COURT FILE NO.:00-CV-192173CP
DATE:20040227

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

JAIME SMITH, ALANA DALTON, JAMIE MCDONALD and IRENE SALES INC., OPERATING AS THE HARTLEY HOUSE Plaintiffs	*F. Paul Morrison, Darryl Ferguson* and *Caroline Zayid* for Her Majesty the Queen in Right of Ontario
-AND-	*Heather Rumble Peterson*, Class Counsel Representative
THE CORPORATION OF THE MUNICIPALITY OF BROCKTON, THE BRUCE-GREY-OWEN SOUND HEALTH UNIT, STAN KOEBEL, THE WALKERTON PUBLIC UTILITIES COMMISSION and HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO Defendants	*Bruce Lee*, Plan Counsel *William Dermody*, Independent Advice Counsel *Stanley Tick, Q.C., Michael Peerless, James Virtue, Robert Garcia, Dave Williams, Michelle Beckow*, Claimants' Counsel
-AND-	
IAN D. WILSON ASSOCIATES LIMITED, DAVIDSON WELL DRILLING LIMITED, EARTH TECH (CANADA) INC., CONESTOGA-ROVERS & ASSOCIATES LIMITED, B.M. ROSS AND ASSOCIATES LIMITED, GAP ENVIROMICROBIAL SERVICES INC., A&L CANADA LABORATORIES EAST, INC., DAVID BIESENTHAL AND CAROLYN BIESENTHAL Third Parties	Case Conference February 18, 2004
Proceeding under the *Class Proceedings Act, 1992*	

REASONS AND DIRECTIONS

WINKLER J.:

[1] The Walkerton Compensation Plan, as the court-approved settlement in this action is known, has now been in operation for almost three years. Since its approval by the court, the Plan has been administered by Crawford Adjusters Canada. The court has a broad supervisory jurisdiction over the Plan but is not involved in its day-to-day operation. The responsibility for claims intake, assessment and the making of compensatory payments rests with Crawford, as Administrator, and Plan counsel.

[2] During the course of the proceedings leading to the settlement, an estimate of the number of anticipated claims was provided to the court by plaintiffs' counsel. Using the Walkerton population as a base, approximately 5,000 people at the material time, it was estimated there would be 7,500 claims, including residents and visitors. As it turns out, the Administrator has received over 10,150 applications. The increased class size has created, understandably, some logistical difficulties for the Administrator in implementing the settlement.

[3] Since the settlement was approved, the court has been issuing orders and directions from time to time and holding periodic case conferences, where necessary, to monitor the operation of the Plan. Throughout, the court has directed that unnecessary delays in providing compensation to eligible claimants must be avoided. In this respect, I note that it has also been the court's experience that certain delays are not attributable to the administrative process but rather relate to delays by claimants in filing claims or responding to offers by the Administrator.

[4] Regardless of the underlying cause, the fact remains that the Plan has been in operation for almost 3 years and there are still some obvious delays in processing claims. In keeping with its supervisory role, the court convened a case conference on February 18, 2004. At the case conference, counsel for the Province of Ontario expressed concerns similar to those of the court and indicated that they had received instructions from the Province to bring a motion for directions to address certain perceived difficulties with the settlement implementation.

[5] In addition to counsel for the Province of Ontario, class counsel, the independent advice counsel appointed by the court, plan counsel, representatives from the Administrator and counsel for individual claimants were also present at the case conference. They were invited to make submissions in response to the court's concern that the delays in claim completion indicated that court intervention by way of formal directions was required. In their various submissions, all participants in the case conference supported such an intervention by the court at this time.

[6] In the past, the court has taken steps on numerous occasions when problems have arisen to correct those problems or to cause procedures to be created to address delay. During the first year of the Plan, a case conference resulted in the implementation of a standardized offer system for injuries lasting less than 30 days and water disruption, the intention of which was to expedite claim resolution by streamlining the process. As matters developed, special mediator/arbitrators were appointed by the court to deal with difficult claims. Independent advice counsel was appointed to assist unrepresented claimants free of charge. As a result of a motion, directions regarding arbitrations for business loss claims were issued.

[7] However, as is always the case, court intervention must first and foremost be based on accurate information. In that regard, an important point of reference is a determination of the exact number of outstanding claims. As stated above, information provided to the court regarding the ongoing administration of the Plan indicates that, since its inception, there have been over 10,150 applications. Of those 9,156 were accepted by the Administrator for assessment. From this group, there were 6,745 Stage 2 applications made and of those 5,859 have received at least a partial Stage 2 payment. In addition, the Administrator has made offers in respect of some Stage 2 claims for which no response has been received from the respective claimants.

[8] The claims resolved in whole or in part have resulted in payments of approximately $45,000,000 to the end of January 2004. Although the tracking system used by the Administrator indicates that there are approximately 5,400 outstanding claims, it became apparent at the case conference that this number is highly inflated. It includes, for example, claims that were not accepted for assessment at the outset, secondary or derivative claims that have already been settled as a result of the payment made on primary claims, outstanding offers for which no response has been received from the claimant and property value claims that do not relate to personal injuries and which are intended to be dealt with under a separate procedure.

[9] Consequently, the court has directed that this list of claims be reviewed to determine the precise number of claims that are, in reality, outstanding. This review will be undertaken on an expedited basis so that the court may address this issue.

[10] There are a number of other issues that can be dealt with at this time however, without waiting for the results of the review. It is obvious that the objectives of the Plan cannot be achieved unless unnecessary delays in the resolution of outstanding claims are avoided. In that respect, the court's review of Plan performance, in conjunction with the submissions of counsel made at the case conference, indicate that there are a number of obstacles to achieving the objectives of the Plan for all claimants. However, those obstacles share a common theme, namely, lack of communication. This, in turn, leads to the dissemination of inaccurate information, which begets confusion for the claimants in attempting to advance or assess their claims.

[11] As an example, there is a lack of information available to counsel with respect to settlements made or arbitration awards granted in relation to resolved claims. Such information would assist in enabling counsel and claimants to evaluate the fairness of offers made regarding outstanding claims, and thus, satisfy themselves that an offer under consideration is within an acceptable range. However, while the provision of information relating to the quantum of compensation paid will doubtless expedite the process, confidentiality concerns remain a paramount consideration. Accordingly, the information shall be made available in a manner that does not compromise the privacy interests of the individual claimants.

[12] A second problem area for claims processing relates to the large number of claims recorded as outstanding that are based on the provisions of the *Family Law Act*. FLA claims are derivative claims that deal with compensation for a loss of care, guidance and companionship

from the primary claimant to family members. However, in many cases, the person on whose behalf the derivative FLA claim has been advanced has also had a claim put forward as a primary claimant. In those cases, the claimant may have already received compensation in respect of his or her primary claim that was intended to subsume the derivative FLA claim as well. Thus, where there has not been a significant FLA type loss or where the claimant has received direct compensation as a primary claimant, the Administrator has, consistent with the circumstances, made what it calls "zero offers" in respect of such outstanding FLA claims. Understandably, because the primary claim has been resolved, no responses have been received with respect to many of these so-called "zero offers". The consequence is that these "offers" remain outstanding on the records of both the Administrator and the responsible counsel. As stated above, the significance of this is that a claim is recorded as outstanding for which the claimant has in fact received compensation under another offer or payment which in turn leads to an undue inflation in the number outstanding claims. A further direction to correct this problem will be issued once the review that has been directed is completed.

[13] A similar situation exists with respect to property value diminution claims. Currently, there appears to be in excess of 1,000 claims for diminished property values. Again, there seems to be a problem with information dissemination. The Administrator has compiled information regarding property sales in Walkerton as well as appraisal reports but this information has not been distributed to counsel for the claimants. To require counsel to duplicate the efforts in collecting this information would involve delay and added costs. Accordingly, the Administrator is directed to make this information available to counsel for claimants and the independent advice counsel to be used in assessing, or assisting claimants in assessing, offers made in respect of property value diminution.

[14] Finally, there are a significant number of compensation offers currently outstanding for which the Administrator has not received a response. This is one part of a two-fold problem that is beyond the Administrator's control in processing claims. The second aspect concerns those applicants with approved stage one claims who have not yet submitted stage two claims. Until these claims are submitted, the Administrator is not in a position to assess them or make offers. Problems associated with these circumstances cannot be attributed to the Administrator but nonetheless they are detrimental to the expeditious resolution of the remaining claims. This situation must be addressed.

[15] The foregoing difficulties stand as roadblocks to the efficient processing of claims. Their existence may, in part, be attributed to two elements of the plan that appear to be the most misunderstood, specifically those provisions dealing with compensation amounts and legal fees.

[16] Under the Plan, claimant's suffering an injury or loss are entitled to receive compensation equivalent to that which would be awarded in damages, in accordance with Ontario law, after a successful trial in respect of a claim. It must be kept in mind that the Plan does not depart from general legal principles and establish a unique compensation scale. Therefore, in making offers, the Administrator must have reference to a developed body of law relating to damage awards for personal injuries and other types of compensable losses covered by the Plan. Further, the

Administrator should take into account, in the interests of fairness and consistency, amounts paid in relation to similar claims under the Plan. Nonetheless, the Administrator must also recognize that the standard of compensation enshrined in the Plan was meant to ensure that claimants received, in the words of the Plan's preamble, "full and complete" compensation. In other words, the Administrator's offer must be fair and reasonable at the outset, as supported by similar or analogous compensatory damages awards in Ontario cases or under the Plan.

[17] The offer system envisioned by the Plan is not meant to be a bargaining process. Therefore, the Administrator's must not make "lowball" offers, designed to begin a negotiation. However, since offers must be made on a principled basis, it would be a misnomer to refer to them as "take it or leave it".

[18] The Administrator is under an obligation to make an offer that is consistent with Ontario law for any properly supported claim for compensation. In this regard, it is anticipated that the amount of supporting information required will be reflective of the claim being advanced. Given the objectives of expedient and fair claim resolution, it should not be the situation that claimants are required to provide the same level of information in respect of a transient injury or smaller loss as would be the case if a claim were advanced for significant ongoing debilitation or loss. This does not mean that the Administrator must make offers in the air. There is still an obligation on a claimant to provide sufficient information to substantiate a claim. Where disputes arise in this process, either at the claims stage or because a claimant considers an offer unacceptable, the claimant does not have to accept the Administrator's decision. The claimant may refer the claim to mediation/arbitration for determination.

[19] This brings me to the second misunderstood element, the payment of legal fees for counsel representing claimants. The Plan provides for the payment of "reasonable" legal fees for claimants. It is clear that the intent of the Plan was that claimants would not have to pay their own legal costs. Moreover, it was represented to claimants at a "town hall" meeting, organized by counsel prior to the approval of the settlement, that the import of this provision was that claimants would be provided with legal services at no cost to them.

[20] Still, there is confusion among claimants about legal fees, especially in relation to potential arbitrations. It has been brought to the court's attention that some claimants have been incorrectly told that the provision respecting fees means that they may be at risk of paying their own costs if they insist on arbitration in respect of their claims. This is not the case.

[21] Where a claimant is represented by counsel under this Plan, the terms of the Plan are incorporated by reference into the retainer agreement. Therefore, once counsel has commenced representing a claimant, counsel cannot resile from further representation of that client without approval of the court, nor is it the case that claimants will be billed directly for the legal services provided. Counsel will be paid "reasonable" fees, as determined under the applicable process instituted by the court, from the funding of the Plan.

[22] This method of providing legal services to claimants appears to have been well utilized so

far, in that as of January 2004, the Plan has paid out over 3.75 million dollars in legal fees and expenses in respect of claims advanced. This does not include the fees and expenses paid in relation to the class proceeding and settlement process.

[23] In summary, the court directs as follows:

1. In order to facilitate the resolution of outstanding claims, the Administrator shall compile a summary of settled claims and arbitration awards as of February 20, 2004. The summary shall be updated on a weekly basis until such time as the court orders otherwise. To protect the interests of the claimants, and in particular to ensure claimant confidentiality, no personal identifying information relating to any claimant shall be included in a case summary. However, the age range into which a particular claimant would fall, within a five year interval, shall be included in the summary.

2. The case summaries are to be held at the Administrator's office and may be distributed to counsel for a claimant or claimants, providing that a written undertaking of confidentiality is obtained. The undertaking shall be in a form that extends the protection of confidentiality to any updated materials that may be received. No copies of the materials distributed are to be made. All distribution copies are to be returned to the Administrator by each recipient as soon as practicable after the settlement of all outstanding claims for which the recipient acts as counsel. Mr. Dermody shall return all material received when advised by the Administrator that the claims of all unrepresented claimants have been resolved.

3. Class counsel and the monitor appointed by the court shall attend at the Administration office for the purpose of reviewing all outstanding offers, including "zero" offers, and outstanding claims for property value loss. Once the review has been completed, a report shall be made to the court and further directions will be issued.

4. Through the course of the case conference, participating claimants' counsel agreed that offers made by the Administrator may be communicated directly to the claimant concurrent with the communication to counsel. It is hoped that this will expedite the offer process. However, in the event that an offer is made and no response has been received by the Administrator within 30 days, or the offer is rejected before that time, the claim will be automatically scheduled for a mediation/arbitration which must be held and determined within 45 days after the deemed, or actual, rejection date. A panel of mediator/arbitrators will be appointed by the court.

5. The Administrator shall ensure that these reasons and directions are communicated to claimants. In addition, information regarding the ongoing Plan

implementation, in a form acceptable to the court having regard to the confidentiality interests of the claimants, shall be distributed on a regular basis by such means as the court directs.

6. The court will revisit matters in 90 days to determine whether further directions are required.

WINKLER J.

Released: February 27, 2004

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Plaintiffs

-and-

THE CORPORATION OF THE MUNICIPALITY OF BROCKTON *et al.*

Defendants

-and-

IAN D. WILSON ASSOCIATES LIMITED *et al.*

Third Parties

REASONS FOR DECISION

WINKLER J.

Released: February 27, 2004