IN THE MATTER OF A REFERENCE PURSUANT TO THE WALKERTON SETTLEMENT AGREEMENT

(Smith, et at. v. The Corporation of the Municipality of Brockton, et al. Court File No. 00-CV492173 CP)

BETWEEN:

[redacted]

(The Appellant)

and

The Administrator

(On an appeal of the order of Martin Teplitsky, Q.C., released May 28, 2008)

Reasons for Decision

WINKLER C.J.O.:

Nature of the Appeal

1. This is an appeal of a decision of an arbitrator made pursuant to the Walkerton Compensation Plan. Under the Compensation Plan, Class Members are entitled to certain compensation for losses caused by the contamination of the Walkerton water supply for the period April 1, 2000 to December 5, 2000.

Facts

2. The Appellant entered into a Release and Confidentiality Agreement (the "Settlement") with the Administrator on June 3, 2008 in relation to economic loss suffered by the Appellant's business as a result of the contamination of the Walkerton water supply. The Settlement was the result of a mediation/arbitration conducted by the Compensation Plan Arbitrator, Martin Teplitsky, Q.C. on May 28, 2008.

3. The essential terms of the Settlement were set out in a consent order issued by Mr. Teplitsky on May 28, 2008, requiring compensation to be paid to the Appellant in the amount of $525,000 less $123,000 already paid, plus $80,000 in prejudgment interest. The consent order also provided that the Appellant waived any right to any further compensation for economic loss of any sort, but preserved the Appellant's rights to advance 'Further Claims' pursuant to s. 2.3 of the Compensation Plan.

4. Under s. 2.3 of the Compensation Plan, the Appellant will only be entitled to further compensation if he suffers "damages occurring or materializing after, or not reasonably discovered before, the date of the latest prior application, for which compensation has not previously been assessed or paid."

5. This appeal was initiated by way of a letter from counsel for the Appellant dated November 15, 2010. Thereafter, submissions were received on behalf of the Administrator and the Appellant.

6. The Appellant submits that the consent order and the June 3, 2008 Settlement were limited in scope to covering only net professional income loss. He contends that the order and the Settlement did not encompass unpaid expenses, loss of insurability, holiday time, loss of practice value, loss of chosen career and fixed and variable expenses. The Appellant argues that these items represent legitimate claims for compensation which should be assessed and paid.

7. The Administrator has a different view. The Administrator contends that the consent order and the Settlement encompass all claims made by the Appellant up to June 3, 2008, and that the Appellant has no further right to compensation based on those claims. Further, the Administrator takes the position that no appeal lies from a consent order such as the one issued by Mr. Teplitsky. It also argues that, to the extent a court has discretion to intervene to amend the terms of consent orders, the Appellant has advanced no evidence which would justify such an intervention in this case.

Issues

8. Two issues arise on this appeal: does an appeal lie from Mr. Teplitsky's consent order of May 28, 2008, and if the answer is yes, should the appeal be granted?

Analysis

9. The Administrator submits that no appeal is available in this case because the final award resulting from the mediation/arbitration was made by way of a consent order. The Administrator relies on the decision of the Court of Appeal in *Monarch Construction Ltd. v. Buildevco Ltd.*, [1988] O.J. No. 332 (C.A.) for the proposition that, absent special circumstances, a consent order is not subject to appeal. In *Monarch*, the court held that "[a] consent judgment is final and binding and can only be amended when it does not express the real intention of the parties or where there is fraud."

10. In my view, the decision in *Monarch* has to be considered in the context of the terms of the Compensation Plan. More importantly, the grounds under which the appeal is taken must be considered as well.

11. The Compensation Plan provides at s. 3.3.2 that an order issued by the arbitrator shall be subject to appeal to this Court on a question of law, a question of fact, or a question of mixed fact and law. Under that provision, the fact that the order issued on the consent of the parties cannot shield it from review. Moreover, under the test articulated in *Monarch*, a consent order may be subject to review and revision where "it does not express the real intention of the parties", which is precisely the argument advanced by the Appellant here.

12. I also note that subsequent to the decision in *Monarch,* other cases have held that the

grounds for reviewing a consent order are not as narrow as the above quoted passage would suggest. *Beetown Honey Products Inc. (Re)* (2003), 67 O.R. (3d) 511 (Sup. Ct. Jus.) and *Stoughton Trailers Canada Corp. v. James Expedite Transport Inc.* (2008), 173 A.C.W.S. (3d) 75 (Ont. C.A.) both stand for the proposition that there is a broad discretion to set aside a consent order where necessary to achieve justice in the circumstances.

13. In consideration of the foregoing, I find that the Appellant has a right of appeal, notwithstanding the nature of the order from which the appeal is taken. Although the appeal was not taken for some time after the order was issued, there was no argument as to delay or laches made by the Administrator and in any event, I would grant relief in that regard.

14. I turn then to consider whether the appeal ought to be granted. The argument regarding the basis on which the order and Settlement should be set aside is straightforward. The Appellant asserts that there was a misunderstanding and the compensation paid under the Settlement was not intended to cover certain claims. In other words, the Appellant contends that the order and Settlement do not "express the real intention of the parties". I do not agree.

15. The order issued by Mr. Teplitsky reads as follows in paragraph 1:

> [The Appellant] will be paid $525,000 less $123,000 already paid on account as damages for economic loss in full satisfaction of all claims for the balance of his working life. He waives any right to make further claims and releases all claim for economic loss past and future.

16. The language is plain and clear. Mr. Teplitsky's order was intended to provide a final resolution to the claims advanced by the Appellant pursuant to the Compensation Plan. All of the claims asserted as being unresolved in this appeal were before Mr. Teplitsky in the arbitration.

17. The Settlement, executed 6 days later by the Appellant, contains the following language in paragraph 2:

> For and in consideration of the compensation amounts paid to him for economic loss as set out in [the order of Mr. Teplitsky], the Appellant ...hereby fully and forever releases, acquits and discharges the Plan Administrator...and the Plan from any and all claims and demands for compensation under the Plan for economic loss... [The Appellant] declares that he fully understands the terms of the agreement made between the parties... and that he voluntarily accepts the said consideration for the purpose of making a full and final compromise, adjustment and settlement of all of his claims...for compensation for economic loss under the Plan.

18. The Settlement accorded with the terms of Mr. Teplitsky's order, indeed the order was attached to it as Schedule "A". As the language expressly provided, the Settlement was intended to be a "full and final compromise, adjustment and settlement of all...claims for compensation for economic loss under the Plan."

19. The appeal is advanced by the Appellant in respect of claims for economic loss, the

substance of which was known or ought to have been known to the Appellant at the time he entered into the Settlement. Consequently, those claims have been fully and finally resolved in accordance with the Settlement.

20. The Appellant also incorporates into his submissions an argument that the Settlement is insufficient. While a readily apparent inadequacy in the amount of compensation may indicate a failure of justice with respect to the settlement process, there is no evidence that such is the case here. On its face, the settlement amount does not appear unreasonable or inadequate.

21. There is no evidence that the order or the Settlement were concluded under unfair or unreasonable circumstances. Moreover, there was at least a six day period between the time when the consent order was issued and the Settlement was finalized. The Appellant was represented by counsel throughout. There was ample time for the Appellant to either raise an objection or seek clarification with respect to the terms upon which the order was issued and the Settlement was being executed.

22. In summary, there is no basis to grant the appeal. No issues have been raised which could not have been addressed at the time of the mediation. In consideration of all of the circumstances, there is no evidence to support the contention that all of the claims made by the Appellant were not addressed in the consent order and Settlement. There is no evidence that there was anything unfair or unreasonable about the process or the order and Settlement that resulted.

23. Further, the claims advanced by the Appellant are not of the sort permitted by s. 2.3. The heads of loss advanced by the Appellant in this appeal fall clearly within the scope of the consent order and Settlement entered into by the Appellant and the Administrator.

Result

24. The appeal is dismissed.

Winkler C.J.O.

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