CITATION: Fanshawe v. LG Phillips, 2017 ONSC 2763
COURT FILE NO.: 54054CP
DATE: 20170607

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: The Fanshawe College of Applied Arts and Technology, Plaintiff

AND:

LG Philips LCD Co., Ltd., L.G. Philips LCD America, Inc., Samsung Electronics Co. Ltd., Samsung Electronics Canada Inc., Hitachi Ltd., Hitachi Displays, Ltd., Hitachi Canada, Ltd., Hitachi America Ltd., Hitachi Electronics Devices (USA) Inc., Sharp Corporation, Sharp Electronics Corporation, Sharp Electronics of Canada Ltd., Toshiba Corporation, Toshiba Matsushita Display Technology Co., Ltd., Toshiba America Corporation, Toshiba of Canada Limited, AU Optronics Corporation America, Innolux Corporation, Chi Mei Optoelectronics USA, Inc., Chi Mei Optoelectronics Japan Co., Ltd. and Chunghwa Picture Tubes, Ltd., Defendants

BEFORE: Justice L. C. Leitch

COUNSEL: Charles M. Wright, Linda Visser and Ronald Podolny, for the Plaintiff

D. Michael Brown and Andrew McCoomb, for the defendants Sharp Corporation, Sharp Electronics Corporation and Sharp Electronics of Canada Ltd.

HEARD: Written submissions

ENDORSEMENT RE: LEAVE TO APPEAL THE ORDER OF GRACE J. DATED JULY 29, 2016

[1] The plaintiff seeks leave to appeal the portions of the order of Grace J. dated July 29, 2016, which denied the plaintiff's motion to amend the definition of the class to include "all downstream purchasers" of large-panel (10 inches or longer measured diagonally) liquid display panels ("LCD panels") and televisions, computer monitors and laptops containing LCD panels ("LCD products") in Canada during the relevant period.

[2] I accept the submission of plaintiff's counsel that, as they are moving to amend a certification order, s. 30(2) of the *Class Proceedings Act* ("*CPA*") applies and leave of this court is required for the plaintiff to appeal to the Divisional Court.

[3] Rule 62.04 provides that leave to appeal to the Divisional Court shall not be granted unless there is a conflicting decision by another judge or court in Ontario or elsewhere and it is desirable that leave to appeal be granted or there is good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that leave to appeal should be granted.

[4] The applicable legal principles were not in contention and were fully set out in the plaintiff's factum and need not be repeated here.

The context of the motion which is the subject of this leave application

[5] This is an action alleging a price conspiracy in relation to LCD panels and LCD products in Canada. The action was certified as a class proceeding by Tausenfreund J. on October 21,. 2011. The class was defined as Canadian purchasers of LCD panels and LCD products directly from a defendant and other specified parties between January 1, 1998 and December 11, 2016.

[6] The defendants were granted leave to appeal the certification order on November 21, 2011. Thereafter the defendants obtained an extension of time to perfect the appeal until 30 days after the Supreme Court of Canada released its decisions in three actions: *Pro-Sys Consultants Ltd. v. Microsoft Corporation* 2013 SCC 57, *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58 and *Option Consommateurs v. Infineon Technologies AG,* 2013 SCC 59 (the "Trilogy") which were relevant to the issue of whether indirect purchasers, as well as direct purchasers, had a cause of action.

[7] The plaintiff brought a motion to amend the class definition to include "all downstream purchasers" of LCD panels and LCD products in Canada during the relevant period or in the alternative to expand the list of named distributors and equipment manufacturers from whom members of the class purchased LCD panels and LCD products.

[8] The plaintiff's motion to amend was heard on April 4, 2014. By this point in time, the Supreme Court of Canada had released its decisions in the Trilogy establishing that indirect purchasers may assert claims for price fixing in Canada. The decision on the motion to amend was reserved until the Divisional Court heard the appeal of the certification motion. That appeal was ultimately dismissed on December 24, 2015.

[9] In reasons released July 29, 2016, the plaintiff's motion to amend was allowed in part. The plaintiff was permitted to expand the list of parties from whom class members purchased LCD panels and/or LCD products but the plaintiff was not permitted to amend the class definition to include "all downstream purchasers" of LCD panels and LCD products. This decision is the subject of this leave to appeal application.

The defendants' submissions on this leave application

[10] In resisting the plaintiff's motion for leave, the defendants note that the plaintiff proposed two alternative class definitions on the certification motion. Both proposed definitions included direct and indirect purchasers. The alternative class, which was not certified, contained significantly more indirect purchasers, both in total number and as a percentage of the class as a whole.

[11] As the defendants also note, the certification judge rejected as "unmanageable", the alternative more expansive class definition, which would have included all persons in Canada who purchased LCD panels or LCD products in Canada.

[12] The defendants further note that while they appealed the certification order with leave, the plaintiff did not pursue any appeal of the certification judge's refusal to certify the alternative and wider class definition.

[13] The defendants emphasize that in the plaintiff's motion to amend, the plaintiff sought an order amending the definition of class members to include persons within the alternative class definition considered by the certification judge or in the alternative an expansion of the class by adding other entities from whom class members could have purchased LCD panels and/or LCD products. As previously indicated, the plaintiff was successful in relation to the second request but not the first.

[14] The defendants also emphasize that they opposed the amendment to the class, which reflected the alternative class definition considered by the certification judge, on the basis that the issue raised on the motion to amend was *res judicata* and the motion was an abuse of process.

Analysis of the plaintiff's arguments justifying the granting of leave

[15] The plaintiff submits that there is good reason to doubt the correctness of the motion judge's refusal to amend the class definition on four bases:

(i) the motion judge did not consider s. 5(1) which provides that the court "shall" certify an action where the criteria under s. 5(1) are met - the plaintiff takes the position that s. 8(3) of the *CP*A permitting amendments of certification orders must be read in conjunction with s. 5(1);

(ii) proper regard was not given to the interlocutory nature of certification orders, which the plaintiff submits are interlocutory procedural orders that may justified and modified as the case proceeds (see *Irving Paper Ltd. v. Atofina Chemicals Inc.*, (2009), 99 OR (3d) 358, [2009] OJ No 4021) at paras. 23-24), and the motion decision is contrary to the flexible nature of the statutory regime in that "certification is a fluid, flexible procedural process" (see *Shah v. L.G. Chem, Ltd.* 2016 ONSC 4670 at para. 42);

(iii) the motion judge failed to consider the underlying objectives and in particular, access to justice by denying indirect purchasers the right to participate in this class action; and

(iv) the motion judge wrongly characterized the plaintiff's motion as an abuse of process and in doing so disregarded the fact that there had been changes in the substantive law.

[16] I do not accept the plaintiff's submissions. I find there is no good reason to doubt the correctness of the decision of the motions judge nor are there conflicting decisions.

[17] Firstly, I disagree with the plaintiff's interpretation of the interrelationship between s. 8(3) and s. 5(1) of the *CPA*. It is clear that pursuant to s. 8(3) a judge hearing a motion to amend a certification order is not obliged to amend a certification order. This is

consistent with s. 12 which grants general discretion to case management judges. Furthermore, as the defendants note, s. 5(1) requires the court to certify an action but it does not mandate certification of a particular class definition.

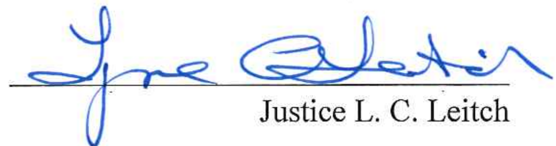
[18] Secondly, I agree with the defendants' submissions that the motion judge was clearly cognizant of the flexibility and fluidity of certification orders and indeed observed that the doctrine of abuse of process should not be applied too rigidly, particularly in a class action.

[19] Thirdly, although the motion judge did not specifically make mention of the principle of access to justice or the objectives of the *CPA*, his decision does not undermine these goals. I note again that the class as now defined includes direct and indirect purchasers from an expanded group of sellers.

[20] Lastly, as outlined by the defendants, attempting to re-litigate an issue may constitute an abuse of process. The motion judge was entitled to conclude that the plaintiff was attempting to re-litigate on an issue that had already been settled by the certification judge. He acknowledged the change in the law with the Supreme Court's decisions in the Trilogy, and noted at para. 54 of his decision, that "the state of the law was fully known when tactical decisions were made by the representative plaintiff and its counsel. Fanshawe should not be permitted to reverse earlier choices made along the long procedural road this case has already travelled".

[21] The motion judge was entitled to decline to decline to exercise his discretion to amend the class definition under ss. 8(3) and (12) of the *CPA*.

[22] As the defendants' correctly pointed out, a decision of a case management judge should be given a large degree of deference. His decision was neither incorrect, nor was there a conflicting decision on the topic. Therefore, under r. 62.02(4) leave to appeal is not granted.



Justice L. C. Leitch

Date: June 7, 2017