Citation: Knudsen v. Consolidated Food Brands Inc.
2001 BCSC 1837

Date: 20010104
Docket: L000093
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

Oral Reasons for Judgment
Mr. Justice Wong
January 4, 2001

BETWEEN:

THOMAS HOLST KNUDSEN by his Guardian ad Litem PALLE KNUDSEN as Representative Plaintiff

Plaintiff

AND:

CONSOLIDATED FOOD BRANDS INC. carrying on business as FLEETWOOD SAUSAGE

Defendant

Counsel for Plaintiff: D.A. Klein, J.G. Pearce

Counsel for Defendant: J.D. Morin

Counsel for the Public Guardian and Trustee: C. Cunningham

INTRODUCTION:

[1] **THE COURT:** This is a threefold application brought by the plaintiff under the ***Class Proceedings Act,*** R.S.B.C. 1996,

c. 50. The first two applications are under Sections 2(2), 8, and 35 of the ***Act*** for an order:

1. Certifying this proceeding as a class proceeding pursuant to Section 2 of the ***Class Proceedings Act***;

2. Declaring that the class be comprised of all residents of British Columbia who suffered personal injuries and tested positive for E. coli 0157:H7 during the period between September the 23, 1999, and January the 31, 2000, after consuming a Fleetwood Sausage product. Persons of legal capacity who have accepted a settlement offer and have signed a release in favour of the defendant in respect of this matter are excluded from the class;

3. Appointing Tom Holst Knudsen by his Guardian Ad Litem, Palle Knudsen, as the representative plaintiff of the class;

4. Declaring that the claims of the class are for damages arising from personal injuries suffered as a result of consuming meat products which were tainted with E. coli bacteria and which

were manufactured and distributed by the defendant;

5. Declaring that the relief sought by the plaintiff class is judgment against the defendant for negligence and breach of the ***Sale and Goods Act***, R.S.B.C. 1996, c. 410, and if granted:

   a) General damages;

   b) Special damages;

   c) Interest pursuant to ***the Court Order Interest Act***, R.S.B.C. 1996, c. 79; and

   d) costs of this action pursuant to the ***Class Proceedings Act,*** R.S.B.C. 1996, c. 50.

6. Declaring that the following question is certified as a common issue in the class proceeding. Does the defendant have liability and damages to the class;

7. Declaring that notice of the certification of this class proceeding and the settlement of

this class proceeding be given to class members in a form and manner to be determined on further application to the court;

8. Declaring that members of the class may opt out of this action by notifying Klein Lyons in a form and manner to be determined upon further application to the court;

9. Declaring that any member of the class who does not opt out of this action will be bound by the settlement agreement once approved;

10. Approving the settlement agreement substantially in the form attached as Exhibit D to the affidavit of Mark L. Lyons, sworn December 29, 2000;

11. Declaring that the settlement agreement is fair, reasonable, and in the best interests of the class members;

12. Such further and other relief as this Honourable Court may deem just.

[2] The third application is for an order pursuant to Section 38(2) of the Act approving a class counsel fee to counsel for

the representative plaintiff. I have concluded the requested applications are appropriate. These are my reasons.

THE BACKGROUND:

[3] This action arises out of the allegation of negligence against Consolidated Food Brands Inc. carrying on business as Fleetwood Sausage in connection with an outbreak of illness caused by the E. coli bacterium in meat products that were manufactured and distributed by Fleetwood in October 1999.

[4] Consolidated Food Brands Inc. is the sole proprietor of Fleetwood. Fleetwood specializes in the manufacturing of ready-to-eat meat products.

[5] The E. coli bacterium known scientifically as *Escherichia coli* 0157:H7 produces high levels of toxins that have a toxic effect on cells in the intestines and, if absorbed, exert toxic effects on the kidneys. Food contaminated with E. coli looks and smells normal.

[6] On October the 25, 1999, the plaintiff's mother purchased some tainted meat from a grocery store located in Langley, British Columbia. The plaintiff ate the tainted meat on October the 28, 1999. The plaintiff was affected with E. coli bacteria as a result of consuming that tainted meat and suffered from severe abdominal pain and vomiting. He passed

frank blood from his bowels. He was admitted to Langley Memorial Hospital on or about November the 1, 1999, and he remained there for treatment for approximately five days.

[7] Laboratory tests requisitioned by the hospital and conducted by the B.C. Centre for Disease Control isolated E. coli 0157:H7 from a stool sample collected from the plaintiff on November the 1, 1999.

[8] The writ of summons was filed in these proceedings on January the 14, 2000. The statement of claim was filed on April the 11, 2000. The amended writ and the amended statement of claim were filed on June 26, 2000. The statement of defence was filed on June 13, 2000.

[9] The amended statement of claim alleges that Fleetwood was negligent in the manufacture and distribution of the tainted meat and that it failed to take any steps or any adequate steps to warn or adequately warn the public of the danger of the consumption of tainted meat or recall the tainted meat in a timely manner or at all.

[10] The defendant denies any wrongdoing or liability to class members. Further, in the defendant's initial submissions, opposing certification, the defendant expressed an intention

to vigorously defend the allegations of negligence that have been brought against it.

[11] 143 cases of E. coli related to tainted sausages were reported to the B.C. Centre for Disease Control (CDC). E. coli causes severe abdominal pain, vomiting, and diarrhoea, often bloody. It can be especially severe in the elderly and in children, with up to 10 percent of young people developing haemolytic uremic syndrome, HUS, which causes kidney failure and internal bleeding. About one-third of persons with HUS have abnormal kidney function many years later, and a few require long-term dialysis. Another 8 percent of persons with HUS have life long complications such as high blood pressure, seizures, blindness, paralysis and the effects of having part of their bowel removed.

[12] Out of the CDC recorded 143 cases, 42 people required hospitalization and 101 did not. Approximately two-fifths of the 143 known victims are minors. Medical literature suggests that likely the most severely affected victims may be minors. Six cases of HUS were reported.

[13] Defence counsel has advised that 80 cases have already been settled. Of those 80, 70 were adults and 10 minors.

[14] On the eve of the initial certification hearing on November the 27 last the parties effected a settlement now before the court for approval.

THE CERTIFICATION NOTICE MOTION:

[15] This motion is now unopposed by the defendant. I am satisfied and find that the statutory requirements under Section 4(1) of the ***Act*** for certification as a class proceeding are satisfied, namely:

1. the pleadings disclose a cause of action;

2. there is an identifiable class of two or more persons;

3. the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;

4. a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;

5. there is a representative plaintiff who:

a) would fairly and adequately represent the interests of the class;

b) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and notifying class members of the proceeding; and

c) does not have on the common issues an interest that is in conflict with the interests of other class members,

and therefore would certify this action as a class proceeding.

THE SETTLEMENT:

[16] The settlement negotiations with the defendant began in May 2000. Negotiations were strongly adversarial with the defendant denying negligence. Terms of settlement, however, were agreed to at the end of November 2000. The settlement agreement appears to ensure that compensation varies between claimants according to established tort principles. Class members qualify for payment in the following categories:

> **Class I** - claimants who were not admitted to hospital: lump-sum payment of $4,000 plus reimbursement of all reasonable and documented special damages suffered by them or the family members as a direct result of the claimant's infection;
>
> **Class II** - claimants who were admitted to hospital for less than 30 days and whose symptoms have now resolved: lump-sum payment of $7,500 plus $700 for each day or part thereof spent in hospital, plus reimbursement of all reasonable and documented special damages suffered by them or the family members as a direct result of the claimant's infection;
>
> **Class III** - claimants not falling within Class I or II and who provide medically supported evidence of continuing symptoms or who were admitted to hospital for 30 days or longer: compensation in an amount agreed by the claimant and Fleetwood.

[17] If the parties are unable to agree, the dispute will be mediated. If the mediation is unsuccessful, the claim will go to binding arbitration. Fleetwood will pay the costs of the mediation and arbitration.

[18] Class members who opt out of the class proceeding are free to pursue individual actions against the defendant and retain all the rights they would have had in the absence of the settlement. I agree with Mr. Klein's submissions that the settlement agreement is more advantageous to class members than continuing with litigation, as it is evident that:

1. class members will receive compensation without the burden of proving liability or, in the main, causation;

2. class members will not have to appear in court;

3. class members will have their confidentiality protected;

4. class members will likely receive compensation more quickly than if they were to pursue litigation.

[19] The settlement agreement also provides a mechanism for resolving class member's claims that is simple and easy to access, but also minimizes and controls administrative, legal, and medical costs. The settlement agreement also provides an administration process that will not burden the court system. The settlement agreement is supported by Palle Knudsen, the Guardian Ad Litem for the representative plaintiff. He has

received and reviewed the terms of the settlement with Mr. David Klein and finds that it is fair and in the best interests of the class.

[20] The settlement was negotiated by senior counsel who have extensive experience in personal injury law and class actions. Plaintiff's counsel consider the settlement agreement to be fair and in the best interests of the class. The settlement agreement compares favourably with the defendant's initial settlement offer.

THE APPLICABLE LAW:

[21] Under the ***Class Proceedings Act***, Sections 35(1) and (3), the settlement of a class proceeding must be approved by the court. For a settlement in the class proceeding to be approved, it must be fair, reasonable, and in the best interests of those affected by it. The court is concerned with the interests of the class as a whole rather than the demands of the particular class member. See ***Endean v. Canadian Red Cross Society***, (October 1, 1999, Vancouver, C965349, (B.C.S.C.), paragraph 13); ***Sawatzky v. Societe Chirurgicale Instrumentarium***, (August 4, 1999), Vancouver, C954740, (B.C.S.C.), paragraph 19; ***Haney Iron Works, Ltd. v. ManuLife Financial***, (December 16, 1998), Vancouver, C954749,

(B.C.S.C.), paragraph 27; and ***Dabbs v. Sun Life***, (February 24, 1998), Ontario Court of Justice 96-CT-022862, (General Division) paragraph 14.

[22] There is no overriding public interest in favour of settlement. This policy promotes the interests of litigants generally by saving them the expense of trial and reduces the strain upon the court system. See ***Dabbs v. Sun Life*** (supra).

[23] The court's power to approve or reject settlements does not permit it to modify the terms of a negotiated settlement. It may only approve or disapprove the settlement. See ***Sawatzky v. The Societe Chirurgicale Instrumentarium*** (supra), ***Harrington v. Dow Corning Corporation***, (February 16, 1999), Vancouver, C954330 (B.C.S.C.), paragraph 7, ***Haney Iron Works Ltd. v. ManuLife Financial*** (supra) paragraph 22; and ***Dabbs v. Sun Life*** (supra) paragraph 10.

[24] The exercise of settlement approval does not lead the court to a dissection of the settlement with an eye to perfection in every respect. Settlements must fall within a zone or range of reasonableness. See ***Endean v. Canadian Red Cross Society***, October 1, 1999, Vancouver, C965349, (B.C.S.C.), paragraph 14.

[25] Settlements must fall within a zone, or range of reasonableness. The range of reasonableness has been described as follows:

> 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 of litigation.
>
> See ***Dabbs v. Sun Life*** (1998), 40 O.R. (3d) 430 at 4440 (Gen. Div.).

[26] This Court has also acknowledged the significance of a recommendation made by experienced counsel:

> The recommendation of class counsel is clearly not depositive as it is obvious that class counsel have a significant financial interest in having the settlement approved. Still, the recommendation of counsel of high repute is significant. While class counsel have a financial interest at stake, the reputation for integrity and diligent effort on behalf of their clients is also on the line.
>
> See ***Dabbs v. Sun Life*** (supra) at page 440.

[27] The Public Guardian and Trustee has filed a report to the court and was represented by counsel at this application. There was a concern by the Public Guardian and Trustee whether the proposed Class II claimants' benefits criteria can be adequately assessed according to unliquidated damage

principles and whether those Class II claimants whose medical symptoms from ingesting tainted meat have continued, can access Class III benefits of provided mediation and arbitration.

[28] It must be remembered, as mentioned earlier, that the exercise of settlement approval does not lead the court to a dissection of this settlement with an eye to perfection in every respect, provided it follows within the zone or range of reasonableness. I think the proposed Class II claimant compensation for those claimants whose symptoms have resolved is reasonable and fair. In any event, individual claimants who qualify as Class II, who believe that Class II compensation is not in their best interests, have the option to opt out of the class.

[29] In reviewing the final and executed draft of the terms of settlement, I think the initial concern by the Public Guardian and Trustee of the need for clarification as to whether potential Class II claimants whose hospitalization was less than 30 days but with continuing medical symptoms fall into Class III can be allayed by the stipulation provided, that the real distinction between Class II and Class III claimants is that in Class II, the medical symptoms at the time of claim is

resolved, whereas in Class III there is evidence of continuing medical symptoms.

[30] There was an additional concern by the Public Guardian and Trustee whether earlier monies paid out by the defendant in individual private settlements on behalf of minors and not yet approved by the Public Guardian and Trustee, as required by Section 40(5) of the ***Infants Act***, have been adequately safeguarded or retained by the minors' guardians. The Public Guardian and Trustee has indicated that there will be opposition to any attempt by the defendant claiming a set-off from monies payable in the class action for monies they advanced contrary to the provisions of the ***Infants Act*** and the special protections built into the law for minors. Mr. Morin, counsel for the defendant, indicated to the court that there would be no attempt to set-off monies paid out earlier on behalf of minors which are no longer preserved for their benefit.

[31] On the matter of notice, the Public Guardian and Trustee wrote:

> The defendant has stated that a condition of settlement is that notification of the class proceeding and settlement agreement will be by direct mail to all potential class members and not by advertising. Since it cannot be assumed that minors and people under mental disability are able to organize their legal affairs in response to

> letters addressed to them, I recommend that letters to children be addressed to their guardians and that all letters sent out be monitored for a response. If a response is not forthcoming, I recommend telephone or other follow-up to make sure entitlements for persons under disability are pursued.

[32] On the matter of opting out, the Public Guardian and Trustee also wrote:

> The notice of motion dated December 29, 2000, seeks a declaration that members of a class may opt out of this action by notifying Klein Lyons in a form and manner to be determined upon further application to the court. Since many of the class members are minors, the decision regarding whether or not to opt out will have to be made on their behalf. And I submit such a decision should be reviewed by the Public Guardian and Trustee and/or the court. If I were persuaded that the Class II compensation is favourable, I would recommend that only decisions to opt the child out of the class be superintended by the Public Guardian and Trustee and/or the court.

[33] I think the notice and opting out procedures for minors and persons with mental disabilities recommended by the Public Guardian and Trustee are reasonable and can be addressed by counsel in later applications. Similarly, the Public Guardian and Trustee's suggestion that since minors and mentally incapable adults do not have legal capacity to swear a statutory declaration in support of the claim, an alternative method for adducing evidence for persons under legal disability be allowed, such as a capable adult who would have

knowledge of the facts could swear a statutory declaration on behalf of a person under legal disability is also one that I would commend for inclusion in the notice and information package contemplated in the direct mailing to potential claimants.

[34] The terms of the proposed settlement agreement appear to be fair and reasonable to all members of the class. It has been approved by the representative plaintiff and senior counsel. As class members are unlikely to receive more compensation if they pursue litigation, the settlement is clearly in the best interests of the class and I would therefore approve it pursuant to Section 35 of the ***Act***.

APPLICATION TO APPROVE CLASS COUNSEL FEES:

[35] The ***Class Proceedings Act*** requires that the fee agreement between the representative plaintiff and his or her counsel be approved by the court. Section 38(2) of the ***Class Proceedings Act*** states:

> An agreement respecting fees and disbursements between a solicitor and a representative plaintiff is not enforceable unless approved by the court on the application of the solicitor.

[36] Counsel for the representative plaintiff is seeking a class counsel fee of 20 percent of each class member's

recovery under the settlement agreement, plus 1 percent of each class member's recovery as reimbursement of disbursements incurred on behalf of the class. Section 38(1) of the ***Class Proceedings Act*** requires that a fee agreement state the terms under which fees and disbursements are to be paid, give an estimate of the expected fee, and state the method of payment.

[37] The fee agreement with the representative plaintiff appears to comply with those requirements. The estimate of the expected fee is expressed as a percentage of any settlement or judgment. As the fee is contingent on the amount of a settlement or judgment, it was submitted that no more specific amount can be provided until a settlement is reached or a judgment is pronounced.

[38] The ***Class Proceedings Act*** does not stipulate the factors to be considered when approving class counsel's fee. However, on such applications British Columbia courts have considered the extent of the legal work done by class counsel, the skill and competence of class counsel, the complexity of the matter, the importance of the matter to the class, the result achieved, the individual claimant's contribution to the fee as a portion of their recoveries, and the fee expectation of the representative plaintiff and other claimants. See ***Harrington v. Dow Corning Corporation***, ***et al.,*** (February 16, 1999),

Vancouver C9544330, (B.C.S.C.), paragraph 18; ***Sawatzky v. The Societe Chirurgicale Instrumentarium Inc***., (September 8, 1999), Vancouver C9544740, (B.C.S.C.) at paragraph 8; ***Fisher v. Delgratia Mining Corporation***, (December 7, 1999), Vancouver C974521, (B.C.S.C.) at paragraph 22; and in ***Endean v. Canadian Red Cross Society et al***., (June 22, 2000), Vancouver, C965349, (B.C.S.C.).

[39] According to American texts and authorities cited by counsel, class counsel fees in the United States range from 15 percent to 50 percent with a presumptively reasonable rate of 30 percent being adjusted according to special circumstances. The requested 20 percent class counsel fee is consistent with several British Columbia decisions:

1. in ***Campbell v. Flexwatt***, (February 26, 1996), Victoria 95/2895 (B.C.S.C)., the court approved a graduated contingency fee agreement which stipulated a fee ranging from 10 percent to 33 percent of the recovery, depending on the time of settlement or judgment;

2. in ***Harrington v. Dow Corning Corporation***, ***et al.,*** (February 16, 1999), Vancouver, C954330, (B.C.S.C.), a fee of 15 percent was approved on a $40 million settlement;

3. Mr. Justice Brenner (as he then was) approved a 20 percent fee in ***Sawatzky v. Societe Chirurgical Instrumentarium Inc.,*** (September 8, 1999), Vancouver C954740, (B.C.S.C.);

4. a 30 percent fee was approved by Mr. Justice Williamson in ***Fisher v. Delgratia Mining Corporation,*** (December 7, 1999), Vancouver C974521, (B.C.S.C.).

[40] Plaintiff's counsel are senior members of the bar who have extensive experience in personal injury litigation and class actions. The writ of summons was filed in January 2000. Plaintiff's counsel were aggressive in the prosecution of the action. Negotiations apparently commenced in earnest after the first case management conference in May 2000. A tentative agreement was reached on the eve of the certification hearing, which was scheduled to commence on November 27, 2000. I agree with Mr. Klein that this represents a very timely resolution of the litigation.

[41] The level of compensation that was achieved for class members appears also to be excellent. The amount represents litigation based recoveries without the expense and risk inherent in litigating the issues. The compensation levels

are substantially higher than the defendant's initial settlement offer.

[42] The degree of skill and effort of counsel for the representative plaintiff is evidenced by the result obtained for class members and the timeliness of the resolution. Most, if not all class members could not retain counsel to pursue these claims even on a contingency basis. The claims are relatively modest and would not have been economic to litigate individually.

[43] The retainer agreement signed by the representative plaintiff provides for a contingency fee of 33 1/3 percent. The requested class counsel fee is lower than this amount. Palle Knudsen, the Guardian Ad Litem for the representative plaintiff has sworn an affidavit confirming that he considers the request of class counsel fee to be fair and reasonable.

[44] The requested levy of 1 percent for common benefit disbursements appears to be modest. Unlike the vast majority of class action settlements, the claims process is being handled entirely by class counsel and counsel for the defendant without the use of an outside claims administrator. Thus, no administration expenses will be deducted from class members' compensation.

[45] The cost of mediation and arbitration for category 3 and exceptional category 1 claims is being borne by the defendant.

[46] To date, Mr. Klein's firm has been retained by 52 claimants and received enquiries from another 12 persons. Mr. Klein estimates that he may ultimately represent 80 class members. If the average individual claim recovered is $5,000, $400,000 would be recovered and his fee at 20 percent would be $80,000, and 1 percent for disbursements would be $4,000. If the average claim is at $10,000, the total recovery would be $800,000, counsel's fees would be $160,000 and $8,000 for disbursements. Counsel's estimate of future actual disbursements would be close to the $8,000 mark.

[47] The proposed 21 percent fee will not cover future legal work plus the administration of the claims; it covers the certification of this class action, negotiation, and effecting of settlement, the notice of class action benefits to potential claimants, and handling inquiries from them thereafter. Implementation of their respective claims would be subject to individual retainers at a discounted rate of 16 1/2 percent on the remaining 79 percent of their recovery.

[48] It is expected that most claimants in Class I and Class II whose symptoms have resolved at the time of claim would be processing their own claims. Those who choose to retain Mr.

Klein 's firm would ultimately pay 33.2 percent of their recovery in fees, in contrast to the “do-it-yourselfers” who would be required to pay 21 percent in class counsel fees in any event.

[49] Viewed in this overall percentage perspective, I think the proposed class counsel fee is fair and reasonable and I would approve it.

“R.S.K. Wong, J.”
The Honourable Mr. Justice R.S.K. Wong