SUPREME COURT OF NOVA SCOTIA
Citation: *Sweetland v. Glaxosmithkline Inc.*, 2019 NSSC 136

Date: 20190430
Docket: HFX315567
Registry: Halifax

Between:

Albert Carl Sweetland and Barbara Fontaine

Plaintiffs

v.

Glaxosmithkline Inc. and Glaxosmithkline LLC

Defendants

DECISION

Judge:	The Honourable Justice Michael J. Wood
Heard:	January 29, 2019, in Halifax, Nova Scotia
Final Written Submissions:	April 18, 2019
Counsel:	Raymond Wagner QC, Madeleine Carter, and Jill McCartney, for the Plaintiffs Scott Campbell, David Woodfield, and Josh Hanet, for the Defendants

By the Court:

[1] This litigation was commenced in August 2009 as a proposed Class Action under the *Class Proceedings Act*, S.N.S. 2007, c. 28. The plaintiffs alleged that Avandia, a pharmaceutical used to treat Type II diabetes, increased the risk of cardiovascular events, including heart attacks and congestive heart failure. They said that adequate warnings had not been given by the defendants.

[2] By decision issued on January 15, 2016 (2016 NSSC 18), I refused the plaintiffs' certification motion, but provided an additional opportunity to remedy the evidentiary deficiencies which I had identified in the record. This was subsequently done and a certification order was issued on December 7, 2016. The order certified two classes for purposes of the proceeding. The Primary Class were persons, including the estates of deceased persons, who were prescribed and ingested Avandia. The second class was the Family Class which consisted of family members of deceased members of the Primary Class.

[3] The defendants appealed the certification order and that proceeding has progressed to the point where each party has filed their factum. By agreement of the parties, the appeal was placed in abeyance in order to permit settlement discussions.

[4] The parties entered into a written settlement agreement dated as of October 11, 2018, which would resolve this proceeding. The plaintiffs have brought two motions, neither of which were opposed by the defendants. The first is for approval of the settlement agreement, the plan for providing notice of the agreement and the claims process, as well as the appointment of a Claims Administrator. The second motion is for approval of Class Counsel's legal fees, as well payment of honoraria for the representative plaintiffs.

[5] By order issued on November 5, 2018, I approved the form of notice and the plan for notifying all interested parties of the certification of this class proceeding, as well as the two motions being brought by Class Counsel. The order also approved the process whereby class members could opt out of the proceeding if they did not wish to participate.

[6] Counsel have provided evidence to confirm that the requirements of the order approving the hearing notice and notice plan have been satisfied. They advised that eight individual opt out forms had been received but not any notices of objection to the motions. In addition, nobody appeared at the hearing to oppose to the motions.

Approval of Settlement Agreement

[7] Section 38 of the *Class Proceedings Act* requires court approval for any settlement. The test for approval is whether the settlement is fair and reasonable and in the best interests of the class as a whole. Not surprisingly, there are a wide range of factors which may come into play. The Ontario Superior Court in *Ainslie v. Afexa Life Sciences Inc.*, 2010 ONSC 4294, discussed the approach to settlement approval in the following terms:

> 30 In determining whether to approve a settlement, the court may take into account factors such as:
>
> - the likelihood of recovery or likelihood of success;
> - the amount and nature of discovery, evidence or investigation;
> - the proposed settlement terms and conditions;
> - the future expense and likely duration of litigation;
> - the recommendation of neutral parties, if any;
> - the number of objectors and nature of objections;
> - the presence of arm's-length bargaining and the absence of collusion;
> - the information conveying to the court the dynamics of, and the positions taken, by the parties during the negotiations;
> - the degree and nature of communications by counsel and the representative plaintiff with class members during the litigation; and
> - the recommendation and experience of counsel.
>
> [Authorities Omitted]
>
> 31 The "zone of reasonableness" concept is helpful in guiding the exercise of the court's supervisory jurisdiction over the approval of a settlement of class actions. It is not the court's responsibility to determine whether a better settlement might have been reached. Nor is it the responsibility of the court to send the parties back to the bargaining table to negotiate a settlement that is more favourable to the class. Where the parties are represented - as they clearly are in this case - by highly reputable counsel with expertise in class action securities litigation, the court is entitled to assume, in the absence of evidence to the contrary, that it is being presented with the best reasonably achievable settlement and that class counsel is staking his or her reputation and experience on the recommendation.

[8] The motion record filed by Class Counsel describes the litigation risks in this proceeding and clearly establishes that ultimate success is not a certainty. The certification motion was vigorously contested by the defendants, and argument

extended over three days in September 2015. Following certification the defendants appealed that order and the matter is ready to be argued in the Court of Appeal. If the settlement is not approved, that hearing will take place later this year.

[9] Counsel also point out that the research concerning the impact of Avandia on cardiac health has continued since this litigation began in 2009. This has required the parties to re-evaluate the scope of potential compensable injury on an ongoing basis. As an illustration, I note that the question of general causation of stroke was initially certified as a common issue. However, the parties have now agreed to exclude stroke as a compensable condition under the settlement agreement.

[10] With Avandia, allegations of cardiovascular harm resulting from use are complex. The expert evidence relied upon by the defendants in opposition to certification indicated that the very condition for which Avandia might be prescribed (i.e. Type II diabetes) is a significant risk factor for cardiovascular disease. Proving that Avandia created risks of harm which were not adequately disclosed is a significant evidentiary burden, which the plaintiffs would have to overcome if the matter were to proceed to a common issues trial.

[11] The plaintiffs' motion record provides a summary of settlement discussions, which began on a preliminary basis in June 2012. By 2015 there was an agreement in principle with respect to the types of claims which might be eligible for compensation, however damage quantification was not discussed at that time. By October 2017, a settlement framework was reached which ultimately led to the final agreement in October 2018.

[12] The agreement establishes a compensation protocol to be administered by an independent third party. The administrator will be responsible for reviewing materials submitted by claimants in order to determine whether they meet specific eligibility criteria. There are four cardiac events for which compensation will be paid, provided other criteria are met. These events are:

1. Myocardial Infarction;
2. Congestive Heart Failure;
3. Coronary Artery Bypass Graft; and
4. Percutaneous Coronary Intervention with Stent Placement.

[13] The Claims Administrator will assign pre-determined points, with adjustments for age and other risk factors. At the end of the claims process, the

settlement funds will be divided amongst approved claimants in proportion to their allocated points.

[14] The settlement payment to be provided by the defendants will be divided into two pools. One of which will be used to compensate claimants who have suffered congestive heart failure ("CHF") and the other for those who establish one of the remaining three cardiac events ("MI/CABG/Stenting"). The parties have agreed to pre-approve 142 class members as being eligible for MI/CABG/Stenting compensation and 38 for CHF. The settlement agreement requires the defendants to pay $3,666,666.67 into the MI/CABG/Stenting fund and $200,000 into the CHF fund. These amounts are based upon an estimate of the number of settling claimants and allocation of an average payment for each. For the MI/CABG/Stenting fund the payment is based upon 200 approved claimants at $18,333.33 apiece. The CHF amount is based upon 60 approved claimants at $3,333.33 each.

[15] The agreement goes on to provide that if more than the estimated number of claimants are approved, the defendants will make a further payment of $18,333.33 for each MI/CABG/Stenting claimant, up to a maximum of 100 additional people, and $3,333.33 for each CHF claimant, up to a maximum of 240 additional people.

[16] In addition to the compensation amounts the defendants have agreed to pay $250,000 as a contribution towards disbursements and the expenses of claims administration.

[17] Provincial health insurers, who may have claims for the cost of services provided to claimants in relation to their use of Avandia, have agreed to release their claims against the defendants in exchange for payment of ten percent of the net amount payable to each settling claimant after payment of Class Counsel legal fees and administrative expenses.

[18] Class Counsel have reviewed information which they have received from potential class members and consulted with plaintiff counsel in other proceedings commenced across Canada. They have expressed the opinion, based upon that information, that the total number of settling claimants will be at or below 300 for each category.

[19] Based upon the motion record and the submissions of counsel, as well as my knowledge of the issues in dispute from the certification hearing, I am satisfied that the settlement agreement is fair and reasonable and in the interest of class members. It was arrived at through lengthy negotiations by reputable counsel with extensive

experience in class proceedings. It falls within the "zone of reasonableness" as that concept was described in the *Ainslie* decision. For this reason I believe it should be approved. The only exception is paras. 13.4, 13.5 and 13.6, which state as follows:

> Individual Claims
>
> 13.4 Class Members who retain lawyers to assist them in making their individual claims for compensation pursuant to this Settlement Agreement or to appeal the classification or rejection of their claim for compensation, shall be responsible for the legal fees and expenses of such lawyers.
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> 13.5 If a Class Member retains Class Counsel to assist him or her in making his or her individual claim for compensation under this Settlement Agreement, Class Counsel hereby agree to cap their fees at fifteen (15) percent of the amount awarded to that Class Member.
>
> 13.6 Class Counsel shall request that the order approving Class Counsel Fees provides that the fee applicable to Class Members who retain non-Class Counsel lawyers to assist them in making their individual claims for compensation pursuant to this Settlement Agreement, including lawyers in Related Counsel Firms, be capped at fifteen (15) percent of the amount awarded to that Class Member.

[20] These relate to the relationship between claimants and lawyers who they may ask to assist them in the claim process. In my view that is not a proper matter for inclusion in a settlement agreement and will be discussed further in considering the motion for approval of Class Counsel fees. Counsel for all parties agreed that these provisions were severable from the settlement agreement without affecting its validity, and I would therefore strike them from the approved agreement.

Appointment of Claims Administrator

[21] The parties propose that RicePoint Administration Inc. ("RicePoint") be appointed as Claims Administrator. They have provided me with information showing that the company has extensive experience in this work. I am satisfied that they are an appropriate party to appoint as Claims Administrator under the settlement agreement.

[22] The affidavit of David A. Weir, Senior Vice-President of RicePoint, outlines their fee agreement. It includes a fixed amount of $55,000 which includes case set up, escrow account activities, distribution of payments, and reporting. RicePoint is also to be paid for the expenses of implementing the hearing notice plan and settlement approval notice plan, as well as the cost of processing individual claims. For the pre-approved claimants the fee is $10 per claim and for the others it is $75 per claim. There is also a fee of $35 per risk factor adjustment review undertaken.

All claims for fees and disbursements beyond the initial fixed fee and the notice implementation costs (of $18,250.00 plus tax) will be subject to court approval before payment.

[23] It is also a condition of the approval of RicePoint as Claims Administrator, that they submit a final report to the court summarizing the claims process, including the number of claims received by category, the number approved and the number and outcome of any appeals.

Settlement Approval Notice Plan

[24] Counsel proposes to provide notice of the settlement approval and claims procedure in the same fashion as notice was given for the approval hearing. This is acceptable and the estimated costs of $18,250 plus tax are approved.

[25] During the hearing I made a number of suggestions with respect to potential amendments to the notice of settlement approval and counsel can send me a revised draft notice for my review and ultimate approval.

Motion for Approval of Class Counsel Fees

[26] The settlement agreement requires court approval for any Class Counsel legal fees to be paid out of the settlement funds. This is consistent with s. 41 of the *Class Proceedings Act*, which requires court approval of any agreement between counsel and a representative party for fees and disbursements.

[27] In this case both representative plaintiffs entered into contingency fee agreements with Class Counsel. The agreements provide for payment of legal fees in an amount of twenty-five percent of the value of any settlement or judgement in favour of the class inclusive of any award of costs.

[28] There are a number of factors which must be considered in determining a fee that is fair and reasonable in all of the circumstances. It is important to ensure that the level of compensation is sufficient to provide a real economic incentive for counsel to undertake a class proceeding and prosecute it diligently. In this case I believe the following factors are relevant and must be considered:

1. the factual and legal complexities of the claim;
2. the risks undertaken, including the possibility that the action might not succeed;
3. the degree of responsibility of Class Counsel;

4. the monetary value of the matters at issue;
5. the degree of skill and competence demonstrated by Class Counsel;
6. the result achieved; and
7. the contingency fee agreement.

[29] As I have already discussed in relation to the approval of the settlement agreement, this was a technically complex proceeding, with a real risk that the plaintiffs might ultimately not succeed. There was a high degree of skill and competence demonstrated by counsel on both sides. The settlement negotiations were extensive and time consuming. I am satisfied that the results achieved represent a good result for class members in all of the circumstances. The level of compensation for approved claimants is meaningful and the claims process accessible.

[30] Some courts seem to place significant weight on the existence of a contingency fee agreement and take the view that the agreement should be presumptively valid and enforceable and the fee should only vary from the calculation if there is a principled reason to do so. (See for example, *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686, and *Pro-Sys Consultants Limited v. Microsoft Corp.*, 2018 BCSC 2091). This court has taken a somewhat more nuanced approach which I believe is appropriate given the nature of class proceedings and the fact that individual class members, whose interests must be protected by the court, were not involved in negotiating or signing the fee agreement.

[31] I would adopt the rationale of Justice LeBlanc, as he then was, in *Elwin v. Nova Scotia Home for Colored Children*, 2014 NSSC 375. In that case, he was considering whether to apply a presumption in favour of adopting the terms of the contingency fee agreement in assessing Class Counsel fees. On that question, he stated:

> 29 As between the presumption suggested by Cannon J., and the less deferential approach suggested by Barnes J., I prefer the latter. As Barnes J. explained, when the fee agreement is made, it is not known how matters will develop. That is not to say that the fee agreement is not a significant consideration, nor that it is not the starting point in the analysis. However, the Act makes it clear that such an agreement is unenforceable without court approval. Moreover, by its nature, where fee approval follows a settlement, and counsel's recovery will be out of the settlement fund, there is no party to oppose it. This is not an adversarial proceeding like a motion for determination of costs as between parties. As such I interpret the Act as imposing upon the court a duty to ensure that fees and disbursements are fair

> and reasonable, in view of the objectives and purposes of the Act and in view of the fee agreement with the representative plaintiffs.

[32] In addition to the issues of risk and complexity it is important to consider the actual work undertaken by counsel. In this case the proceeding went through a highly contested certification motion and partially through an appeal process. The settlement discussions themselves were extensive. Counsel advised that the total value of docketed time by the two plaintiff firms was approximately $1.5 million. I have not been given any information concerning hours docketed, hourly rates, or the nature of work performed. This information provides a general indication of the level of work but has limited value in assessing the reasonableness of the fee sought under the contingency fee agreement.

[33] The position of Class Counsel is that the twenty-five percent contingency fee should be based upon the total initial payment by the defendants of $4,116,667.67, which consists of the $250,000 contribution towards disbursements and administration, $3,666,667.67 for the MI/CABG/Stenting claimants and $200,000 for the CHF claimants. They also claim twenty-five percent of any additional payments made by the defendants should the number of claimants exceed 200 for MI/CABG/Stenting or 60 for CHF. The total base fee sought by Class Counsel, which would be payable at the time of the initial payment by the defendants, is $1,029,166.67 plus HST and disbursements.

[34] I disagree with counsel's assertion that the contingency fee calculation should apply to the $250,000 payment by the defendants as a contribution towards disbursements and administration expenses. I say this because cl. 5.1(a) of the settlement agreement breaks that amount out separately from the contributions to the settling claimants. The rationale for a separate payment towards shared expenses is obvious because the settlement benefits the defendants as much as the plaintiffs. I would also note that if this amount was subject to the contingency fee the contribution would be reduced by $62,500 plus HST, meaning the amount actually applied to disbursements and administration would be less than $180,000. This is contrary to the intent of cl. 5.1(a).

[35] Applying the contingency fee calculation to the portion of the initial payment available to approved claimants leads to a fee of $966,666.67 plus HST and disbursements. Taking into account all of the factors noted above I conclude this is a fair and reasonable fee for Class Counsel. I would also approve the disbursement amounts set out in the affidavit of Madeleine Carter affirmed on April 18, 2019.

[36] Where the settlement includes a claims administrative process, such as the case here, the courts will frequently defer payment of a portion of counsel fee until the administration is complete (see for example, *Jardine v. Certainteed Corporation*, 2017 BCSC 364, *Pro-Sys Consultants Limited*, supra, and *Elwin*, supra). The underlying rationale is generally to ensure that Class Counsel continue to assist members of the class through the claims process.

[37] In some circumstances, the court will approve a portion of the fee at the time of settlement, and have a second fee approval hearing at the conclusion of the claims process. The reason for having a two stage approval was described in the *Ainslie* decision as follows:

> 50 The remaining issue is whether the fee should be payable immediately or whether all or some part should be deferred until the claims process has been completed. It was vigorously argued by Mr. Strosberg that all the criteria necessary to assess the reasonableness of the fee are known at this time and that there is no reason to defer compensation. It is also fair to note that class counsel has gone without compensation for some three years, all the while incurring disbursements, paying lawyers and incurring substantial overheads. Deferred compensation means less compensation.
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> 51 I have concluded that there are several reasons why it is more fair and reasonable to approve payment of two-thirds of the amount claimed as fees now and to defer approval of the balance until after the results of the claims process are known. This is similar to the procedure I adopted in *Boulanger v. Johnson & Johnson Corp.*, [2010] O.J. No. 1913 and I believe that it is appropriate to do so in this case.
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> 52 First, in the case of a results-based fee, there is nothing inherently unfair in requiring the lawyer to wait for payment until the client actually receives his or her money. Any delay in payment can be compensated by interest.
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> 53 Second, an important test of the value of the settlement will be the number and amount of claims actually paid to the class as a result of the settlement and the extent to which the settlement fund is sufficient to satisfy the claims of the class. If the projections of counsel and their expert are correct, and if all eligible class members make claims, each class member might be expected to receive around 50 per cent of his or her loss. If, at the end of the claims process, the recovery is substantially less than that, one might have reason to question the value of the settlement. If, on the other hand, there are a very small number of claims, or the total amount of compensation awarded is small, one might question the real value of the settlement in terms of access to justice.
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> 54 Third, class counsel acknowledges an ongoing responsibility to the class to respond to inquiries concerning the claims process, to supervise the implementation of the settlement and to report to the court prior to the distribution of funds. The

> responsibilities of class counsel after settlement are important and the court must rely on class counsel to ensure that the settlement is in fact efficiently implemented in accordance with its terms. It is no reflection on the diligence of class counsel to suggest that the fee should not be paid in full until such time as counsel's responsibilities have been fully discharged.
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> 55 For this reason, I will order payment of two-thirds of the fees claimed by class counsel, together with all disbursements, at this time. The balance of counsel's fees will be reviewed at the same time as the request for distribution of the settlement.

[38] In this case I am satisfied that Class Counsel will diligently carry out their responsibilities during the claims administration process, without the necessity of withholding any portion of the approved fee. At the same time I am not prepared to pre-approve a twenty-five percent fee on any additional settlement funds that might be paid by the defendants as a result of the claim thresholds being exceeded. If that occurs and counsel believe they ought to receive additional fees, they can make a motion to that effect. At that time there will be a much clearer picture of the value of the settlement and any work required of counsel during the claims process.

[39] Clause 13.5, which I struck from the settlement agreement, entitled Class Counsel to charge an additional fee for assisting a claimant through the claims process. In my view, Class Counsel have an ongoing obligation to provide some degree of assistance to class members. Given counsel's estimate of the maximum number of claimants who may qualify and the number who have been pre-approved, it is not unreasonable to expect this to be part of the approved fee. If additional claimants come forward and there is a further fee approval hearing, any work done by counsel during the claims administration process can be taken into consideration.

Honoraria for Representative Plaintiffs

[40] Class Counsel has asked for approval of payment, out of the settlement funds, of honoraria totaling $25,000 to be distributed to all of the plaintiffs in the 18 Avandia proceedings commenced in Canada.

[41] I am not satisfied that class members should be expected to compensate plaintiffs in other litigation, nor have counsel provided me with any authority to suggest otherwise. In deciding whether to approve a payment to Mr. Sweetland or Ms. Fontaine, I am guided by the approach taken in *Lozanski v. Home Depot Inc.*, 2016 ONSC 5447, where the court said:

> 81 Compensation to the representative plaintiff should not be routine and should be awarded only in exceptional cases. In determining whether the circumstances

> are exceptional, the court may consider among other things: (a) active involvement in the initiation of the litigation and retainer of counsel; (b) exposure to a real risk of costs; (c) significant personal hardship or inconvenience in connection with the prosecution of the litigation; (d) time spent and activities undertaken in advancing the litigation; (e) communication and interaction with other class members; and (f) participation at various stages in the litigation, including discovery, settlement negotiations and trial: *Robinson v. Rochester Financial Ltd.*, 2012 ONSC 911 at paras. 26-44.

[42] Typically such payments are awarded where the representative plaintiffs have committed significant time to the litigation and suffered some degree of personal hardship or prejudice. They are often involved in discovery examinations or cross-examination, as well as communication with other class members. In this case, counsel's affidavit describes Mr. Sweetland's contribution as follows:

> **EFFORTS OF THE REPRESENTATIVE PLAINTIFFS**
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> 50. Mr. Sweetland has spend considerable time and effort advancing the Class Members' claims in this litigation, voluntarily exposing himself to scrutiny avoided by other Class Members. He provided timely responses to any requests made of him by Class Counsel, including
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> a) familiarizing himself with the various issues to be decided by the Court;
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> b) being briefed by and providing instructions to Class Counsel on various aspects of the litigation, among other things, the certification motion, settlement negotiations, and the proposed Settlement Agreement;
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> c) providing information to be used in the preparation of affidavits (for the certification and settlement approval motions) and executing those affidavits, making known to the public his personal medical issues related to his Avandia use; and
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> d) in response to a motion brought by the Defendants for production of medical and pharmaceutical records of the representative plaintiffs in the within action, having to produce all of his medical and pharmaceutical records deemed to be relevant to the proceeding, which in turn were reviewed by defence counsel's experts.

[43] With respect to Ms. Fontaine, she was added as representative plaintiff in October 2018. Her contribution was described in counsel's affidavit as follows:

> 51. Ms. Fontaine, together with her late husband, spent time and effort advancing the Class Members' claims in this litigation by commencing an individual action in Ontario. Ms. Fontaine also volunteered to act as a

> Representative Plaintiff for the Family Class in the within action. She provided timely responses to any requests made of her by Class Counsel, including:
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> a) familiarizing herself with the various issues to be decided by the Court;
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> b) being briefed by Class Counsel on the Settlement Agreement; and
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> c) providing information to be used in the preparation of affidavits (for the Plaintiffs' motion to amend the Second Amended Notice of Action and Statement of Claim and to amend the Certification Order appointing her as Representative Plaintiff for the certified Family Class, and for the settlement and fee approval motions) and executing those affidavits.

[44] Based upon the evidence before me and the applicable legal principles, I do not believe that Ms. Fontaine has made the type of exceptional contribution which would justify an honorarium. Mr. Sweetland is in a different circumstance because he has been involved in the litigation since 2009 and has filed a number of affidavits. In addition, he was required to produce certain medical and pharmaceutical records to the defendants (2014 NSSC 216). In the circumstances I believe a payment to him of $3,000 would be appropriate.

[45] I would ask Class Counsel to prepare orders reflecting this decision as soon as possible and provide them to counsel for the defendants for consent as to form.

Wood, J.