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Toronto Court File No.: 99-CT-030781CP
DATE: 20031223

ONTARIO

SUPERIOR COURT OF JUSTICE

Proceeding under the *Class Proceedings Act, 1992*

B E T W E E N:	
MICHAEL GARIEPY, LYNE MARION, WAYNE McGOWAN, PAUL BERTHELOT, DALE ELLIOTT and ROSS BAPTIST	*Michael A. Eizenga and Elizabeth deBoer*, for the plaintiffs
Plaintiffs	
- and -	
SHELL OIL COMPANY, E.I. DU PONT DE NEMOURS and COMPANY and HOECHST CELANESE CORPORATION	*David W. Kent*, for the defendant, Shell Oil Company *Laura F. Cooper*, for the defendant, E.I. Du Pont De Nemours and Company *J. D. Timothy Pinos*, for the defendant, Hoechst Celanese Corporation
Defendants	
	HEARD: December 19, 2003

REASONS FOR DECISION

NORDHEIMER J.:

[1] The representative plaintiffs move to approve a settlement under the *Class Proceedings Act, 1992*, S.O. 1992, c.6 with respect to the plaintiffs' claims against the defendant, Shell Oil Company. This is the second settlement for which approval has been sought in this proceeding. By reasons dated October 22, 2002 I provisionally approved (and subsequently on November 5,

2002 gave final approval to) a settlement of the representative plaintiffs' claims against the defendant, E.I. Du Pont De Nemours and Company.

[2] I noted in my earlier reasons that the motion to approve that settlement was somewhat unusual because the motion to grant certification and approve the settlement followed my decision on July 9, 2002 in which I denied certification of this action as a class proceeding with respect to the plaintiffs' claims against the other two defendants. This motion takes that unusual situation one step further in that it is now one of the defendants against whom certification was denied in the litigation context who seeks, along with the representative plaintiffs, to have this action certified in the settlement context.

[3] This unusual aspect of the motion is compounded by the fact that my decision denying certification is currently under appeal. I am advised that the appeal is scheduled to be heard by the Divisional Court in early June 2004. This fact raised a procedural issue because Shell, understandably, did not wish to abandon its position on the appeal without knowing that the proposed settlement was approved but, at the same time, formal approval of the settlement cannot be granted, given the need for the proceeding to be certified as part of that approval, as long my order denying certification is outstanding. After hearing from all parties concerned on an earlier attendance, it was agreed that the practical solution was to move for approval on a provisional basis with final approval, and the formal order being granted, only after the parties seek and obtain an order from the Divisional Court setting aside my earlier order as it relates to Shell.

[4] In terms of the proposed settlement itself, I begin by again setting out briefly the nature of the action. The claims asserted arise out of alleged defects in two products, polybutylene plumbing pipe and acetal insert fittings. The plaintiffs allege that fittings made from acetal resin, supplied by the defendants, Hoechst Celanese Corporation and E.I. Du Pont De Nemours and Company, and pipe made from polybutylene resin, supplied by the defendant, Shell Oil Company, are unsuitable for use in potable water plumbing systems. The plaintiffs allege that if such fittings and piping are used in potable water plumbing systems, they will fail prematurely leading to leaks and damages consequent on such leaks. The plaintiffs assert causes of action including negligent design, failure to warn, misrepresentation and breach of warranty.

[5] In the proposed settlement, Shell agrees to make payments to Canadian homeowners with polybutylene plumbing and heating systems from a fund of up to $20 million. The terms and conditions are set out in a Settlement Agreement entered into between class counsel and Shell on October 15, 2003. Pursuant to the proposed settlement, settlement class members will be deemed to have released Shell from all claims against it arising from polybutylene plumbing and heating systems, but will retain their rights to pursue their claims against the non-settling defendant, Celanese. On the basis of "bar order" language agreed upon by class counsel and Shell, cross-claims, third party claims and all claims for contribution and indemnity are to be barred against Shell. As a consequence of the bar order, settlement class members will be restricted to making "several" claims only against Celanese. The language of the proposed bar order is identical to the language of the bar order that was eventually approved in the DuPont settlement.

[6] As was the case with the DuPont settlement, this proposed settlement was only reached after class counsel had conducted a significant amount of investigation. As part of the investigation, class counsel retained expert witnesses, interviewed dozens of installers and plumbers, examined the plumbing in many structures, arranged for scientific analysis on failed plumbing parts and interviewed hundreds of other witnesses and class members throughout Canada. In addition, class counsel reviewed hundreds of documents that were produced in the course of litigation which has been ongoing for many years in the United States over these issues.

[7] Class counsel say that these investigations and research, including the plaintiffs' involvement in these proceedings, their involvement with the DuPont settlement, as well as the plaintiffs' preparation for the substantive litigation, enabled them to negotiate a Settlement Agreement that they are confident is fair, reasonable and in the best interests of the class. It is not disputed that the parties entered into the proposed settlement after months of arm's length negotiations.

[8] While it is the plaintiffs' position that this litigation has merit, in evaluating settlement options, class counsel have understandably assessed the risks associated with the litigation. Those risks include various risks that are necessarily associated with this type of litigation

including procedural risks related to certification (which risks might now be seen to be obvious in light of my decision denying certification), risks associated with complex scientific evidence and the assertion of some novel causes of action. In addition, there is the ever present reality that even if the plaintiffs are successful on each and every material issue in the litigation, appeals by the defendants could significantly delay a resolution for many years.

[9] There are companion proposed class proceedings ongoing in British Columbia and Quebec. This proposed settlement applies to all three actions and requires the approval of the courts in all three Provinces. Hearings seeking approval of the proposed settlement are scheduled to take place in British Columbia on January 6, 2004 and in Quebec on February 6, 2004.

[10] The proposed definition of the settlement class, subject to certain exclusions as set out in the Settlement Agreement, is as follows:

> All persons and entities as of the date of the first publication of notice of approval of this Settlement, who own or who previously owned a Unit in Ontario and any of the other Canadian provinces or territories except British Columbia and Quebec, constructed between January 1, 1978 and December 31, 2002 in which there is or was during the time of such class member's ownership, any of the following:
>
> (i) a PB plumbing system;
> (ii) a PB hot water heating system;
> (iii) a PB yard service line.

Persons excluded from the settlement class include those who have previously settled with Shell or who have availed themselves of any of the settlements in the United States.

[11] Reduced to its basics, therefore, a person is a member of the settlement class if they own, or have owned, property that contains or has contained a polybutylene plumbing or hot water heating system or a polybutylene yard service line. Polybutylene pipe is identifiable because it is usually grey plastic and because it normally carries product identification markings of the manufacturer.

[12] A website has been set up as part of the settlement process. It contains photographs of components of polybutylene plumbing and heating systems which were posted in conjunction

with the notice of the proposed settlement. Copies of the photographs can also be obtained through a toll-free number.

[13] Pursuant to the proposed settlement, class members will be allocated points based on the nature of their claim. There will also be a maximum amount that any claimant can receive for each type of claim. In addition, an amount has been set aside in a "hardship" fund which will allow the claims administrator to make any additional payment in cases where the limits would cause particular hardship. It is proposed under the settlement that no eligible claimant will be excluded due to limitations issues. Further, members of the class do not have to have experienced a leak in their systems to participate in the settlement. In addition, Shell has agreed to pay the fees of class counsel and Shell has also agreed to fund a notice campaign informing class members of the approval of the settlement, the claims process and their opt out rights. The costs of both of these items are over and above the amounts being set aside for the settlement fund.

[14] Once the period for submitting claims has passed, the settlement fund will be distributed to eligible claimants on the basis of their accumulated points subject to the limits I earlier mentioned. Any amount that might remain after these distributions will be returned to Shell.

[15] Shell and class counsel have agreed that settlement class members will be deemed to have released all claims against Shell arising from their polybutylene plumbing and heating systems but will retain their claims against the non-settling defendant, Celanese. As I earlier mentioned, crossclaims, third party claims, and all claims for contribution and indemnity are to be barred against Shell.

[16] Extensive notice of the hearing to approve the settlement was given. Notice of the hearing was placed in Canadian newspapers and other media in accordance with the Plan of Notice approved by the Courts of British Columbia, Ontario and Quebec. The notice was also posted on a website, and made available at a specified toll-free number. The notice required that any objections to the proposed settlement were to be received by class counsel by a fixed date. No objections were, in fact, received.

[17] The Notice Plan also provides for comprehensive coverage of the settlement itself, if approved. The notice program will involve publication in two national newspapers, 52 other newspapers in ten provinces and two territories, two national magazines and two provincial magazines. In addition, a website and dedicated toll-free telephone number have been established.

[18] Any class member who is not satisfied with the terms of the settlement, and wishes to individually pursue his or her claim against Shell, may opt out of the settlement. The proposed opt out period is 60 days following the first publication of Notice of court approval of the Settlement Agreement. A person can opt out by completing an opt out form which they will return to the Claims Administrator by mail on or before the deadline. The opt out procedure is clearly described in the Notice.

[19] Finally, I should mention that legal fees to be paid to class counsel were negotiated separately and after the Settlement Agreement was reached. The fees to be paid to class counsel are to be the subject of a separate approval hearing.

Analysis

Should the action be certified as a class proceeding?

[20] I do not intend to repeat my analysis on this issue which I set out in approving the DuPont settlement. It is sufficient to say that, for those same reasons, I am satisfied that the action should be certified as a class proceeding for settlement purposes.

Should the settlement be approved?

[21] Similarly, I do not intend to repeat my analysis of this issue which I set out in approving the DuPont settlement. While I appreciate that the mechanics of the settlement here are different from those in the DuPont settlement, the effect on the class members is essentially the same. For virtually the same reasons that I set out in approving the DuPont settlement, I am satisfied that this settlement is fair and reasonable and one which ought to be approved subject to two matters that I will now address.

The proposed bar order

[22] The jurisdiction of the court to grant a "bar order" and the considerations in so doing are extensively canvassed by Mr. Justice Winkler in *Ontario New Home Warranty Program v. Chevron Chemical Co.* (1999), 46 O.R. (3d) 130 (S.C.J.). As I said in my reasons for approving the DuPont settlement, I agree with Justice Winkler's reasons and with his conclusion that the court does have the jurisdiction to grant such orders in appropriate cases.

[23] As was the case with the DuPont settlement, I believe that it is an appropriate order to grant in respect of this settlement. The practical reality is that no single defendant would agree to a settlement in this type of litigation without such a provision. However, counsel for Celanese appears to once again express its opposition to any bar order being granted. Insofar as that objection is based on the issues which Celanese raised in the DuPont settlement, counsel does not seek to argue those points again. Rather, Celanese raises a different point of objection.

[24] There is an indemnity provision in the Settlement Agreement by which the class members will indemnify Shell from "all cross-claims, third-party claims and claims for contribution and indemnity" occasioned by continuing litigation. Celanese submits that, as a consequence, Shell should not be permitted to seek a bar order as a "further supplement". Put another way, Celanese says that, given the indemnity provision, Shell does not need a bar order.

[25] I do not agree with that position. There is a difference between an indemnity provision and a bar order. The former only compensates Shell for any liability for which it may be found responsible to a third party. The latter prohibits any such claim in the first place. There are clearly hidden or non-compensable costs that are associated with participating in litigation that would not be covered by an indemnity and that Shell would obviously prefer to avoid rather than simply being compensated for, even assuming compensation is possible. Accordingly, the presence of an indemnity provision does not preclude the need for a bar order nor does a bar order necessarily preclude the need or desirability of an indemnity provision. The simple fact is that they address different, although admittedly somewhat overlapping, considerations and concerns.

[26] Further, in a situation such as this settlement, where the class members retain their rights to pursue other persons for claims relating to the polybutylene issue, who are not parties to this proceeding and would not therefore be covered by the bar order, there is an independent need for the indemnity provision.

The "blow up" provision

[27] The one concern that I did raise with counsel regarding this settlement is the provision in clause 10.9 of the Settlement Agreement which states:

> "If the total number of Settlement Class members who elect to opt out of the Settlement is, in Shell's sole opinion, excessive, Shell shall have the right to withdraw from this Agreement by giving written notice to class counsel within 30 days after receipt from class counsel of the report on opt outs."

[28] Counsel referred to this as a "blow up" provision. They contended that it was a necessary provision to protect Shell in case there are a large number of class members who choose to opt out of the settlement – a result which class counsel and counsel for Shell were quick to say they had no reason to expect.

[29] My concern with this provision is that it has all the appearances of allowing the parties to obtain court approval of the settlement but then to permit Shell to unilaterally vitiate or set aside that approval. My initial reasoning was that if Shell was going to seek court approval for a settlement which, by definition, it must view as fair and reasonable and in the best interests of the class members, then it ought to be held to the consequences of the settlement, if approved, regardless of what those consequences might be. At the very least, if the consequences are not what Shell envisioned them to be, then Shell ought to be required to come back to court and seek to have the approval set aside rather than being able to achieve that result of its own motion.

[30] However, having further considered the matter, I have concluded that the "blow up" provision is not as problematic as I originally considered it to be. I reach that conclusion for two primary reasons. One is the point, made by counsel at the hearing, that if the settlement is approved, all of the class members have the right to opt-out if they do not like, or at least do not wish to be bound by, the terms of the settlement. Consequently, it is submitted, there is no reason to deny the other party to the settlement, namely Shell, the same option if, despite its best

intentions, the settlement does not attract the degree of support it was hoped it would do. Shell is, after all, like any other settling party. It is trying to buy peace and if that peace is not going to be achieved, or if too many insurgents remain, then Shell is not going to achieve what it bargained for. While all sides believe, in putting the settlement together and presenting it to the court for approval, that it is a good settlement and one which the class members will benefit from and welcome, no one, including the court, will know the actual reaction to it until the opt-out process concludes. If the reality does not match expectations, then Shell should have the right to re-evaluate its position, just as the class members will have effectively done. At the same time, on this point, requiring Shell to return to court to seek to have the approval set aside, then casts the court in the role of deciding what is or is not in Shell's best interests – a role that does not immediately appear to be an appropriate one for the court to assume.

[31] The other point, also made by counsel at the hearing, is that there is no serious prejudice to the class members from the existence of this provision. If Shell resiles from the settlement, then the class members will find themselves in exactly the position that they do now, that is, with a proposed class action to pursue. Admittedly, they may lose the benefit of a settlement that a number, perhaps the majority, of them may have wanted but their underlying right to pursue their claims is not altered. The fact that they may lose the settlement because a sufficient number of class members opt out of the settlement reflects, I suppose, the price class members pay for choosing to be part of a class proceeding rather than pursuing individual actions.

[32] While I must say that I would have had less of a negative reaction to this provision had it contained a threshold level (i.e., a minimum percentage or number of opt-outs) before which Shell could exercise the right to terminate the settlement, I accept the point that it is not the job of the court on a motion to approve a settlement to engage in modifying or re-negotiating its terms. I should either approve the settlement as presented or reject it. I have concluded that the absence of a threshold level in the "blow up" provision is not, in and of itself, a sufficient reason to reject the settlement outright.

Summary

[33] In the end result, I grant provisional approval to the proposed settlement, subject to the necessary order being obtained from the Divisional Court regarding the outstanding appeal.

Counsel may make arrangements with me to finalize the approval, and obtain the formal order, once the Divisional Court issue has been addressed.

NORDHEIMER J.

Released: December 23, 2003

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SUPERIOR COURT OF JUSTICE

B E T W E E N:

MICHAEL GARIEPY
and others

Plaintiffs

- and -

SHELL OIL COMPANY
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Defendants

REASONS FOR DECISION

NORDHEIMER J.

RELEASED: DEC. 23 2003