CITATION: Shah v. LG Chem, Ltd., 2016 ONSC 4670
DIVISIONAL COURT FILE NO.: 556/15
DATE: 20160808

SUPERIOR COURT OF JUSTICE – ONTARIO
DIVISIONAL COURT

RE: KHURRAM SHAH AND ALPINA HOLDINGS INC., Plaintiffs

AND:

LG CHEM. LTD., LG CHEM AMERICA, INC., PANASONIC CORPORATION, PANASONIC CORPORATION OF NORTH AMERICA, PANASONIC CANADA, INC., SANYO ELECTRIC CO., LTD., SANYO NORTH AMERICA CORPORATION, SANYO ENERGY (U.S.A.) CORPORATION, SONY CORPORATION, SONY ENERGY DEVICES CORPORATION, SONY ELECTRONICS INC., SONY OF CANADA LTD., SAMSUMNG SDI CO., LTD., SAMSUNG SDI AMERICAN, INC., SAMSUNG ELECTRONICS CANADA INC., HITACHI LTD., HITACHI MAXELL, LTD., MAXELL CORPORATION OF AMERICA, MAXELL CANADA, GS YUASA CORPORATION, NEC CORPORATION, NEC TOKIN CORPORATION, NEC CANADA, TOSHIBA CORPORATION, TOSHIBA AMERICA ELECTRONIC COMPONENTS, INC. AND TOSHIBA OF CANADA LIMITED, Defendants

BEFORE: Stewart J.

COUNSEL: *David Sterns, Jean-Marc Leclerc, Andy Secretis, Charles M. Wright, Andrea DeKay and Linda Visser,* for the Plaintiffs

Sandra A. Forbes and Kristin Jeffrey, for the Defendant, LG Chem Ltd. and LG Chem America, Inc.

Laura Cooper and Vera Toppings, for the Defendants, Toshiba Corporation, Toshiba America Electronic Components, Inc. and Toshiba of Canada Limited

John Rook, Emrys Davis and Christiaan Jordan, for the Defendants, Panasonic Corporation, Panasonic Corporation of North America, Panasonic Canada, Inc., Sanyo Electric Co., Ltd., Sanyo North America Corporation and Sanyo Energy (U.S.A.) Corporation

Dana M. Peebles, Miranda Lam and Emily MacKinnon, for the Defendants, Sony Corporation, Sony Energy Devices Corporation, Sony Electronics, Inc. and Sony of Canada Ltd.

Robert E. Kwinter and Litsa Kriaris, for the Defendants, Samsung SDI Co., Ltd. and Samsung SDI America, Inc.

Kevin Wright, Mary Buttery and Kelly Friedman, for the Defendants Hitachi Maxell, Ltd. and Maxell Corporation of America

HEARD at Toronto: In Writing

ENDORSEMENT

Nature of the Motions

[1] The Plaintiffs and the Defendants seek to appeal the Order of Perell, J. dated October 5, 2015 certifying this action pursuant to the *Class Proceedings Act*, 1992, S.O. 1992, C-6. By order of Swinton, J. dated January 12, 2016, both motions for leave to appeal were ordered to be heard together.

[2] This class action relates to an alleged global price-fixing conspiracy in the lithium-ion battery ("LIB") industry. Related litigation has been commenced in British Columbia and Quebec.

[3] The motion judge certified the action, but declined to certify those claims relating to unlawful means conspiracy and those advanced on behalf of "umbrella purchasers", being persons who purchased LIBs from manufacturers not involved in the conspiracy but who nevertheless claim damages against the alleged conspirators.

[4] The Plaintiffs seek leave to appeal the denial of certification of these two aspects of the certification order.

[5] The Defendants seek leave to appeal the order granting certification of the action insofar as it concerns the civil remedy provided for in section 36 of the *Competition Act*, R.S.C. 1985, c.C-34 (the "*Act*"). The Defendants submit that the issue was wrongly decided by the motion judge and is in conflict with Supreme Court of Canada and Court of Appeal for Ontario precedents.

Jurisdiction

[6] Section 30(1) of the *Class Proceedings Act* creates an automatic right of appeal from an order refusing certification. Because the action was certified in part, there is not an order refusing certification and therefore s. 30(2) applies. Section 30(2) requires the granting of leave from this Court to appeal the Order to Divisional Court.

Test for Leave to Appeal

[7] 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.

[8] 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 (see: *Comtrade Petroleum Inc. v. 490300 Ontario Ltd.* (1992), 7 O.R. (3d) 542 (Div. Ct.)).

[9] 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 that the judge granting leave finds that the correctness of the order is open to very serious debate (see: *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 (see: *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.)).

Plaintiffs' Motion for Leave

[10] The Plaintiffs sought certification by the motion judge of causes of action based on, among other things, unlawful means conspiracy. They also sought to have umbrella purchasers included in the class.

(a) Unlawful Means Conspiracy

[11] The motion judge declined to certify the unlawful means conspiracy claim on the basis of his finding that the *Act* is a complete code and therefore a breach of s. 45 (the criminal price-fixing provision) cannot be used as the "unlawful element" in advancing a claim under s. 36 for the tort of unlawful means conspiracy.

[12] The Plaintiffs argue that the motion judge's analysis of unlawful means conspiracy conflicts with authorities from the Supreme Court of Canada, appellate decisions from Ontario and other provinces and several lower court decisions.

[13] The Plaintiffs refer to several decisions that conflict with the motion judge's approach (see: *Pro-Sys Consultants Ltd., v. Microsoft Corp*, 2013 SCC 57; *Apotex Inc., v. Hoffman La Roche Ltd.,* (2000) 102 ACWS (3d) 70; *Westfair Foods Ltd., v. Lippens Inc.,* (1989), 64 DLR (4^{th}) 335).

[14] The principal basis for the motion judge's analysis was his agreement with *obiter dicta* opinion from the 2014 decision of the British Columbia Court of Appeal in *Wakelam v. Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc.,* 2014 BCCA 36. The Plaintiffs submit that this aspect of *Wakelam* has been overtaken and displaced by the British Columbia Court of Appeal's decision in *Watson v. Bank of America Corp.*, 2015 BCCA 362.

[15] After *Wakelam* was decided, the British Columbia Court of Appeal in *Watson* narrowed its application to claims for restitution based solely on a breach of the *Act*. The Court of Appeal conducted an analysis of the constitutional history of the *Act* and unlawful means conspiracy jurisprudence from the Supreme Court of Canada and concluded that a claim for unlawful means conspiracy based upon a breach of the *Act* is a viable claim, if properly pled.

[16] However, the motion judge in this case held that he preferred the *obiter dicta* reasoning of *Wakelam* over the reasons for the more recent *Watson* decision.

[17] The Plaintiffs also submit that the motion judge's decision has important practical implications in price-fixing cases under the *Act* and has created some uncertainty in the governing law. They urge that appellate review by the Divisional Court would be helpful to litigants and courts alike and it is therefore desirable that leave to appeal be granted.

[18] I agree with the Plaintiffs' argument that this issue has been the subject of the requisite conflicting decisions and is one that merits the attention of an appellate court.

[19] In my opinion, the Plaintiffs have met the test for leave to appeal on this issue under Rule 62.02(4) (a).

(b) Umbrella Purchasers

[20] The second issue for which leave to appeal is sought involves the Plaintiffs' proposed class definition which includes all direct and indirect purchasers of LIBs and LIB products in Canada, including umbrella purchasers.

[21] In support of their position, the Plaintiffs tendered on the certification motion the expert opinion of Dr. Keith Reutter, an economist and economic analyst. Dr. Reutter concluded that all members of the proposed class, including umbrella purchasers, were affected by the alleged conspiracy. Dr. Reutter also provided a proposed methodology for establishing loss to those class members on a class-wide basis.

[22] Dr. Reutter expressed the opinion that the entire market for LIBs and LIB products would have been affected by the alleged conspiracy. This conclusion was supported by the following industry characteristics: (i) LIBs do not have economic substitutes; (ii) LIBs are commodity-like products; (iii) the Defendants controlled over 70% of global LIB sales; and (iv) there were high barriers to entry. These characteristics mean that the Defendants acting together would have had market power to move LIB prices above the competitive level.

[23] Dr. Reutter stated that, given the market share and alleged collusive behaviour of the Defendants, it is likely that any non-conspirator manufacturers would not have competed as vigorously on price. Thus, umbrella purchasers necessarily would have paid higher prices because of the alleged breaches and conspiracy.

[24] The Plaintiffs submit that claims by umbrella purchasers are grounded in basic principles of causation. In certain markets, where a cartel has sufficient market power, a price-fixing conspiracy will have an impact on the price of all goods sold in that market, regardless of whether they are sold by participants in the cartel. But for the cartel, all prices would have been lower, including prices paid by the umbrella purchasers. The fact of "umbrella impact" is often known and intended by the cartel.

[25] The Plaintiffs argue that the motion judge ignored this aspect of the evidence before him and declined to certify these claims largely on the basis that such claims are inconsistent with restitutionary principles. His analysis, they submit, was based on a faulty interpretation of the *Act* and an improper importation of negligence principles into the sphere of intentional acts.

[26] Further, in the companion action in British Columbia in which these same claims have been asserted, Masuhara, J. rejected the approach of the motion judge in Ontario, concluded that it is not plain and obvious that umbrella purchasers do not have a cause of action under the *Act* and expressed the view that the ordinary meaning of s. 36 is capable of extending to umbrella purchasers.

[27] Accordingly, there is a conflict in these decisions involving the same subject matter.

[28] The Plaintiffs further submit that this is a significant issue in price-fixing class actions under the *Act*, which are commonly brought on behalf of a class that includes umbrella purchasers. This issue has never been considered by an appellate court in Canada, but has attracted significant attention in the United States and Europe.

[29] In my view, the Plaintiffs have satisfied the test for leave to appeal on this issue under Rule 62.02 (4)(a).

Defendants' Motion for Leave

[30] The motion judge certified common issues regarding the Plaintiffs' statutory conspiracy claims pursuant to ss. 36 and 45 of the *Act*. Among the certified issues was whether class members had suffered injury as a result of the alleged misconduct.

[31] The motion judge rejected the Defendants' argument that the Plaintiffs are required to show some basis in fact that loss could be established with respect to each and every single class member. He concluded that the applicable law only requires plaintiffs in an indirect purchaser case to adduce a methodology for establishing pass-through to the indirect level of the distribution chain.

[32] In assessing the expert evidence on whether fact of loss could be determined on a class-wide basis, the motion judge held that the Defendants' criticisms of Dr. Reutter's opinion as being purely theoretical and not grounded in the facts of the case was inaccurate and unfair. He found that the Defendants' criticisms ignored that Dr. Reutter had closely studied the industry and market within which the Defendants operate. He further found that their criticisms ignored that much of the information required to categorically prove or disprove the Plaintiffs' theory had not been disclosed by the Defendants pre-certification and that the Defendants' expert evidence was equally theoretical.

[33] The motion judge held that Dr. Reutter's conclusions were adequately grounded in the facts as presented and his analysis could be done without resort to individual inquiries. He noted that after certification the Defendants would have an opportunity to prove that Dr. Reutter's conclusions were wrong. The motion judge referenced the admonition that certification is not the time for plaintiffs to finally and absolutely prove their case, or for the court to resolve a battle of the experts over methodology.

[34] The Defendants argue that no person is entitled to damages unless they have suffered a loss and, if loss has been suffered, a person is only entitled to recover an amount equal to that loss.

[35] The Defendants submit that the motion judge applied the wrong standard of commonality in certifying the balance of the claims asserted in the action and seek to appeal his conclusions as a result. They argue that the Plaintiffs did not establish harm as a common issue, and that the motion judge improperly relied on the possibility of an aggregate damages award in analyzing the commonality requirement.

[36] The Defendants therefore take the position that there is good reason to doubt the correctness of the Order, which they assert conflicts with other decisions on the application of the "same basis in fact" test.

[37] The Defendants further submit that leave to appeal should be granted to permit reconciliation of alleged conflicts in the law and "to clarify the meaning of commonality for future class actions".

[38] It is a trite observation to note that the onus is on the party seeking certification to meet the requirements for such an order. However, the burden is not an onerous one. The cause of action requirement of the *Class Proceedings Act* is satisfied unless, assuming all the pleaded facts are true, it is plain and obvious that the claim cannot succeed (see: *Hunt v. Carey Canada Inc.,* [1990] 2 S.C.R. 959; *Hollick v. Toronto (City)*, 2001 SCC 68).

[39] With respect to the other requirements for certification, the applicant need only provide a minimum evidentiary basis that shows some basis in fact for each of them. The certification hearing is procedural and is not expected to be the forum where the merits of the action are decided. In particular, the "some basis in fact" standard does not require the motion judge to resolve conflicting facts and evidence at the certification stage. The authorities on this point

have stressed that at the certification stage the court is ill-equipped to resolve such conflicts (see: *Pro-Sys Consultants Ltd. V. Microsoft Corporation*, supra).

[40] As a general observation, it has also been established that substantial deference is owed to a motion judge on an appeal of a certification motion. Although this is a leave to appeal motion, due recognition of that principle should be given in considering whether it has been shown that there is reason to doubt the correctness of the order (see: *Turner v. York University*, 2012 ONSC 4272 (Div. Ct.); *Markson v. MBNA Canada Bank*, 2007 ONCA 334) or that it is desirable that leave be granted or that the public interest is engaged by the issue.

[41] The motion judge found that the Plaintiffs' expert evidence meets the requirements as set out in *Pro-Sys Consultants Ltd.* v. *Microsoft Corp,* supra. The Plaintiffs' expert provided a well-reasoned report that was supported by industry data and publicly available information. He considered that the report provides a credible and plausible methodology for determining the fact of loss on a class-wide basis.

[42] In conducting the leave to appeal analysis, it is necessary to consider the nature of class proceedings. Certification is a fluid, flexible procedural process. The certification order can be amended, varied or set aside at any time. Certification is not to be treated as an impediment to the action being brought as a class proceeding where it is an appropriate and preferable mechanism for resolving the dispute.

[43] Certification decisions often involve a careful balancing of competing interests and delicate judgment calls by judges who have developed an expertise in class action proceedings. Any intervention by appellate courts at the certification stage should be limited to matters of general principle. The question on a motion for leave to appeal is not whether a different judge may have reached a different conclusion on the certification motion. In my view, however, this is the very question that the Defendants seek to raise and argue.

[44] I also consider that the recent decision of the Ontario Divisional Court in *Fanshawe College v. LG Phillips LCD Co. Ltd.,* 2015 ONSC 7211 is further support for the position of the Plaintiffs on this issue.

[45] In my view, the Defendants have not established either that there are any applicable conflicting decisions on the issue or that there is reason to doubt the correctness of the decision such that leave should be granted on either branch of the test.

Conclusions

[46] For these reasons, leave is granted to the Plaintiffs to appeal on the following issues:

(c) Did the motion judge err in denying certification of the unlawful means conspiracy claim? and

(d) Did the motion judge err in denying certification of the umbrella purchaser claims?

[47] The Defendants' motion for leave to appeal is denied.

Costs

[48] The parties have agreed that there will be no costs for the certification motion or any appeals.

Stewart, J.

Stewart J.

Date: August 8, 2016