CITATION: McCartney v. CDSPI Advisory Services Inc., 2025 ONSC 4250
COURT FILE NO.: CV-22-00687006-00CP
DATE: 20250718

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Dr. Judy McCartney and Dr. Judy McCartney Dentistry Professional Corporation, Plaintiffs

– AND –

CDSPI Advisory Services Inc., Aviva Insurance Company of Canada, Aviva General Insurance Company and Aviva Canada Inc., Defendants

BEFORE: Justice E.M. Morgan

COUNSEL: *William Pepall (agent for Lax O'Sullivan Lisus Gottlieb LLP and Adair Bieber Goldblatt LLP), John Adair, and Nicole Kelly* – for the Plaintiff, Dr. Judy McCartney

Elizabeth Bowker and Avi Sharabi – for CDSPI Advisory Services Inc.

Eliot Kolers, Sam Dukesz, and Amy Yun – for Aviva Insurance Company of Canada and Aviva General Insurance Company

Tim Gleason (agent for McCarthey Tetrault) – for the Plaintiffs in Dr. Ketan Mistry et al. v. CDSPI [Court File No. CV-22-00000227], Dr. Peter H. Olejarz et al. v. CDSPI [Court File No. CV-22-00001277], Dr. Alexandra Ociepa et al. v. CDSPI [Court File No. CV-22-00678237], and Dr. Bradley S. Templeman et al. v. CDSPI [Court File No. CV-22-00688964]

HEARD: June 27-29, 2025

Proceeding under the *Class Proceedings Act, 1992*

REASONS FOR DECISION

I. The multiple motions

[1] The Plaintiff [Court File No. CV-22-00687006-00CP] (the "Class Action"), Dr. Judy McCartney, brings a motion pursuant to sections 5(1) and 27.1 of the *Class Proceedings Act, 1992*, SO 1992 c. 6 ("CPA") to have the action certified for settlement purposes as against the Defendant, CDSPI Advisory Services Inc. ("CDSPI"), and to have a proposed settlement with CDSPI approved.

[2] The Defendant in the Class Action, Aviva Insurance Company of Canada and Aviva General Insurance Company ("Aviva"), opposes the approval. At the same time, it brings a motion to stay the class action on the grounds that the partial settlement between the Plaintiff and CDSPI changes the alignment of the parties and was not disclosed to Aviva in a timely fashion.

[3] The parties in four individual actions against CDSPI [Court File Nos. CV-22-00000227, CV-22-00001277, CV-22-00678237, CV-22-00688964] (the "Individual Actions") , which pertain to the same subject matter as the Class Action and whose Plaintiffs are also some, but not all, of the members of the putative class in the Class Action, have negotiated their own potential settlement with CDSPI. Although the settlement of the Individual Actions is not subject to court approval, the proposed partial settlement of the Class Action impacts on those individual plaintiffs in that the settlement of the Individual Actions has been made contingent on approval of the proposed settlement with CDSPI in the Class Action. The Plaintiffs in the Individual Actions have therefore participated in these motions as interested parties.

II. The proposed settlement

[4] The actions in issue here all relate to business interruption insurance provided as part of Aviva's "Triple Guard" insurance policies for dentists. Those policies were marketed and sold by CDSPI and issued by Aviva.

[5] The Triple Guard pandemic outbreak coverage is up to an aggregate limit of $1,000 per day or $20,000 per year. Prior to March 13, 2020, dentists who held a Triple Guard policy could, by paying an additional premium, increase their pandemic outbreak coverage up to an aggregate limit of $5,000 per day or $100,000 per year. The Plaintiffs in all of the actions allege that on that date the right to increase pandemic coverage was cancelled and all requests by policyholders to exercise that right and to increase their coverage were refused.

[6] As set out in the affidavit of Crawford Smith, a lawyer for the Plaintiff in the Class Action, the Individual Actions against CDSPI were already in existence prior to the commencement of the Class Action. There are also parallel individual actions brought against Aviva, which address the same subject matter as those against CDSPI but in which settlements have not been negotiated and so are not part of the present set of motions.

[7] The Individual Actions name some 800 Canadian dentists as Plaintiffs; it is estimated that the putative class in the Class Action is comprised of approximately 5,200 Canadian dentists. It should be noted that the plaintiffs in the Individual Actions and the Plaintiff in the Class Action have different counsel.

[8] Given the timing of the actions, the Individual Actions against CDSPI are procedurally advanced compared to those against Aviva and the Class Action. By September 2022, before the proposed Class Action was commenced, the pleadings in the CDSPI action were closed, discoveries were complete, and the individual Plaintiffs were preparing to bring a motion for summary judgment. That motion was subsequently scheduled to be heard on April 27 and 28, 2023, but was withdrawn to allow the parties to pursue ongoing settlement discussions.

[9] By way of contrast, no steps have been taken in the individual actions against Aviva beyond service of the claims. Likewise, in the Class Action the parties are still at the pre-certification stage. Neither CDSPI nor Aviva have served a Statement of Defense.

[10] In January 2023, shortly after serving the Statement of Claim in the Class Action, counsel for the Plaintiff in the Class Action was advised by counsel for CDSPI that a summary judgment motion was planned in the Individual Action against CDSPI and that the Individual Plaintiffs were engaged in settlement negotiations that, if successful, would involve payment to them of the full amount of money available under CDSPI's only insurance policy. CDSPI also provided to counsel for the Class Action Plaintiff confidential financial information, subject to a non-disclosure agreement, establishing that CDSPI did not have further available insurance funds and was otherwise judgment proof.

[11] Given this information and state of affairs, the Plaintiff in the Class Action instructed counsel to negotiate a settlement with CDSPI which at least would secure for the class access to relevant CDSPI documents and evidence in exchange for a full and final release. The Plaintiff's Class Action counsel proceeded to negotiate a settlement with counsel for CDSPI.

[12] The record contains evidence demonstrating that, while Aviva and its counsel were not party to the settlement negotiations between the Plaintiff and CDSPI, counsel for Aviva was advised that the discussions were taking place and was kept apprised of their status; the fact that Aviva's counsel was updated on a periodic basis about the state of the negotiations is related in an affidavit by Aviva's own counsel. In addition, the Court itself was advised in January 2024 that settlement discussions were ongoing between the Plaintiff and CDSPI, as set out in a case conference endorsement dated January 9, 2024. No part of the settlement process took Aviva by surprise.

[13] The record also contains email correspondence from CDSPI's counsel, and sworn evidence by Mr. Smith on behalf of the Class Action Plaintiff, showing that although the settlement negotiations themselves took place between the lawyers, from the outset and throughout the negotiation period the discussions were expressly made subject to final approval of the respective clients.

[14] The following is a brief chronology of the months leading up to the signing of the settlement between the Class Action Plaintiff and CDSPI.

- January 17, 2024 – counsel for the Individual Plaintiffs advises Plaintiff's counsel in the Class Action that the Individual Plaintiffs have signed a settlement agreement with CDSPI, confirming that CDSPI would not be able to pay compensation in any Class Action settlement or judgment.

- January 22, 2024 – Counsel in the Class Action met with the (then) Plaintiff to update him about the discussions regarding a settlement comprising a full release of CDSPI in exchange for CDSPI providing relevant documents. The Plaintiff advised that he was considering whether he would remain in the role of proposed representative Plaintiff.

- February 5, 2024 – Counsel for CDSPI sends Plaintiff's counsel a copy of the Class Action settlement agreement signed by CDSPI's lawyers.

- February 12, 2024 – Counsel for CDSPI advises Plaintiff's counsel: "We jumped the gun on signing. We needed board approval, which we expect to receive on March 1. Please hold off on signing the agreement until then."

- March 11, 2024 – Plaintiff in the Class Action advises his counsel that he continues to contemplate withdrawing from his role in the case.

- March 12, 2024 – Counsel for CDSPI provides a copy of the settlement agreement signed by three CDSPI directors.

- March to May 2024 – CDSPI's counsel follows up several times inquiring whether the Plaintiff in the Class Action had signed the settlement agreement. In an email on May 1, 2024, CDSPI's counsel specifically asks Plaintiff's counsel if the agreement has been "finalized" yet. Parties take no steps under the draft settlement agreement.

- Late May/early June 2024 – counsel in the Class Action identifies a new proposed representative plaintiff. The original Plaintiff continues to consider whether he will sign the proposed settlement agreement. The parties continue to take no steps pursuant to the still unsigned settlement agreement.

- June 12, 2024 – the original Plaintiff in the Class Action executes the settlement agreement with CDSPI. The same day, counsel in the Class Action advises Aviva that a settlement has been entered into with CDSPI and sends Aviva's counsel an unredacted copy of the executed agreement.

- July 12, 2024 – Counsel to the Plaintiff in the Class Action served CDSPI and Aviva with a motion record for certification against CDSPI, containing an affidavit of the President and CEO of CDSPI deposing that CDSPI has also entered into a settlement in the Individual Actions "for the entirety of the balance of its $10,000,000 liability insurance limits."

- August 28, 2024 – Counsel for the Plaintiffs in the Individual Actions against CDSPI sends counsel for Aviva a copy of the settlement agreement in the Individual Actions, indicating that the disclosure constitutes a "limited waiver of settlement privilege" only for use in the then upcoming case conference.

- September 17, 2024 – A case conference is held scheduling the hearing of a settlement approval motion for the Class Action settlement; the endorsement authorized the settlement agreement in the Individual Actions to be filed before the court in the Class Action settlement approval motion.

- October 29, 2024 – The settlement approval motion is adjourned, to be heard together with Aviva's motion for stay of proceedings.

III. Certification

[15] In order to implement the proposed settlement, the Class Action must first be certified. In that way, the settlement, if approved, will be binding on the entire class (with the exception of any who decide to opt out). The Plaintiff therefore moves to certify the Class Action under section 5(1) of the *Class Proceedings Act*, 1992, SO 1992, c. 6 ("CPA").

[16] Where certification is sought for the purposes of settlement, all the criteria set out in section 5(1) must still be met: *Baxter v. Canada (Attorney General)* (2006), 83 OR (3d) 481, at para. 22 (SCJ). However, compliance with the certification criteria is not required with the same level of strictness as in a contentious certification, as the different circumstances dictate a different approach: *Sayers v. Shaw Cablesystems Ltd.*, 2011 ONSC, 962 at para. 24; *Davidson v. Solomon (Estate)*, 2020 ONSC 2898, at para. 57.

[17] In the present situation, certification is sought as against CDSPI alone, and the motion has proceeded on the basis of CDSPI's consent. Certification is not sought at this time as against Aviva. And while Aviva objects to the certification of CDSPI, that objection is really an objection to the way the proposed settlement has proceeded than on the certification criteria under section 5(1) of the CPA. Aviva has spent little to no time either in its written materials or at the hearing of the motion addressing the certification criteria as against CDSPI. Its objections will be fully considered here with respect to the settlement approval and its own stay of proceedings motion; however, the certification motion that relates to CDSPI alone will be considered on the same basis as any unopposed certification motion brought for the purposes of settlement.

[18] Turning first to the cause of action requirement in section 5(1)(a) of the CPA, that will be met by the pleaded causes of action unless it is plain and obvious that the claim cannot succeed: *Hollick v. Toronto (City)*, [2001] 3 SCR 158, at para. 25.

a) Cause of action – section 5(1)(a)

[19] Generally, the cause of action criterion for certification will be met unless it is plain and obvious that the claim cannot succeed: *Hollick*, at para. 25. The claims asserted against CDSPI are negligence and breach of contract. Given the nature of the claim and CDSPI's role in selling the insurance policies to the Plaintiff and class members, the two causes of action are certainly credible enough to meet the minimum threshold of section 5(1)(a).

b) Identifiable class – section 5(1)(b)

[20] In order to meet the identifiable requirement for certification, the Plaintiff must show that the proposed class definition is circumscribed by objective criteria to determine whether an individual is a member of the class. There must also be a rational relationship between the class, as defined, and the proposed common issues: *Cloud v. Attorney General of Canada* (2004), 73 OR (3d) 401, at para. 45.

[21] For the purposes of the CDSPI settlement, the proposed class is defined as:

> All persons, corporations or other entities carrying on business in Canada who were insured pursuant to a TripleGuard insurance policy with master number C3679100

> ("Policy") procured through CDSPI Advisory Services Inc. ("CDSPI") and issued by Aviva Insurance Company of Canada, Aviva General Insurance Company, and Aviva Canada Inc. ("Aviva") between January 1, 2020 and December 31, 2020.

[22] The definition refers to entirely objective criteria and the class is appropriately delineated. It certainly bears a rational relationship with the common issues as set out below. Accordingly, this definition meets the requirement of an identifiable class in section 5(1)(b).

c) Common issues – section 5(1)(c)

[23] The general purpose served by setting out common issues that can be determined on a class-wide basis is to allow the claim to proceed without duplication of fact-finding and/or legal analysis. There must be some basis in fact for each common issue, but the Supreme Court of Canada has indicated that the common issues requirement represents a low bar: *Vivendi Canada Inc. v. Dell'Aniello***,** [2014] 1 SCR 3, at para. 72.

[24] The Plaintiff proposes the following common issues for the purposes of the proposed settlement with CDSPI:

> (a) Whether CDSPI owed the Class Members a duty of care and/or contractual obligation to advise the Class Members of the ability to increase the Pandemic Coverage limits available under the Policy before that ability was discontinued by Aviva;
>
> (b) If the answer to (a) is "yes", the applicable standard of care and/or contractual terms that applied in the circumstances;
>
> (c) If the answer to (a) is "yes", whether CDSPI breached the applicable standard of care and/or contractual terms identified in (b).

[25] The question of liability under negligence or contract is a central feature of the claim against CDSPI, and is to be determined on the basis of CDSPI's conduct. This determination would apply on a class-wide basis and would avoid duplicative fact-finding or legal analysis: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 SCR 534, at para. 39.

[26] The proposed common issues therefore meet the requirement for certification in section 5(1)(c) of the CPA.

d) Preferable procedure – section 5(1)(d)

[27] The preferable procedure requirement for certification will be met where there is some basis in fact to show that that proceeding on a class basis will be fair, efficient, and manageable: *Banman v. Ontario*, 2023 ONSC 618, at para. 314. Generally, the preferability analysis should be analyzed through the lens of the three overall class action objectives – i.e. judicial economy, behaviour modification, and access to justice: *AIC Limited v. Fischer*, [2013] 3 SCR 949, at paras. 24-38.

[28] In the context of the proposed settlement with CDSPI, a class action is superior to any other means of adjudicating the dispute. The conduct of CDSPI in marketing the insurance policies in issue can be determined once and for all for all purchasers of the policies, and can thereby go far in establishing the entitlement of all purchasers in respect of that conduct: *Vistoli v. Haventree Bank*, 2024 ONSC 1887, at paras. 21-22.

[29] Proceeding as a class action is therefore the preferable way to proceed with this claim. The requirement in section 5(1)(d) of the CPA is therefore met.

e) Representative Plaintiff – section 5(1)(e)

[30] No one has expressed any objection to the Plaintiff carrying on as representative Plaintiff once the action is certified as against CDSPI. She is an educated person and there has been no suggestion that she does not understand or cannot fulfill the duties of a representative plaintiff. Furthermore, I have not been alerted to any conflicts of interest that the proposed representative Plaintiff has with any other class members.

[31] The requirement for an acceptable representative Plaintiff in section 5(1)(e) of the CPA is therefore satisfied.

IV. Disclosure of the settlement

[32] As indicated at the outset, Aviva not only opposes the motion to approve the settlement; it has brought its own motion to stay the entire action arguing that the settlement was not disclosed to it in a timely manner. In Aviva's view, the settlement is a form of Mary Carter agreement that not only allows one party to exit the litigation while the other remains, but that changes the adversarial landscape and relationship between the parties by converting CDSPI from Defendant to a party assisting the Plaintiff.

[33] Aviva's counsel invoke the rule of disclosure as set out in *Handley Estate v. DTE Industries Limited*, 2018 ONCA 324, at paras. 25, 39-40:

> …Mary Carter-type agreements must be disclosed to the court and to the other parties to the lawsuit as soon as the agreement is made. […] …The disclosure obligation extends to any agreement between or amongst parties to a lawsuit that has the effect of changing the adversarial position of the parties set out in their pleadings into a co-operative one…[…]
>
> In *Aviaco International Leasing Inc.*, at para. 23, the court formulated the question to pose to ascertain whether an agreement triggers the immediate disclosure requirement: Do the terms of the agreement alter the apparent relationships between any parties to the litigation that would otherwise be assumed from the pleadings or expected in the conduct of the litigation?

[34] It is Aviva's view that the Plaintiff was obliged to disclose the Class Action settlement with CDSPI at an earlier date as it was already effectively concluded and being acted upon before being formally signed by the Plaintiff and his counsel. Moreover, it is Aviva's view that the Plaintiffs in the Individual Actions were likewise obliged to disclose their settlement agreement with CDSPI

at an earlier date, as the two settlements – that in the Class Action and that in the Individual Actions – were negotiated with CDSPI "in tandem".

[35] Aviva's stay motion raises three questions, to be discussed in sequence: a) does the *Handley Estate* rule apply to settlements in class actions? b) is the settlement with CDSPI in the Class and the settlement with CDSPI in the Individual Actions all one package such that they both must be disclosed to Aviva? and c) was the settlement disclosed to Aviva in a timely enough manner?

a) Does *Handley Estate* apply to class actions?

[36] In *Oakdale Drywall & Acoustics Ltd. v. Providence St. Joseph's*, 2024 ONSC 3504, the Minutes of Settlement between the plaintiff and one of the defendants were dated "as of the 6th day of November 2023". However, the formal and final execution by the parties to the settlement was not completed until the releases, which were an integral part of the settlement package, were signed on December 1, 2023.

[37] Justice Kimmel found that the disclosure of the settlement, which was delivered to the non-settling defendant on December 1, 2023, was done in a timely manner and in accordance with the rule in *Handley Estate*. It did not have to be sent to the non-settling party in early November when it was negotiated but not yet signed and in force. In doing so, she made a point one would think would be self-evident and that needed no further explanation, at para. 90:

> No Ontario authority requires that parties disclose an unexecuted, unenforceable draft of a settlement agreement to the non-settling defendants in advance of it being finalized and executed.

[38] The *Oakdale Drywall* case was not a class action; had it been one, Justice Kimmel's point would have been even stronger. Sections 27.1(1) and (3) of the CPA provide that class action settlements require court approval and that they are not binding unless and until such approval is obtained. Prior to court approval, settlements in class action cases – including the settlement between the Plaintiff and CDSPI in the present Class Action – are not binding and enforceable. No steps can be taken by any party pursuant to the settlement prior to approval, since there is no settlement prior to approval.

[39] Section 27.1(7) provides that full disclosure of the settlement is part and parcel of the court approval process. Furthermore, a non-settling party is a participant in the approval hearing; indeed, Aviva exercised its standing in the present motion by making written and oral submissions in response to the settlement motion and combining it with a motion of its own to stay the proceedings. That full participation was accommodated by the court by scheduling the two motions to be heard at the same time.

[40] Accordingly, there is no *Handley Estate* concern that the non-settling party may be left in the dark about a change in the action. The protections afforded to the non-settling party are far more fulsome in the class action context than in an individual action. As counsel for the Plaintiff observed in his argument, given the statutory context in which class action settlements take place, it is no surprise that no Ontario case has applied the common law partial settlement rule in *Handley Estate* to an action governed by the CPA. The *Handley Estate* rule exists for non-class actions

precisely because those actions have no equivalent protection such as that provided by section 27.1 of the CPA.

[41] I find that there was no untimely disclosure or non-disclosure to Aviva of the Plaintiff's settlement of the Class Action with CDSPI. Aviva was served with the motion materials filed in the present settlement approval hearing and was a full participant in that hearing. The hearing itself was adjourned and rescheduled at Aviva's request in order to fully accommodate its participation.

[42] The CPA makes clear that there was no enforceable class action settlement between the Plaintiff and CDSPI at any time prior to the approval motion, and, in fact, there will be no enforceable settlement until the present judgment is released by the court. The *Handley Estate* rule is not applicable to class actions since the statutorily required court approval process subsumes that rule. But it is equally important here that Aviva was never deprived of any information about the settlement to which it had a right, and so *although* the *Handley Estate* rule is not formally applicable to this context, the *Handley Estate* principle of timely disclosure once the settlement is finalized and in place has been fully honoured.

b) Are the two settlements with CDSPI all one package?

[43] My conclusion that the *Handley Estate* rule is superseded by the CPA's requirement of court approval of any settlement is dispositive of Aviva's motion for a stay of proceedings and its objection to the settlement. Its objection is entirely based on the timing of notice of the settlement; otherwise, while Aviva is not happy with being the sole remaining Defendant in the Class Action, it presents little in the way of a substantive ground of objection to the Class Action settlement with CDSPI.

[44] A partial settlement of the Class Action is up to the Plaintiff and CDSPI to agree upon and for the Court to determine if it is fair and reasonable under the circumstances. The mere fact that CDSPI is settling and will no longer share liability with Aviva is not in itself a form of prejudice that would bar its approval. While the settlement has to be in the best interest of the class, it does not have to be in the best interest of Aviva as non-settling Defendant.

[45] Aviva's one substantive basis for objecting to the proposed settlement is that it contains a bar order prohibiting it from seeking contribution and indemnity from CDSPI. That is, of course, at least notionally a diminution of Aviva's rights; however, as discussed further below, its practical effect on Aviva's position is minimal to none.

[46] It is Aviva's view that CDSPI's settlements in the Class Action and the Individual Actions are so intimately interrelated that Aviva ought to have been given timely notice not only of the Class Action settlement but of the Individual Actions settlement under the *Handley Estate* rule. As discussed in the section above, Aviva got precisely the notice of the Class Action settlement to which it was entitled: a copy of the proposed settlement on the same day as it was signed by the Plaintiff, service of the motion record for settlement approval shortly thereafter, and full opportunity to participate in the settlement approval motion.

[47] On the other hand, although Aviva's counsel were aware that CDSPI and the plaintiffs in the Individual Actions had negotiated a settlement, a copy of that settlement agreement was not sent to Aviva until August 28, 2024 – i.e. two months prior to the initial hearing date of the

settlement approval motion for the Class Action settlement, but over six months since the agreement in the Individual Actions had been signed on January 12, 2024. As already indicated, the Individual Action settlement was expressly made conditional on the concluding and approval of the Class Action settlement. Aviva's counsel submit that the two agreements were really part of the same settlement and in their factum refer to the two agreements in the singular as a "Joint Settlement Agreement".

[48] One contract being conditional on another does not, of course, make the two contracts into one joint agreement. To take the most commonplace example, a contract to purchase a house that is conditional on the purchaser entering a contract to sell her existing house does not make the two contracts all one joint agreement. The seller of the purchaser's new house and the buyer of the purchaser's old house are not party to the same contract and they would not, merely because one contract is a point of contingency for the other, have contractual rights as against each other. There could, hypothetically, be other factors at play that would make two separate contracts into one joint contract or joint venture – e.g. shared expectations of profit or shared responsibilities for loss among all parties: *River Cree Resort Limited Partnership v. Canada*, 2023 FCA 130, at para. 65. But conditionality of one contract on the other being concluded would not on its own convert two agreements into one.

[49] In the ordinary course, Aviva would not be entitled to notice of the settlement with CDSPI in the Individual Actions, as it was not a party to those actions. The plaintiffs in the Individual Actions had sued CDSPI alone. As already indicated, they had also sued Aviva in parallel actions, but, unlike the Class Action, the Individual Actions against CDSPI and the individual litigation against Aviva remained separate. Ironically, the record shows that the plaintiffs in the Individual Actions against CDSPI had at one stage sought to join Aviva as co-defendant in those actions, but Aviva objected to that amendment of those Individual Actions and so the individual plaintiffs brought their claims against Aviva separately.

[50] Since the Individual Actions against CDSPI have not been treated as part of any joint claim against Aviva, it is difficult to see how their settlement can be treated as if it is a partial settlement of a joint claim with Aviva. Aviva cannot object to the joinder of the individual claims against it with the individual claims against CDSPI such that its liability, if any, will be determined separately from that of CDSPI, but nevertheless insist that it be afforded the rights – including the right to immediate notice of a settlement with CDSPI – that it would have if the individual claims against it had been joined with the individual claims against CDSPI. "Courts of equity" – or, for that matter, courts of law – "do not allow litigants to have their cake and eat it too": *Servus Credit Union Ltd. v. Miller*, 2012 ABQB 765, at para. 38.

[51] In any event, there is nothing in the Individual Actions settlement that needs to be disclosed. The issue of immediate disclosure turns on "whether the terms of the agreement alter the apparent relationships between any parties to the litigation that would otherwise be assumed from the pleadings or expected in the conduct of the litigation": *Handley Estate*, at para. 40. As Justice Nordheimer said in *Aviaco International Leasing Inc. v. Boeing Canada Inc*., 2000 CanLII 22777, at para. 23 (SCJ), the key is whether the agreement "changes [the settling party's and non-settling party's] relationship from an adversarial one to a co-operative one… Otherwise the court and the other parties might be misled."

[52] Aviva argues that the cooperation agreement between the Plaintiff and CDSPI is a fundamental change, transforming CDSPI from Aviva's ally as co-Defendant to its adversary as someone assisting the Plaintiff in forwarding the claim against Aviva: see *Peninsula Employment v. Castillo*, 2025 ONSC 1121, at paras. 12-15. The submission is expounded upon in Aviva's counsel's factum as follows:

> Third, the Class Action Settlement requires CDSPI to cooperate with the representative plaintiffs in their claim against Aviva, including by: (i) disclosing documents and information to Class Counsel, (ii) reviewing documents and information produced by Aviva, meeting with Class Counsel and answering questions posed by Class Counsel; and (iii) voluntarily providing affidavit evidence and attending as a witness at trial.
>
> This level of cooperation entirely changes the litigation landscape, particularly in conspiracy claims.

[53] For its part, the Plaintiff argues that the cooperation agreement entailed little more than the ordinary production and discovery obligations that CDSPI would be under if they did not settle. This view is elaborated upon in the Plaintiff's counsel's factum as follows:

> The terms of the Class Action Settlement, including its co-operation terms, did not have 'the effect of changing the adversarial position of the parties into a co-operative one' and thus change the litigation landscape. Rather, the nature of the terms required little more than what would have been required of Aviva in any event in the litigation…
>
> The key terms of the Class Action settlement, as they relate to Aviva, are as follows:
>
> > (a) CDSPI would provide relevant documents and evidence to the Plaintiffs. This is akin to the routine discovery obligations that CDSPI would have had in the litigation in any event. There is no specification of what the evidence must be, no "incentive" to CDSPI for providing evidence that is helpful to the Plaintiffs, and no standard of acceptability to the Plaintiffs that must be met. CDSPI simply must provide truthful information, which it would have been required to do as a party in any event. There is no prohibition on Aviva seeking such documents and evidence from CDSPI as well. …

[54] The extent of CDSPI's cooperation commitment is indeed debatable, and it is a matter of assessing the degree of cooperation to determine whether the adversarial landscape has truly changed. But much as the parties spend their energies debating the point, it is a red herring – and a particularly bright red one at that. It attracts considerable attention but does not really matter to the substance of the case. All parties acknowledge that the cooperation agreement is in the Class Action settlement, not in the Individual Actions settlement. It does not create any disclosure obligation for CDSPI, or reciprocal right for Aviva, in relation to the settlement of the Individual Actions.

[55] The Individual Actions settlement mentions nothing about cooperation and contains nothing of relevance to Aviva. It is silent with respect to the ongoing litigation with Aviva for good reason – Aviva is not a party to the Individual Actions. There is no reason for the individual plaintiffs and CDSPI to have considered the position of Aviva or any ongoing claim against Aviva in settling actions to which Aviva is not a party. The settlement agreement in the Individual Actions sets out the payment terms on which CDSPI is being released from those actions and, although it is conditional on the Class Action settlement being signed and in force, adds no terms relevant to Aviva at all.

[56] Accordingly, on its own, the Individual Action settlement is not disclosable to Aviva as a non-party to the action being settled. Likewise, the Class Action settlement is disclosable to Aviva in the context of the settlement approval motion, which has been appropriately done. Aviva has no rights to enforce under either settlement agreement standing on their own, and thus has no rights to enforce if the two are considered together. Without putting too hard an edge on the point, and with the greatest of respect to Aviva and its counsel, the answer to Aviva's stay motion is a matter of basic arithmetic:

> 0 [zero] disclosure claim in the Individual Actions settlement + 0 [zero] disclosure claim in the Class Action settlement = 0 [zero] disclosure rights denied.

[57] To the extent that anything needed to be disclosed to Aviva, it was all properly disclosed in the lead up to the Class Action settlement approval motion. There was no disclosure obligation with respect to the Individual Actions settlement as Aviva is not a party to those actions; and, in any case, that settlement agreement was also disclosed well in advance of the settlement approval motion and formed a central part of Aviva's argument in that motion.

[58] The combination of the Class Action settlement and the Individual Actions settlement did not create any more rights for Aviva in the aggregate than either of those settlements created on their own. There is no identifiable denial of rights to Aviva in any characterization of those agreements.

V. Best interest of the class

[59] In the course of the Class Action settlement negotiations, CDSPI provided Plaintiffs' counsel with financial disclosure establishing that CDSPI did not have the means to financially contribute to any settlement. The settlement of the Individual Actions for the entire balance of CDSPI's $10,000,000 insurance coverage, means that there is no more money available for the Class Action settlement.

[60] The claim in the Class Action and the total claims in the Individual Actions are both for more than $10 million. I will concede that I initially felt that it was awkward, and potentially even unseemly, for roughly 800 class members to share in CDSPI's $10 million compensation payment, and for the balance of the estimated 5,200 class members to get no payment from CDSPI at all. That is the effect of the plaintiffs in the Individual Actions settling for all of the insurance proceeds and the Plaintiff in the Class Action settling for cooperation from CDSPI and nothing more.

[61] From one perspective, the difference between one person holding a relevant insurance policy and getting some compensation from these settlements, and another holding the identical

insurance policy and getting no compensation from these settlements is an arbitrary one. That is, it is not based on any difference in substantive rights, but rather on when and how the insured person heard about the claim and the choice of procedural route to a claim that person made.

[62] On further reflection, it occurred to me that this is not very different than the distinction between what is obtained in a class action and what might be obtained by a class member opting out of a class action. The fact that there are many opt-outs – which may well diminish the pool of funds available for the class – is not determinative of the merits of the proposed settlement.

[63] In the present case, the timing of the actions makes the comparison even more stark. The affidavit of CDSPI's president and CEO, Edo Dermit, reminds me that the Individual Actions were commenced in 2020, and that by the time the Class Action was commenced in 2023 were at an advanced stage. In fact, discoveries in the Individual Actions were completed, the plaintiffs had served a motion record for summary judgment, and a summary judgment hearing date of April 27-28, 2023 was approaching by the time the Class Action was commenced in January 2023.

[64] The only reason the Individual Actions are still not completed is that the summary judgment motion was adjourned in order to allow a settlement in the Individual Actions to be negotiated. If this settlement, which is conditional on the Class Action settlement being approved, does not become binding and enforceable, the Individual Actions can immediately proceed to a summary judgment motion.

[65] Unlike the Class Action, the Individual Actions are mature actions on their way to completion. The Class Action, by contrast, is still in its infancy. Neither CDSPI nor Aviva has served a statement of defense. The certification process lies ahead of them, as do documentary and oral examinations for discovery and, ultimately, a common issues trial. In the event that the settlement in the Class Action is not approved, and the settlement in the Individual Actions is thereby abandoned, final judgment can be rendered in the Individual Actions before certification, let alone a final judgment, is obtained in the Class Action.

[66] In other words, if the Class Action settlement is approved, the plaintiffs in the Individual Actions will be first in line for the entirety of the CDSPI insurance proceeds. And if the Class Action settlement is not approved, the plaintiffs in the Individual Actions will still be first in line for the entirety of the CDSPI insurance proceeds. The 800 plaintiffs in the Individual Actions are not only like class members who opt out in the ordinary class action settlement context; they are class members who 'opted-out', as it were, prior to the Class Action beginning and who, by virtue of that sequence of events, have a priority claim over CDSPI's only source of funds.

[67] This same economic logic forms a counterweight to Aviva's objection to the bar order contained in the settlement agreement. If the Plaintiff and class are successful at trial, CDSPI's financial well will have already run dry; and if it is dry for the Plaintiffs, it will be equally dry for Aviva if it were to claim over against CDSPI for contribution and indemnity. Thus, while the bar order protecting CDSPI is in theory a limitation on rights that Aviva would otherwise have, it is a justifiable limitation under the circumstances. From an economic point of view, it barely, if at all, changes Aviva's circumstances or chances of achieving financial participation by CDSPI.

[68] In any case, the plaintiffs in the Individual Actions who share in the payout of CDSPI's insurance proceeds will have that much less to claim from Aviva, either in the Class Action where they remain class members or in the individual actions already started against Aviva. That reduction in the total claims against Aviva can be factored into any settlement or damages award down the road, thereby having a similar economic effect as a successful claim for contribution and indemnity by Aviva against CDSPI. In all, I see no rationale for interfering with a proposed settlement due to notional prejudice to the non-settling Defendant that has little practical import.

[69] Thus, although there is some momentary awkwardness in some class members receiving monetary compensation from CDSPI because they sued in advance of the Class Action being brought, and other class members receiving no monetary compensation from CDSPI because their claims against CDSPI are embodied in the Class Action, the compensation of the two groups may eventually get evened out. At present, the distinction is built into the way the actions were brought; but if – and I emphasize that this still remains to be determined – liability is established against, or a settlement is reached with Aviva, the distinction in compensation between the two groups may vanish.

[70] As usual, the court here is limited in what it can do – i.e. it can either approve the proposed Class Action settlement or not approve it; it cannot change or re-draft its terms.

[71] It is well established in the case law under the CPA that the terms of a class action settlement need not be optimal; rather, they must be determined to be within a zone of reasonableness: *Rizzi v. Handa*, 2021 ONSC 1004, at para. 19. The settlement terms are not expected to suit each and every class member in the same way, but instead must treat them, collectively, in a fair and reasonable way given the circumstances of the case: *Kirsch v. Bristol Myers Squibb*, 2024 ONSC 7191, at para. 24.

[72] Settlement approval analysis takes into account factors such as litigation risk, future expenses, recommendation of experienced counsel, arm's-length bargaining with experienced adversaries, and the settlement terms themselves in assessing the merits of a settlement: *Vell v. Mattel Canada Inc.*, 2016 ONSC 5789, at para. 27. I have considered these as useful guides in evaluating the settlement proposal before me: *Maggisano v. Skyservice Airlines Inc.*, 2010 ONSC 7169, at para. 19.

[73] I take particular note that the Class Action settlement is strongly recommended by experienced counsel. The deference owed to class counsel applies to class counsel's view of both the prospects of litigation with CDSPI, and the likely result of other actions and events that will impact on the class action, in this case including the Individual Actions. Class counsel is of the view that the Individual Actions will inevitably beat the Class Action to the insurance funds, and that there is little to no prospect of the Class Action catching up with them so that they might have a chance of taking or sharing CDSPI's insurance funds.

[74] I also observe that Plaintiff's counsel in the Class Action is not seeking approval of any legal fees at this time. The Class Action will continue with Aviva as the only Defendant, and counsel will presumably seek its fees from any settlement or proceeds of judgment when the action is concluded. Counsel's lack of any financial interest in the present settlement only serves to

augment the credibility of and deference owed to Plaintiff's counsel in recommending the settlement.

[75] The relevant considerations all add up to the conclusion that the Class Action settlement agreement with CDSPI is fair and reasonable and is in the class members' best interest.

VI. Disposition

[76] The Class Action settlement agreement between the Plaintiff and CDSPI is approved.

[77] The motion by Aviva for a stay of proceedings is dismissed.

[78] The parties may make written submissions on costs. I would ask counsel for the Plaintiffs in all of the actions considered here, as well as counsel for CDSPI, to send brief submissions by email to my assistant within two weeks of today, and for counsel for Aviva to send brief submissions by email to my assistant within two weeks of receiving the last of the Plaintiffs'/CDSPI's submissions.

Morgan J.

Date: July 18, 2025