IN THE SUPREME COURT OF BRITISH COLUMBIA

Brought under the ***Class Proceedings Act***, R.S.B.C. 1996, c. 50

Citation: *Fakhri et al. v. Alfalfa's Canada, Inc. cba Capers,* 2005 BCSC 1123

Date: 20050729
Docket: L02398
Registry: Vancouver

Between:

Helen Fakhri and Ady Aylon
as representative Plaintiffs

Plaintiffs

And

Alfalfa's Canada, Inc.
carrying on business as Capers Community Market

Defendant

Before: The Honourable Madam Justice Gerow

Supplementary Reasons for Judgment

Counsel for the Plaintiffs: David A. Klein

Counsel for the Defendant: Elaine J. Adair
Warren B. Milman and
Michelle S. Lawrence

Date and Place of Hearing: July 12, 2005
Vancouver, B.C.

[1] The plaintiffs' action is for damages for injuries and losses as a result of a Hepatitis A outbreak at Capers Community Market in March 2002. The action was certified as a class proceeding pursuant to the ***Class Proceedings Act***, R.S.B.C. 1996, c. 50 in November 2003. The class consists of individuals who either contracted Hepatitis A virus (HAV) or who could have been exposed to HAV as a result of consuming food products sold by Capers. The majority of class members are individuals who did not contract HAV, but who obtained a shot of Immune Serum Globulin (ISG) because they were exposed to food products listed in news releases from the Vancouver Coastal Health Authority.

[2] The parties have reached a comprehensive settlement and on July 12, 2005 sought court approval of the settlement, counsel fees and payment of $5000 to the representative plaintiff, Mr. Aylon, which I granted. At the time I approved the settlement I advised the parties I would provide these additional reasons.

[3] The issues are:

1. Should the settlement be approved?

2. Should the class counsel fee be approved?

3. Is it appropriate to compensate the representative plaintiff, Mr. Aylon, for the time he expended on the case on a *quantum meruit* basis?

Background

[4] The action was certified as a class proceeding on November 17, 2003 and the certification was affirmed by the Court of Appeal on October 27, 2004. After the certification the parties took steps to move the case toward the common issues trial. Document discovery took place and the parties engaged in a without prejudice information sharing. The plaintiffs brought a summary trial application on one of the common issues. After the summary trial application the parties agreed to attend mediation. The plaintiffs provided an expert's report to the defendant for the mediation. The parties attended a mediation at which a comprehensive settlement was achieved and they have finalized the terms of a Settlement Agreement.

The Settlement

[5] The settlement provides four different levels of compensation to class members which are referred to Tiers 1 to 4. Each level of compensation depends on the relative severity of the alleged claims. The settlement agreement requires objective documentary proof from class members to safeguard against false claims, but does so in a cost effective, simple manner, consistent with the modest nature of the claims asserted. The settlement is designed so that class members will be able to file claims and obtain compensation with a minimum amount of effort. The letter to the class members from the Vancouver Coastal Health Authority notifying them of the claim also serves as proof for each class member that they qualify as a Tier 1 claimant, thereby simplifying the claims process.

[6] The terms of the settlement including the levels of compensation and description of each tier are set out in the Settlement Agreement:

1. Tier 1 is for class members who received ISG injections during the HAV outbreak. They are entitled to $250 in-store credits or $150 cash;

2. Tier 2 is for class members who received ISG injections and submit documentary proof that they had a medical condition which heightened the risk for complications from being exposed to HAV. They are entitled to $500 in-store credits or $300 cash;

3. Tier 3 is for class members who received ISG injections and submit documentary proof that they received medical attention for having suffered an adverse reaction to the injection. They are entitled to $750 in-store credits or $450 cash;

4. Tier 4 is for class members who contracted HAV and who have not already settled with the defendant. Their compensation will be negotiated or subject to mediation/arbitration;

5. All tiers will be entitled to out-of-pocket expenses, loss of employment income claims and business loss claims;

6. The defendant will be credited for all payments made to a claimant;

7. Former and current employees are excluded from the settlement;

8. The defendant will pay the cost of administering the settlement and distributing compensation to class members. Crawford Adjusters, who has been hired to administer the settlement, is experienced in the administration of class action settlements;

9. The defendant will pay the class counsel fees of $570,000 inclusive of disbursements and tax;

10. The defendant will pay the representative plaintiff, Ady Aylon, $5,000 in compensation for his time and effort for the benefit of the class.

SHOULD THE SETTLEMENT BE APPROVED?

Test for approval

[7] Settlement approval by the court is required under s. 35 of the ***Class Proceedings Act*** which provides:

> (1) A class proceeding may be settled, discontinued or abandoned only
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> (a) with the approval of the court, and
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> (b) on the terms the court considers appropriate.
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> …
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> (3) A settlement under this section is not binding unless approved by the court.
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> …
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> (5) In dismissing a class proceeding or in approving a settlement, discontinuance or abandonment, the court must consider whether notice should be given under section 20 and whether the notice should include

(a) an account of the conduct of the proceeding,

(b) a statement of the result of the proceeding, and

(c) a description of any plan for distributing any settlement funds.

[8] The test for approval is whether the settlement is fair and reasonable and in the best interests of the class as a whole. Factors which courts have considered in making that determination include:

1. the likelihood of recovery, or the likelihood of success;

2. the amount and nature of discovery evidence;

3. settlement terms and conditions;

4. recommendations and experience of counsel;

5. future expense and likely duration of litigation;

6. recommendations of neutral parties, if any;

7. number of objectors and nature of objections;

8. presence of good faith and absence of collusion;

9. degree and nature of communications by counsel and the representative plaintiffs with class members during litigation;

10. information conveying to the court the dynamics of, and the positions taken by the parties during the negotiation.

See ***Sawatzky v. Societe Chirugicale Instrumentarium Inc.*** (1999), 71 B.C.L.R. (3d) 51, at ¶ 19 (S.C.); ***Haney Iron Works Ltd. v. Manufacturers Life Insurance Co***. (1998), 169 D.L.R. (4th) 565 at ¶ 23 (B.C.S.C.); ***Dabbs v. Sun Life Assurance Co. of Canada*** (1998), 40 O.R. (3d) 429 (Gen. Div.) affd (1998), 41 O.R. (3d) 97 (C.A.); leave to appeal to the S.C.C. refused, [1998] S.C.C.A. No. 372; ***Parsons v. Canadian Red Cross Society*** (1999), 40 C.P.C. (4th) 151 (Ont. S.C.J.)

[9] The court has the power to approve or reject a settlement, but may not modify or alter a settlement. The standard against which the settlement is judged is that it is within a range of reasonableness, not perfection. ***Sawatzky,*** *supra,* at ¶ 21, ***Haney Iron Works Ltd.,*** *supra*, at ¶ 22; ***Dabbs,*** *supra.*

[10] The purpose of applying the various factors that have been enunciated by the courts is to determine whether a settlement is fair and reasonable and in the best interests of the class as a whole by balancing the benefits of the settlement against the potential risks and benefits of continuing with the litigation. In assessing settlement courts have also looked at how the settlement was negotiated to ensure the settlement agreement is the product of good faith bargaining between the parties. After considering all of the circumstances the court must be satisfied that the settlement is fair, reasonable and in the best interests of those affected by it. ***Haney Iron Works Ltd***., *supra,* at ¶ 24 – 27.

Do the benefits of settlement outweigh the potential benefits of continued litigation?

[11] The proposed settlement is unopposed.

[12] The benefits of the settlement outlined by the by the class counsel are:

1. The proposed compensation for non-pecuniary damages is likely equivalent to or more than what class members would receive at trial. As well, class members receive full compensation for out-of-pocket expenses, lost income and business income losses. They would receive no greater compensation under those heads of damage if the matter proceeded to trial.

2. If litigation continued the legal fees and disbursements would reduce the recovery available to class members in that class counsel fees and disbursements for the common issues would be deducted from class member damage awards. In the settlement the defendant has agreed to pay class counsel fees over and above the compensation to class members.

3. There is a risk that the representative plaintiffs would be unsuccessful at the common issues trial. The defendant denies wrongdoing and argues that the public health alert was a purely precautionary move and not related to any breach of alleged duty.

4. Even if the representative plaintiffs won at the common issues trial, challenges would exist in resolving the remaining individual issues. If individualized hearings were necessary the costs might deter class members from pursuing their individual claims.

5. The resolution of the matter would be delayed.

[13] I was referred to two American cases involving food vendors and HAV outbreaks in which settlements have been proposed to assist me in determining whether the proposed amounts for the non-pecuniary losses are reasonable. In ***Foster v. Friendly Ice Cream Corporation***, a case in the Superior Court of Massachusetts, approximately 3000 class members who had been exposed to HAV at a restaurant operated by the defendant obtained ISG injections. The proposed settlement involved a payment of $200 U.S. per class member. In ***Lucca v. Delops, Inc. d/b/a D'Angelo's Sandwich Shop***, another Massachusetts action, 1,728 class members received ISG injections as a result of being exposed to HAV. The proposed settlement was $200 U.S. per class member. Neither settlement proposal contained tiered compensation such as has been proposed in this settlement. Both cases indicate that the compensation being proposed in this case falls within a reasonable range.

[14] The evidence that the settlement negotiation was in good faith resulting in a fair settlement includes:

1. The representative plaintiffs pursued the claim through a contested certification hearing, appeal of the certification and an application for summary judgment, which all demonstrate a resolve to litigate the case if the mediation was unsuccessful;

2. Document discovery and information sharing, including the plaintiffs obtaining an expert report, were conducted prior to the mediation;

3. The class was represented in the negotiations by an experienced class action counsel;

4. Mr. Aylon, the representative plaintiff, has been actively involved in the litigation, including attending the mediation. He recommends approval by the court of the settlement.

[15] In the circumstances, and having considered the benefits of the settlement as opposed to continuing with the litigation, I am satisfied that the settlement falls within the range of reasonableness or fairness. As well, I am satisfied that the proposed administration of the settlement is satisfactory. Accordingly there will be an order approving the proposed settlement.

SHOULD THE CLASS COUNSEL FEE BE APPROVED?

[16] Section 38 of the ***Class Proceeding Act*** requires court approval for class counsel fees:

> (2) 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.

[17] The purpose of the fee approval requirement is to ensure that the fee charged to the class is fair and reasonable, and that the class counsel is appropriately compensated. Class action litigation can be challenging and risky.

[18] This risk has been recognized by both the Ontario Law Reform Commission on Class Actions and the courts. In *Report on Class Actions* (Toronto: Ministry of

the Attorney General, 1982), the Commission indicated that it was essential that fee awards provide risk premiums to successful class counsel.

[19] The Ontario Court of Appeal in ***Gagne v. Silcorp Ltd***. (1998), 41 O.R. (3d) 417 at 422-423 (C.A.) addressed the issue of risk premiums:

> Another fundamental objective is to provide enhanced access to justice to those with claims that would not otherwise be brought because to do so as individual proceedings would be prohibitively uneconomic or inefficient. The provision of contingency fees where a multiplier is applied to the base fee is an important means to achieve this objective. The opportunity to achieve a multiple of the base fee if the class action succeeds gives the lawyer the necessary economic incentive to take the case in the first place and to do it well. However, if the *Act* is to fulfil its promise, that opportunity must not be a false hope.

[20] The defendant has agreed to pay the class counsel fee over and above any compensation paid to class members. In my view, the defendant's agreement is evidence of the reasonableness of the fees as the defendant will have a good idea of the work involved in bringing the litigation to this stage. As the fees are paid over and above any compensation the payment will not reduce compensation to the class members.

[21] In assessing the reasonableness of fees courts have considered the extent of work done, the skill and competence of counsel, the complexity of the matter, the importance of the matter to the class, the result achieved, individual claimants' contribution to the fee as a portion of their recoveries and the fee expectation of the representative plaintiffs: see ***Fischer v. Delgratia Mining Corp***., [1999] B.C.J. No. 3149 (S.C.); ***Killough v. Canadian Red Cross Society***, 2001 BCSC 1745, [2001]

B.C.J. No. 2631 (S.C.); ***Knudsen v. Consolidated Food Brands Inc***., 2001 BCSC 1837, [2001] B.C.J. No. 2902 (S.C.)

[22] There was a considerable amount of work done by class counsel. The matter was prosecuted through a contested certification hearing, the appeal of the certification, a motion for summary judgment, document discovery, preparation of an expert's report, conduct of the mediation and negotiation of the settlement agreement. As well, counsel prepared for the hearing regarding the manner in which the notice to the class was to be given.

[23] The lead class counsel is experienced and has been recognized by courts in approving settlements in other class actions. As well, the material in this case was complex and well organized, and is indicative of both the difficulty of the work and skill of counsel.

[24] That the matter was important to the class members is evident. The damages are small and it is unlikely that many of the class members would have prosecuted claims, absent a class action. The action has provided a means of recourse to class members.

[25] Class counsel has achieved a good result. Class members will receive compensation for their non-pecuniary losses and full compensation for their pecuniary losses. The fee award does not reduce the recoveries in this case.

[26] The representative plaintiffs signed a 30% contingency fee agreement. It is difficult to calculate the value of the fees in proportion to the recovery, however,

counsel have estimated the total value of the settlement as approximately $2.7 million. The fees sought are approximately 20% of the total recovery, which falls within the range of fees approved by courts in other class actions: see ***Endean v. Canadian Red Cross Society***, 2000 BCSC 971, [2000] B.C.J. No. 1254 (S.C.) at ¶ 78.

[27] Similarly, if another approach is taken and a comparison is made of the fees sought based on the amount of time expended on the file using a multiplier to reflect the risk involved, the multiplier is 2.5, which is also within the range approved by courts in other class actions.

[28] Based on a consideration of the above factors, I am satisfied that the class counsel fees are reasonable and, accordingly, the fee is approved.

IS COMPENSATION FOR THE REPRESENTATIVE PLAINTIFF, MR. AYLON, APPROPRIATE?

[29] The defendant has agreed to pay the representative plaintiff, Mr. Aylon, $5,000 to compensate him for the work he undertook for the class as a whole. The ***Class Proceedings Act*** makes no provision for compensation of a representative plaintiff.

[30] In ***Windisman v. Toronto College Park Ltd.*** (1996), 3 C.P.C. (4th) 369 at ¶ 28 (Ont. Gen. Div.) the court acknowledged at ¶ 28 that in circumstances where the representative plaintiff has participated in the litigation, providing necessary and active assistance, and the assistance results in success for the class, it may be

appropriate to compensate the representative plaintiff for the time spent on a *quantum meruit* basis.

[31] The evidence is that Mr. Aylon, as a representative plaintiff, took an active role in the litigation. He delivered multiple affidavits, reviewed pleadings, provided instructions, attended the mediation and court hearings, and helped shape the final settlement. His efforts on behalf of the class had an impact on the successful resolution of the proceeding. The defendant has agreed to pay the amount of $5,000 directly so it will not reduce the recovery of the other class members. In the circumstances it is appropriate that Mr. Aylon be awarded the amount of $5,000 as compensation for the time he has expended.

CONCLUSION

[32] The proposed settlement is approved on the basis that it is fair and reasonable and in the best interests of the class members. The proposed class counsel fee in the amount of $570,000 is approved as reasonable and the payment to the representative plaintiff, Mr. Aylon, of $5,000 is approved on a *quantum meruit* basis.

"Madam Justice Gerow"