CITATION: Airia Brands Inc. v. Air Canada, 2016 ONSC 4929
COURT FILE NO.: 50389CP
DATE: 2016/08/04

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Airia Brands Inc., Startech.com Ltd., and QCS-Quick Cargo Service GMBH, Plaintiffs

AND:

Air Canada, AC Cargo Limited Partnership, Societe Air France, Koninklijke Luchtvaart Maatschappij N.V. dba KLM, Royal Dutch Airlines, Asiana Airlines Inc., British Airways PLC, Cathay Pacific Airways Ltd., Deutsche Lufthansa AG, Lufthansa Cargo AG, Japan Airlines International Co., Ltd., Scandinavian Airlines System, Korean Air Lines Co., Ltd., Cargolux Airline International, LAN Airlines A.A., LAN cargo S.A., Atlas Air Worldwide Holdings Inc., Polar Air Cargo Inc., Singapore Airlines Ltd., Singapore Airlines Cargo Pte Ltd., Swiss International Air Lines Ltd., Qantas Airways Limited, AND Martinair Holland N.V. Defendants

BEFORE: Justice J. N. Morissette

COUNSEL: L. Visser and Charles M. Wright, for the Plaintiffs

Katherine L. Kay, Danielle K. Royal and S. Hosseini for the Defendants Air Canada and AC Cargo Limited Partnership

John P. Brown, Brandon Kain and T.D. Chapman-Smith, for the Defendant Cathay Pacific Airways Ltd.

Paul J. Martin and Laura F. Cooper, for the Defendant, Asiana Airlines Inc.

S. Bhattacharjee, A.T. McKinnon and Jon Smithen, for the Defendant, Korean Air Lines Co. Ltd.

R. Russell and Zirjan Derwa, for the Defendant, British Airways PLC

HEARD: In writing

REASONS FOR DECISION RE: LEAVE TO APPEAL

Introduction

[1] The defendants Air Canada and British Airways seek leave to appeal from the order of Madam Justice L. Leitch dated August 26, 2015. In that order, the motion judge certified this action as a class proceeding.

[2] This class action relates to an alleged price-fixing conspiracy in the market for global "Airfreight Shipping Services", specifically in relation to fuel and security surcharges.

Questions to be answered on appeal, if leave is granted:

[3] Did the certification judge err in determining the pleading discloses a reasonable cause of action for common law conspiracy based solely on a breach of section 45 of the Competition Act;

[4] Did the certification judge err in determining that class members who purchased Airfreight Shipping Services from non-defendants (also known as umbrella purchasers) have a cause of action against the named defendants for their alleged losses; and

[5] Did the certification judge err in certifying the action as a class proceeding in circumstances where the plaintiffs' proposed methodology for establishing class-wide harm was not grounded in the facts of the case.

Test for Leave to Appeal

[6] The test for granting leave to appeal under rule 62.02(4) is well-settled. It is recognized that leave should not be easily granted and the test to be met is a very strict one. There are two possible branches upon which leave may be granted. Both branches involve a two-part test and, in each case, both aspects of the two-part test must be met before leave may be granted.

[7] Under rule 62.02(4)(a), the moving party must establish that there is a conflicting decision of another judge or court in Ontario or elsewhere (but not a lower level court) and that it is, in the opinion of the judge hearing the motion, "desirable that leave to appeal be granted." A "conflicting decision" must be with respect to a matter of principle, not merely a situation in which a different result was reached in respect of particular facts: *Comtrade Petroleum Inc. v. 490300 Ontario Ltd.* (1992), 7 O.R. (3d) 542 (Div. Ct.).

[8] Under rule 62.02(4)(b), the moving party must establish that there is reason to doubt the correctness of the order in question and that the proposed appeal involves matters of such importance that leave to appeal should be granted. It is not necessary that the judge granting leave be satisfied that the decision in question was actually wrong – that aspect of the test is satisfied if the judge granting leave finds that the correctness of the order is open to "very serious debate": *Nazari v. OTIP/RAEO Insurance Co.*, [2003] O.J. No. 3442 (S.C.J.); *Ash v. Lloyd's Corp.* (1992), 8 O.R. (3d) 282 (Gen. Div.). In addition, the moving party must demonstrate matters of importance that go beyond the interests of the immediate parties and involve questions of general or public importance relevant to the development of the law and administration of justice: *Rankin v. McLeod, Young, Weir Ltd.* (1986), 57 O.R. (2d) 569 (H.C.J.); *Greslik v. Ontario Legal Aid Plan* (1988), 65 O.R. (2d) 110 (Div. Ct.).

Conflicting decision:

[9] Leitch J. considered the defendants' submissions with respect to *Wakelam v Johnson & Johnson*, 2014 BCCA 36[1], but held "I cannot conclude that it is plain and obvious and beyond doubt that the plaintiffs' common-law conspiracy claim for unlawful [means] conspiracy is certain to fail". She carefully reviewed the relevant case law, such as *Apotex*[2], in which the Ontario Court of Appeal held that a breach of the *Competition Act* could supply "the element of unlawful means" for an unlawful means conspiracy claim. She further considered other decisions and concluded that in light of this precedential case law, the tort claims based on a breach of the *Competition Act* are not bound to fail.

[10] Five weeks after the release of the certification judge's decision, J. Perell of the Superior Court of Justice in *Shah v LG Chem, Ltd*[3]("*Shah*") released his decision that is in conflict with the decision of the certification judge.

[11] With respect to the inclusion of umbrella purchasers, this issue was not raised by the defendants at the time of the certification and therefore cannot now seek to visit this issue on appeal.

[12] The decision in *Shah* stands alone and leave to appeal of that decision has been sought on the same two issues as are before this Court. It seems that granting leave to appeal in this action, on the same issues for which leave has been sought in *Shah*, would not be an efficient use of judicial resources and could lead to significant unnecessary delays in the litigation and conflicting decisions.

[13] This case was commenced in 2006 with certification record served in February 2008 and the certification motion heard in December of 2014.

[14] The *Class Proceedings Act*, 1992 "provides for flexibility and adjustment at all stages of the proceeding" including amendments of the class definition after the certification and the decertification of all or part of the class.[4]

[15] If *Shah*'s findings are upheld, it may be necessary to adjust the parameters of the class or decertify part of the class. Therefore, while *Shah*'s appeal results may affect the scope of the class and the common issues, it remains open to the case management judge to re-address that at a later time.

[16] For these reasons it is not desirable that leave to appeal be granted.

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[1] Leave to appeal refused (SCC)
[2] *Apotex Inc v Hoffmann-La Roche Ltd* (2000), 195 DLR (4th) 244, [2000] OJ #4732 (CA)
[3] 2015 ONSC 6148
[4] SO 1992, c. 6 ss 8(3), 10(1)

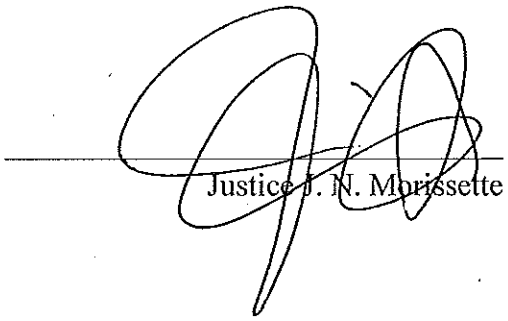
Correctness of the order:

[17] The defendants assert that there is good reason to doubt the correctness of the certification decision because the "plaintiff's proposed expert methodology does not offer a 'realistic prospect of establishing loss on a class-wide basis'.

[18] In my view the certification judge's application of *Microsoft* [5]does not raise legal issues of such importance that leave to appeal be granted. Every price-fixing conspiracy case decided in Ontario since *Microsoft* (including J. Leitch's decision) has interpreted the SCC requirements in the same manner.

Disposition

[19] Leave to appeal is dismissed.



Justice J. N. Morissette

Date: August 4, 2016

[5] Pro-Sys Consultants Ltd. V Microsoft Corp, 2013 SCC 57