27

SUPERIOR COURT OF JUSTICE – ONTARIO

Proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6

RE: Andrea Kozlovic, Plaintiff

AND:

Suunto Oy, Defendant

BEFORE: Regional Senior Justice Calum MacLeod

COUNSEL: Jeff Orenstein & Andrea Grass, for the Plaintiff

Sean McGarry, for the Defendant

HEARD: October 26, 2022

REASONS FOR APPROVAL

[1] As discussed in my decision of June 17, 2022 (2022 ONSC 3648), this is a proceeding in which the plaintiff sought a remedy for residents of Canada who had purchased dive computers manufactured and distributed by the defendant during the relevant time period. It was alleged that certain of the dive computers contained defective pressure sensors so that they might be inaccurate.

[2] The Canadian class proceeding was similar to a proceeding in the United States. The Canadian class consisted of approximately 28,000 individuals who were believed to have purchased the dive computers since 2006. This is approximately one tenth the size of the class in the American class proceeding. The claim itself was a claim for compensation for the economic consequences of repairing, replacing or verifying the potentially faulty dive computers and specifically excludes any claims involving injury or death if any such claims exist.

[3] At the time of the June hearing, the parties had arrived at a proposed settlement. I certified the action for settlement purposes and approved the plan for notice to the class leading up to a motion to approve the settlement and the fees to be awarded to class counsel. The Act requires court approval of any settlement and also requires court approval of the fees and disbursements.

[4] The settlement includes three components. Firstly, there is an Inspection, Repair or Replacement Program which permits members of the class to have their device inspected and tested at an authorized service centre and for those with faulty sensors to be repaired or replaced at no cost and with a warranty of at least five years. This program covers each dive computer for eight years from the date of purchase or three years from the date of the order approving the

settlement, whichever is longer. This is a significant benefit which deals directly with the issue at the heart of the litigation. It will provide ongoing benefits to the members of the class.

[5] The second component of the settlement is a reimbursement fund of US \$77,500, which will be used to compensate members of the class who experienced a depth sensor failure within ten years of purchasing it and either discarded the computer, purchased a replacement computer or paid for repairs. The settlement provides for a payment to those class members of an amount between 10 percent and 60 percent of the retail cost depending on the date of purchase and reimbursement of any repair costs. These are the claims which must be made to the claims administrator between July 27, 2022 and February 28, 2023.

[6] The third component provides for any unused portion of the settlement fund to be used to provide class members with certificates redeemable for certain education programs run by PADI, the Professional Association of Diving Instructors. These certificates will be available on a first come first served basis if the Reimbursement Fund is not exhausted after the claims period has expired, all claims have been paid and the time for cashing cheques has expired. Any funds remaining at the end of that program will be paid to the non-profit PADI Foundation.

[7] Finally, there is an education and outreach program. Under this program, the defendant will produce and distribute a professionally produced educational video concerning the use of dive computers and how to assess pressure sensor problems. That video will also be posted on the defendant's web site for at least ten years.

[8] The date for opting out or objecting to the settlement was September 9, 2022. No member of the class objected or opted out and no member of the class appeared today and asked to be heard. In contrast, as of this morning, 185 class members have registered for the Inspection, Repair and Replacement program, 359 class members have filed claims under the Reimbursement program and 60 have signed up for the PADI educational certificates. This indicates both the effectiveness of the notice campaign and a high degree of satisfaction with the settlement amongst the class members. I am told that this is a higher percentage of uptake than under the similar settlement in the United States.

[9] Overall, I am satisfied that the proposed settlement is a fair and reasonable resolution of the claims described in the statement of claim, that it operates to the benefit of the class and was fairly negotiated. There is no sign of any collusion or conflict of interest to suggest that the claim was not vigorously pursued and defended. The evidence put before the court is in compliance with the applicable evidentiary requirements now set out in s. 27.1 (7) of the Act. The settlement is approved.

[10] The court must also approve the proposed counsel fee. Mr. Orenstein follows a commendable practice of first settling the action on the basis that 100 percent of the benefits negotiated for the class flow to the class. He then negotiates separately about the costs to be paid by the defendant on the basis that if the parties do not settle costs, they will be fixed by the court. The idea is that the costs are paid in addition to the settlement and do not come out of the award. That is the case here. The parties agreed on the benefits to be provided to the class and negotiated

costs as a separate issue. The defendant has also agreed to pay the notice costs, the costs of the claims administrator and a modest honorarium to the representative plaintiff.

[11] I accept that this methodology avoids conflict of interest with the class in negotiating costs. These values are, however, part of the overall settlement. Even using this method, the defendant will have had to factor in the costs exposure when agreeing to the settlement. The separate fee negotiation does not mean that it will be automatically approved by the court without the court being persuaded that the compensation is reasonable. In approaching that analysis, the court may examine other methods by which the fees could have been structured or determined. For that reason, I have been provided with the contingency fee agreement originally signed by the representative plaintiff, the time dockets and disbursements for amounts actually invested in this litigation by counsel and additional information and evidence set out in the motion record.

[12] The cost award the defendant has agreed to pay and that plaintiff's counsel has agreed to accept as full compensation for fees and disbursements is US \$400,000.00 plus HST. Whether this amount is reasonable must still be assessed in relation to the work actually done on the file and whether it is proportionate to the value of the settlement. I accept the evidence that net of disbursements, the counsel fee would approximate a multiplier of 1.68 times the value of the docketed time on the file at counsel's normal hourly rates.

[13] It is difficult to assess the value of the settlement in any scientific manner. That is because in addition to the US \$77,500 to be paid in compensation directly or indirectly to class members, there is the educational program and the Inspection, Repair and Replacement program along with additional warranty coverage. The actual cost of honouring these warranty obligations over the next eight years will only be known when the warranty period has expired, but Mr. Orenstein has proposed a conservative assessment of the value of such a warranty. He has provided evidence about the cost of purchasing warranty coverage on appliances including used appliances and proposes this as a model to value the benefits to be received by the class. He proposes that the court accept this "imperfect" method of valuing the benefit at \$2.8 million. If he adds to this, the value of the reimbursement fund, the costs of the notice and the costs of the settlement administration as well as the proposed counsel fee and the honorarium, the value of the settlement in Canadian dollars is represented as being \$3,595,000.00. This is detailed in Ms. Glass's affidavit in support of the motion. Measured against that estimate, the proposed counsel fee is 15.3 percent of the value of the settlement.

[14] In light of all of the evidence and considering the significant amount of time spent by counsel as well as the very significant disbursements that were incurred in bringing the matter to this point, I am satisfied that the proposed amount of \$400,000.00 plus HST is reasonable measured against the results achieved and the risk borne by counsel. I am approving the cost component of the settlement and approving that amount as the amount to be charged by class counsel. There will be no other fee or cost to members of the class.

[15] I must also consider the proposed honorarium to the named class plaintiff. This practice has become common, if not routine. An honorarium provides some modest compensation for the risk, time and effort spent by the named plaintiff in pursuing this litigation on behalf of the class.

This is reasonable. I accept the evidence that this plaintiff was significantly engaged in the litigation and the proposed honorarium of \$5,000.00 to be paid by the defendant is also approved. There is no danger that this sum is sufficient to induce this or any other plaintiff to pursue being named as a plaintiff in a class proceeding as a career and the honorarium is not in any way contrary to the interests of the class or the purposes of the legislation.

[16] In summary, I have approved the settlement and the amounts to be paid to class counsel along with the proposed honorarium. I will sign the draft order as proposed, but for the original paragraph 17 which dealt with voiding the order if the settlement became void. The conditions that might have led to that result are no longer possible and counsel agree that providing court approval is granted, the settlement is in full force and effect.

[17] Mr. Orenstein is to provide a fully completed electronic version of the final order complete with all appendixes and attachments for my signature. For that purpose, he may communicate directly with my office by e-mail.

Regional Senior Justice C. MacLeod

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Released: October 27, 2022