FILE/DIRECTION/ORDER
(UNOFFICIAL TRANSCRIPT)[1]

BEFORE JUDGE Glustein Action # CV-20-00634770-00CP

Arsalani

Plaintiff(s)

v.

Islamic Republic of Iran et al

Defendant(s)

CASE MANAGEMENT: YES [✓] NO [ ]

COUNSEL:	T. Arndt for the plaintiff	tom@twalaw.ca
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	J. Dais-Visca for the Attorney General of Canada	jacqueline.dais-visca@justice.gc.ca
	M. Arnold/J. Arnold for proposed Intervenors Zarei and Gorji	mark.arnold@gmalaw.ca jonah@healthlawfirm.ca

Nature of Motion and Overview

At a videoconference hearing today, I approved the proposed funding agreement entered into on February 11, 2020 (the "Funding Agreement") between the plaintiff ("Arsalani"), counsel (Tom Arndt, Barristers and Solicitors ("Arndt")), and the third party litigation funder, Galactic PS752 Litigation Funding LLC ("Galactic PS752").

Counsel for the defendant Ukraine International Airlines PJSC ("UIA") did not oppose approval of the Funding Agreement. The Attorney General of Canada representing the Department of Foreign Affairs took no position.

Only the proposed intervenors Gorji and Zarei (Gorji is the plaintiff in CV-20-635078-00CP) opposed approval of the Funding Agreement. Counsel for the proposed intervenors, in their submissions, advised that "[Gorji] is prepared to make supporting submissions upon the return date of the funding motion, September 21, 2020, without an adjournment or any delay". On that basis, I heard the proposed intervenors' submissions. Given that none of those submissions modify my conclusion that the Funding Agreement should be approved, I make no finding on the appropriateness of plaintiffs in another proposed class action seeking leave to intervene on a

[1] Edited by the court after receipt of draft unofficial transcript from counsel. No modifications affecting the substance of the initial written endorsement have been made.

funding approval motion brought by another plaintiff in a proposed class action related to the same matter, prior to a carriage motion to determine which of the actions should proceed to a certification motion.

The Funding Agreement

On the present motion the Funding Agreement is virtually identical to the funding agreement approved by Justice Morgan in *JB & M Walker Ltd./1523428 Ontario Inc. v. TDL Group*, 2019 ONSC 999 ("*TDL*"). The Funding Agreement provides for a total combined return shared between Galactic PS752 and Arndt ranging between 24% to 29% of proceeds, for all steps in the action, including enforcement and appeals. Galactic PS752 will pay legal fees, disbursements and adverse costs awards pursuant to a budget which I have reviewed and found to be reasonable. The budget was not disclosed to avoid providing the defendant with a litigation advantage (see *TDL* at para. 18). Such redactions in the publicly-filed agreement were appropriate.

The Funding Agreement does not require repayment of legal fees, disbursements or adverse costs. Those payments are made by Galactic PS752 on a non-recourse basis.

The Funding Agreement further provides that:

(i) Galactic PS752 will post security for costs, if required;

(ii) Galactic PS752 will attorn to the jurisdiction of the court and comply with any protective orders made by the court;

(iii) Arsalani has the sole right to direct and settle the proceedings;

(iv) Galactic PS752 is bound by the deemed undertaking rule;

(v) Confidentiality of any communications or documents that may pass between Arndt, Arsalani and Galactic PS752 is protected and subject to all legal privileges of Arsalani; and

(vi) Termination of the Funding Agreement is only with approval of the court.

Arsalani received independent legal advice from class action lawyer and bencher of the Law Society of Ontario, Jacqueline Horvat, prior to executing the Funding Agreement.

The Need for Third-Party Litigation Funding

Absent the Funding Agreement, Arsalani is not in a position to address an adverse costs award or fund the litigation. Consequently, Arsalani instructed Arndt to seek third party litigation funding for the action to not only protect Arsalani's assets but also to ensure Arndt would have the resources available on a "pay as you go" basis to fully prosecute the claim against the defendants.

Galactic PS752

Galactic Litigation Partners LLC ("Galactic") is the parent company of Galactic PS752. Galactic is an experienced litigation funder who assists parties who are not prepared to take on the risks associated with litigation or lack the financial resources to pursue their claims. As of May 31, 2020, Galactic has total assets of US$75 million, total liabilities of US$21.6 million, and over US$60 million in equity. If and as needed, cash will be provided to Galactic PS752 from Galactic.

Analysis

I do not repeat the cogent analysis of Justice Morgan in *TDL*, in which he considered and approved a virtually identical Galactic funding agreement. I rely on his analysis to find that the present Funding Agreement satisfies the requirements as set out in *Houle v. St. Jude Medical Inc.*, 2017 ONSC 5129 (SCJ), affirmed 2018 ONSC 6352.

In the present case, I find that:

(i) The Funding Agreement is necessary in order to provide access to justice. Arsalani cannot proceed with the action if not protected against adverse costs, and Arndt requires the Funding Agreement to ensure he has the available resources to prosecute the claim (*TDL*, at paras 8-12).

(ii) The Funding Agreement provides a meaningful contribution, as it "protects the financial and human capital of class counsel while seeing to it that [Arsalani] and class have adequately resourced legal representation" (*TDL*, at para 13).

As in *TDL*, counsel's fees are to be paid in full, on a non-recourse basis, under a budget which provides "a reasonable estimate of fees and disbursements that Galactic will cover over the course of the litigation, and specifically states that the amounts set out therein are estimates and may have to be adjusted as the matter unfolds" (*TDL*, at para 15). Galactic "is in a financial position to meet the obligations of this case as it goes forward." (*TDL*, at para 16).

As in *TDL*, the Funding Agreement "places appropriate obligations on Galactic to support all aspects of the case, maintains [Arsalani's] right to instruct counsel and direct the litigation" and is accompanied by a realistic budget (*TDL*, at para 17). Consequently, I find that the Funding Agreement "makes a meaningful contribution to the goal of access to justice and other objectives of the CPA" (*TDL*, at para 17).

(iii) The Funding Agreement protects the defendants' interests. UIA raised no objection, and Galactic has (i) covenanted to post security for costs if required to do so, (ii) committed to respect the deemed undertaking rule and (iii) attorned on consent to Ontario court jurisdiction to be subject to any orders issued by this court during the course of the litigation (*TDL*, at para 19).

(iv) Galactic is not overcompensated. As in *TDL*, the maximum combined recovery for Galactic and Arndt is 29% of any final settlement or award, an amount within the "presumptive validity" reviewed in *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686, at para

10, and an amount that would result in greater recovery to the class than if class counsel had entered into a typical 33% contingency fee agreement (let alone if further 10% recovery was sought by the Class Proceedings Fund if the plaintiff had sought such funding) (see *TDL*, at pars 24-26). Consequently, as in *TDL*, I find that Galactic is not over-compensated.

Submissions of the proposed intervenors

1. The proposed intervenors submitted that Arndt and Galactic were over-compensated on the basis that Arndt and Galactic would seek payment both under the contingency fee (33 1/3%) retainer agreement and the Funding Agreement, resulting the class being asked to incur over 60% in lawyer and funding fees. However, while the Arsalani retainer agreement did not expressly state so, the Zarei retainer agreement made it clear that only a combined recovery under the Funding Agreement was sought, with no recovery under the retainer agreement. The Zarei agreement states that "the combined funder and the lawyer returns are reduced from 33 1/3% to ranging from 24-29% of the litigation proceeds, depending how long it takes for the Class Action to be resolved", and "[t]he ultimate returns are subject to court approval at the end of the Class Action".

   Consequently, the proposed intervenors' "over compensation" objection is ill-founded. Arndt agreed to modify the Arsalani retainer agreement to include the same notice of combined fees, to avoid any uncertainty on the matter.

2. The proposed intervenors submit that the Funding Agreement is not "necessary" since under their counsel's approach, (i) UIA is not a defendant; (ii) it is much less likely any adverse costs would be ordered if the government of Iran is the defendant and (iii) disbursements may be minimal if UIA is not a defendant. I do not agree.

   The Funding Agreement is based on the case as pleaded by Arsalani. That claim includes UIA as a defendant, and seeks damages in negligence against the Iran defendants. While the different approaches of counsel in the two claims will be considered on the carriage motion, it is not contested that a claim against UIA in negligence and the proposed negligence claim against the Iran defendants could result in adverse cost awards, security for costs orders, and disbursements for experts to address standard of care issues. Consequently, the Funding Agreement sought by Arsalani is appropriate and necessary to pursue that claim.

3. The proposed intervenors compare their "20%" agreement with the alleged higher cost of the Funding Agreement. First, any difference in cost may (possibly) be considered on a carriage motion but is not relevant to a funding agreement approval motion where both agreements fall within presumptive validity. Second, as noted by Arsalani's counsel, it is not certain that the proposed intervenors' retainer agreement is at a lower cost, as it does not include disbursements, nor costs of an appeal or enforcement. I make no findings on these issues as they are not relevant to the funding approval motion brought by Arsalani. I raise them to suggest that even the factual premise of the proposed intervenors' submission is not certain.

4. The proposed intervenors challenge the validity of independent legal advice ("ILA"). However, I find the certificate of ILA provided by Ms. Horvat sets out that she fully reviewed the interpretation, execution, and consequences of the Funding Agreement with Arsalani.

There is no basis to support the proposed intervenors' assertion that Arsalani did not understand those issues when signing the Funding Agreement. Further, I do not agree with the proposed intervenors' submission that Ms. Horvat or Arndt is required to set out the legal fees charged for her services so that the proposed intervenors can test the strength of Ms. Horvat's advice. The proposed intervenors offered no case law in support of such a proposition.

5. The proposed intervenors challenge the retainer agreement as they assert that due to the termination clause, Arsalani may have felt "pressured" to sign the Funding Agreement. I do not agree.

   First, there is no evidence to support such a bald assertion. Second, both the Arsalani and proposed intervenor retainer agreements contain similar provisions that if the client terminates the retainer agreement, fees and disbursements must be paid by the client to counsel. While the Arsalani retainer agreement bases those fees on the greater of fees incurred or percentage of recovery (on a pro rata basis) and the Gorji agreement requires payment of fees incurred and disbursements, there is no evidence that at this very early stage of the proceedings, the "percentage" basis in the Arsalani retainer agreement would in any way cause increased pressure on Arsalani to accept the Funding Agreement, particularly as he had ILA from Ms. Horvat.

   For the above reasons, I reject the submissions of the proposed intervenors. Consequently, I do not address whether I would have granted them intervenor status.

Order and costs

I approve the Funding Agreement. The Arsalani retainer agreement is to be modified to include the note in the Zarei retainer agreement as I discuss above. I order no costs of the motion. While Arsalani did have to review the proposed intervenors' materials, no factum to address those issues was prepared and the hearing was not significantly extended as a result of those submissions. Consequently, I do not find a basis to order costs against the proposed intervenors.

On consent of the parties, as requested by counsel for the proposed intervenors, I extend the deadline to exchange motion materials in the carriage motion to October 1, 2020. Counsel may seek to adjust cross-examination dates as convenient to them, but all dates for the exchange of factums shall remain the same.

DATE: September 21, 2020

Benjamin Glustein J
JUDGE'S SIGNATURE