

CITATION: *Banerjee v. Shire Biochem Inc.*, 2011 ONSC 7616
COURT FILE NO.: 05-CV-293457 CP
DATE: 20111221

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: **Swapan Banerjee**, Plaintiff/Moving Party
Shire Biochem Inc. et al., Defendants/Respondents

BEFORE: G.R. Strathy J.

COUNSEL: *Darcy R. Merkur and Stephen Birman*, for the Plaintiff/Moving Party
Sylvie Rodrigue, for the Defendants Eli Lilly Canada Inc. and Eli Lilly and Company
Malcolm N. Ruby, for the Defendant Shire Biochem Inc.
Christopher Hubbard and Keegan Boyd, for the Defendant Draxis Health Inc.

DATE HEARD: December 15, 2011

ENDORSEMENT

(Settlement and Fee Approval)

[1] This is a motion by the plaintiff, on consent of the defendants, for approval of a settlement of a class action on behalf of residents of Canada who were prescribed a drug called "Permax" (the "Class"). The plaintiff also seeks certification of this action against Draxis Health Inc., now Jubilant DraxImage Inc. ("Draxis") for the purposes of settlement. Draxis consents to that order. As well, Class Counsel seek approval of their proposed fee.

[2] Permax was developed by the defendants Eli Lilly Canada Inc. and Eli Lilly and Company and was prescribed primarily for the treatment of Parkinson's disease. It was initially distributed in Canada by Draxis and later by the defendant Shire Biochem Inc., now known as Shire Canada Inc.

[3] On February 8, 2010, I made an order certifying this action as a class proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 and approving a pilot project to enable the parties to explore settlement: *Banerjee v. Shire Biochem Inc.*, 2010 ONSC 889, [2010] O.J. No.

507. A class action was also commenced in the province of Québec by France Lépine (Court file #500-06000464-095). As a result of agreements between Class Counsel in this action and Class Counsel in the Lépine action, Lauzon Bélanger Lospérance, the Lépine action has been permanently stayed and class counsel in that action assumed primary responsibility for dealing with, and assisting, members of the sub-class of Québec residents in this action.

[4] The nature of the claim is described in detail in my reasons for certification. I will give an abbreviated description. The plaintiff alleged that a very small percentage of users of Permax experienced behavioural changes, broadly described as “impulse control disorders” (“ICDs”). These included compulsive gambling, hyper-sexuality, compulsive shopping and compulsive eating. The defendants deny any causal link between Permax and ICDs or any breach of a duty to Class members. Permax was approved for sale in Canada in 1991 and was successfully used to treat thousands of Canadians with Parkinson’s disease.

[5] The negotiation process has been successful and the parties now ask the court to approve a settlement whereby the defendants will pay \$2.4 million in settlement of the claims of the Class together with a contribution of \$300,000 towards costs. The settlement fund will be distributed to the 58 known Class members who have come forward to make claims. The distribution is based on a matrix prepared by Class Counsel, which includes an assessment of each individual claim, discounted to reflect various factors, including litigation risks. Class Counsel seek court approval of their fees and disbursements, in the total amount, inclusive of taxes, of \$811,563.03. These fees and disbursements will be paid partly by the defendants’ contribution towards costs and partly by a charge of 20% against the net recovery of each Class member.

[6] Following certification, there was an extensive notice program, which included publication in national and Québec newspapers. Copies of the notice were also sent to various Parkinson’s societies across Canada. The negotiation process was designed to assist the parties in determining the approximate Class size and the quantum of damages at issue. Class members were able to respond to a questionnaire by describing their circumstances and their claims. There were no opt-outs.

[7] Class Counsel collected extensive information concerning individual claims and prepared an evaluation of each claim. The evaluations included allowances for general damages, special damages, income loss and subrogated health insurance claims. Discounts were applied to the claims, depending on a variety of factors, including the availability and reliability of the information in support of each Class member’s claim. Discounts were also applied, on a temporal basis, to reflect emerging knowledge about potential side effects of Permax. This information was supplied to defendants’ counsel to inform the negotiation process.

[8] Initial settlement discussions between the parties, in the latter part of 2010, were not successful. At the request of the parties, another judge of this court agreed to mediate the dispute and, as a result of mediation sessions in February and April, 2011, a settlement in principle was reached with respect to the then known claims. A reserve fund was set aside to cover potential new claims. Some new claims have been filed, and assessments of those claims have been made. In the result, there are a total of 58 claimants, of whom 10 are members of the Québec sub-class.

[9] The proposed settlement applies a litigation risk discount of approximately 50% to the claim of each Class member, as quantified by Class Counsel. This discount reflects the fact that the outcome of the litigation is far from certain. There are issues about whether Pormax can cause ICDs. There are issues about whether the defendants should have known, based on the medical knowledge at the time, that there was an association between the use of Permax and ICDs and whether they had a duty to warn users. There are issues of proof of damages, contributory negligence and mitigation. On a practical level, absent a settlement, the litigation could have taken years to resolve. Many of the Class members were seniors, had serious health issues, and were in challenging physical and financial circumstances. Delay was very much against their interests. As in any important litigation, the value of certainty of outcome and timely payment usually justifies a discount -- sometimes a substantial discount -- from the face value of the claim.

[10] These were factors that Class Counsel took into account in deciding whether to recommend the settlement of this action based on a 50% discount. Class Counsel are experienced in both class actions and medical and pharmaceutical litigation. The settlement comes with their strong recommendation. In my view, the discount factors considered and applied by Class Counsel are appropriate and realistic.

[11] Of particular significance is the fact that Class Counsel have been in contact with every single known Class member and there has been no objection to the proposed settlement. Every single Class member has authorized the settlement for his or her share and has agreed to the net amount he or she will receive and to the portion of the settlement that will be allocated to Class Counsel's fee.

[12] This is a somewhat unusual case. The Class is relatively small -- only 58 members. The settlement will result in Class members receiving an average net recovery of just under \$32,000. The largest amount is about \$168,000 and the smallest amount is approximately \$4,745. There is no doubt that without this class action the Class members were unlikely to have obtained a satisfactory resolution of their claims. Many of them are in an already vulnerable state, with serious physical, psychological and financial challenges. This settlement brings them much-needed, and reasonably timely, compensation.

[13] The fact that the settlement has been unanimously accepted by all Class members is not determinative, but it is significant. It is also significant that there has been a careful and thorough assessment of the claim of each Class member by Class Counsel.

[14] In assessing a proposed settlement, the court will take into account a number of factors, keeping in mind that the relative importance of one factor or another will vary from case to case. These factors were summarized by Perell, J. in *Corless v. KPMG LLP*, [2008] O.J. No. 3092 (Sup. Ct.) at para 38:

When considering the approval of negotiated settlements, the court may consider, among other things: likelihood of recovery or likelihood of success; amount and nature of discovery, evidence or

investigation; settlement terms and conditions; recommendation and experience of counsel; future expense and likely duration of litigation and risk; recommendation of neutral parties, if any; number of objectors and nature of objections; the presence of good faith, arms length bargaining and the absence of collusion; the degree and nature of communications by counsel and the representative plaintiffs with class members during the litigation; and information conveying to the court the dynamics of and the positions taken by the parties during the negotiation; *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.) at 440-44, aff'd (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. refused Oct.22, 1998; *Parsons v. The Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) at paras. 71-72.; *Frohlinger v. Nortel Networks Corp.*, [2007] O.J. No. 148 (S.C.J.) at para. 8; *Kelman v. Goodyear Tire and Rubber Co.*, [2005] O.J. No. 175 (S.C.J.) at paras. 12-13; *Vitapharm Canada Ltd. v. P. Hoffmann-La Roche Ltd.* (2005), 74 O.R. (3d) 758 (S.C.J.) at para. 117; *Sutherland v. Boots Pharmaceutical ple.*, [2002] O.J. No. 1361 (S.C.J.) at para. 10.

[15] The likelihood of success is very difficult to predict in any litigation. It is particularly difficult to predict in complex pharmaceutical product litigation such as this. The issues of causation, standard of care and duty to warn would have been exceedingly complex. As well, there were, as I have mentioned, significant and difficult individual issues in many cases. These factors, together with the usual discounts one would apply in any case to reflect the value of a "bird in the hand" and timely settlement, warrant a substantial discount from what Class members might expect to receive if successful after years of litigation and potential appeals.

[16] Settlement was the product of an arm's length, adversarial and judicially mediated process. I am satisfied that the process was fair.

[17] The settlement comes with the recommendation of experienced counsel. The court places great importance on the appointment of qualified counsel in class proceedings, because counsel has extraordinary responsibilities to the class and to the court. In particular, because counsel is most familiar with the factual and legal issues bearing on the merits of the litigation, the court is necessarily influenced by Class Counsel's recommendation on settlement.

[18] There are three factors that I find particularly important in this case in concluding that the settlement is fair and reasonable. First, there has not been a single opt out from the class action. Clearly, no member of the Class felt that it was worthwhile to pursue individual litigation of his or her claim. Second, there has been a detailed work-up of each Class member's claim. This has necessarily involved communication with Class members, with a settlement being tailor-made to suit the particular circumstances of each Class member. Third, every Class member has agreed to his or her proposed share of the settlement and of the fee of Class Counsel. There is no objection by anyone. This is a rather significant and commendable accomplishment.

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[19] In my view, the settlement is fair, reasonable and in the best interests of the Class.

[20] I now turn to the approval of Class Counsel's fee. The task for the court on a motion of this kind is to determine a fee that is "fair and reasonable" in all of the circumstances: *Parsons v. Canadian Red Cross Society* (2000), 49 O.R. (3d) 281 (Sup. Ct.) at paras. 13 and 56.

[21] In *VitaPharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117 (Sup. Ct.) at para. 67, Cumming J. summarized some of the factors to be considered by the court when fixing Class Counsel's fees:

Factors relevant in assessing the reasonableness of the fees of any Class Counsel include the following:

- (a) the factual and legal complexities of the matters dealt with;
- (b) the risk undertaken, including the risk that the matter might not be certified;
- (c) the degree of responsibility assumed by Class Counsel;
- (d) the monetary value of the matters in issue;
- (e) the importance of the matter to the class;
- (f) the degree of skill and competence demonstrated by Class Counsel;
- (g) the results achieved;
- (h) the ability of the class to pay;
- (i) the expectations of the class as to the amount of fees; and
- (j) the opportunity cost to Class Counsel in the expenditure of time in pursuit of the litigation and settlement.

[22] In this case, the retainer agreement signed between the representative plaintiff and Class Counsel stipulates a contingency fee of 15% over and above partial indemnity costs. In addition, the retainer agreement permits Class Counsel to seek an order for a multiplier of up to four times, being applied to the fees charged, where the outcome of the litigation warrants such a multiplier.

[23] Class Counsel has expended time valued at \$629,232 and has incurred disbursements of \$49,548.08. Further time will be spent in the completion of the settlement. I have reviewed the time dockets and disbursement statements of Class Counsel and I am satisfied that the time was reasonably spent and the disbursements were reasonably incurred. Quite apart from issues having to do with certification and settlement negotiations, it is appropriate to keep in mind that Class Counsel was required to communicate with, collect information from and liaise with every single one of the 58 Class members. The result warrants a modest multiplier, which in this case is roughly 1.2.

[24] I should add that it is anticipated that the Lépine action in Québec, currently stayed, will be discontinued. Québec counsel will make application to the Québec Superior Court for that purpose. With the consent of the parties, the Court has been in communication with the case management judge in the Lépine action, who is aware of this motion and of the disposition I am making and who has expressed no concerns. I am satisfied that appropriate communication with

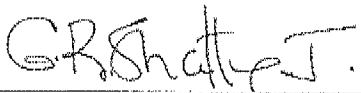
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members of the Québec sub-class has taken place through Mc. Lespérance, who has assumed primary responsibility for communications with those Class members.

[25] In summary, an order will issue:

- (a) certifying this action as a class proceeding against Draxis, for the purpose of settlement, on the same terms as set out in paragraphs 2 through 5 of the Court's order dated February 8, 2010;
- (b) declaring that the settlement contained in the minutes of settlement executed by the parties is fair and reasonable and in the best interests of the Class, and approving the settlement;
- (c) dispensing with publication of notice of the settlement approval, except through publication on the website of Class Counsel;
- (d) approving the retainer agreement between Class Counsel and the representative plaintiff;
- (e) declaring that the fees and disbursements of Class Counsel, in the total amount of \$811,563.03, inclusive of taxes, are fair and reasonable, approving the said fees and disbursements and directing that they be paid out of the settlement monies.

[26] I commend the parties and their counsel for resolving this matter in a timely way. I also express the Court's appreciation to Mr. Banerjee for taking on the responsibility as representative plaintiff.


C.R. Strathy J.

DATE: December 21, 2011