

CITATION: Wilson and Shah v. LG Chem et al., 2014 ONSC 1875

COURT FILE NO.: CV-13-56893 and CV-13-483540-00-CP

DATE: 20140324

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Lloyd C. Wilson, Plaintiff

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, Sony Corporation, Sony of Canada Ltd., Sony Energy Devices Corporation, Sony Electronics, Inc., Samsung SDI Co., Ltd., Samsung SDI America, Inc., Hitachi, Ltd., Hitachi Canada, Ltd., Hitachi Maxell Ltd. and Maxell Corporation of America, Defendants

AND 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., Samsung SDI Co., Ltd., Samsung SDI America, 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: Conway J.

COUNSEL: *Joel P. Rochon, Peter R. Jervis, Suzanne E. Chiodo* (Rochon Genova LLP) and *Jeff Orenstein* (Consumer Law Group LLP) – Counsel for the Plaintiff in *Lloyd C. Wilson v. LG Chem. et al.*

David Sterns (Sotos LLP) and *Linda Visser* (Siskinds LLP) – Counsel for the Plaintiffs in *Khurram Shah and Alpina Holdings Inc. v. LG Chem. et al.*

HEARD: March 18, 2014

Proceeding under the Class Proceedings Act, 1992

REASONS FOR DECISION
(re: Carriage Motion)

Conway J.

[1] Two proposed class proceedings have been commenced in Ontario against LG Chem Ltd. and numerous other defendants. Both actions allege that the defendants engaged in a price-fixing conspiracy with respect to the sale of rechargeable lithium ion batteries (“**Lithium Batteries**”) and consumer electronic products containing Lithium Batteries.

[2] The two actions are:

- *Lloyd C. Wilson v. LG Chem. et al.* CV-13-56893 (the “**Wilson Action**”)
- *Khurram Shah and Alpina Holdings Inc. v. LG Chem. et al.* CV-13-483540-00-CP (the “**Shah Action**”)

[3] Rochon Genova LLP and Consumer Law Group LLP (“**Rochon/Consumer**”) are co-counsel in the Wilson Action. Sotos LLP and Siskinds LLP (“**Sotos/Siskinds**”) are co-counsel in the Shah Action.

[4] Both sets of counsel seek carriage of the proposed class proceeding and an order staying the other action.

Procedural History of the Actions

[5] The following is a brief overview of the procedural history of both actions.

The Wilson Action

[6] The Wilson Action was commenced by Consumer Law Group LLP (“**Consumer**”). The statement of claim was issued on February 26, 2013. Consumer had previously commenced a related proceeding in the province of Québec, in November 2012 (the “**Québec Action**”).¹ An authorization motion in the Québec Action is scheduled for April 2014.²

[7] In the fall of 2013, when the carriage motion was announced, Rochon Genova LLP became involved in the Wilson Action. Rochon/Consumer is now prosecuting both the Wilson Action and the Québec Action as co-counsel.

¹ *Jordan Cohen v. LG Chem Ltd. et al.*, court file number 500-06-000632-121.

² Originally the Québec Action was brought on behalf of a national class. Mr. Rochon confirmed at the hearing that regardless of the outcome of this carriage motion, Rochon/Consumer is now seeking authorization in Québec for a provincial class only.

[8] The statement of claim in the Wilson Action has been served on all but one of the North American defendants. The claim is in the process of being served on the overseas defendants.³

[9] On February 3, 2014, Rochon/Consumer first contacted Andrew Schwarz, a partner with OSKR LLC, a U.S. firm that provides expert services to clients involved in anti-trust litigation. In an affidavit filed on this motion, Mr. Schwarz describes his past research into pricing conduct in the Lithium Battery marketplace and the services that his firm will provide to Rochon/Consumer in the Wilson Action.

[10] Rochon/Consumer's evidence was that it was in the process of preparing its certification record. Counsel advised at the hearing that the record has now been finalized.⁴

[11] Rochon Genova has a long-standing working relationship with Lieff, Cabraser, Heimann and Berstein LLP, co-lead counsel for the indirect purchasers in the parallel U.S. class action (the "U.S. Action").⁵ Rochon/Consumer states that it will be co-ordinating its work with that of Lieff Cabraser and that this relationship is integral to its prosecution of the Wilson Action.

The Shah Action

[12] The Shah Action was commenced by Sotos/Siskinds. The statement of claim was issued on June 23, 2013. Sotos/Siskinds subsequently identified additional defendants and commenced a second claim against those defendants in July 2013.⁶ Sotos/Siskinds sought case management of the two actions. Lax J., the case management judge, consolidated the two actions in October 2013.

[13] The statement of claim has been served on the North American defendants. It was translated and sent out for service on the overseas defendants in late 2013.

[14] Sotos/Siskinds' evidence was that it had prepared a certification record and intended to serve the record prior to the hearing of this motion.⁷

³ On February 25, 2014, Consumer obtained an order for extension of service on each of the overseas defendants to August 26, 2014. The exact status of the overseas service is not entirely clear from the record.

⁴ Counsel advised that a copy of that record was in the courtroom. It is not part of the record on the carriage motion.

⁵ *In Re Lithium Ion Batteries Anitrust* Litigation, case no. 13-MD-02420 YGR(MDR). All class actions in the U.S. related to the Lithium Batteries (including direct and indirect purchaser actions) were consolidated and are being heard in the Northern District of California in the U.S. District Court.

⁶ The consolidated complaint in the U.S. Action was filed in July 2013 after the some of the defendants were ordered to produce documents to the plaintiff from the U.S. criminal investigations. The consolidated complaint named additional defendants. Sotos/Siskinds filed its second action against those new defendants and their Canadian subsidiaries.

⁷ The certification record is not part of the record on the carriage motion. Sotos/Siskinds subsequently confirmed that the certification record has now been served on the North American defendants. This supplementary affidavit confirming service was received after the court-imposed deadline for filing materials. I have not considered it in my analysis.

[15] Sotos/Siskinds is working under a co-counsel agreement with Camp Fiorante Matthews Mogerman (“CFM”). CFM is plaintiff’s counsel in a related British Columbia proceeding (the “B.C. Action”), commenced in November 2012.⁸ A certification record was served in the B.C. Action in January 2014. The motion is scheduled for December 2014. The B.C. record includes an expert report of Keith Reutter, PhD, an economist with Berkeley Research Group, a U.S. consulting firm. Sotos/Siskinds’ evidence was that it was involved in instructing Dr. Reutter in preparing his report on the B.C. Action and expected that his report in the Shah Action would be substantially similar to the B.C. one.

[16] Sotos/Siskinds, through CFM, has a working relationship with Hagens Berman Sobol Shapiro LLP, co-lead counsel for the indirect purchasers in the U.S. Action.

Legal Principles

[17] In determining carriage of a class proceeding, the court’s objective is to make the selection that is in the best interests of class members, while at the same time being fair to the defendants and being consistent with the objectives of the Act: *McSherry v. Zimmer GMBH*, 2012 CanLII 39616 (S.C.J.), at para. 128; *Smith v. Sino-Forest Corp.*, 2012 ONSC 24, at para. 16.⁹

[18] In determining who should be appointed as lawyer of record in a class action, the court may consider, among other things:

- the nature and scope of the causes of action advanced;
- the theories advanced by counsel as being supportive of the claims advanced;
- the state of each class action, including preparation;
- the number, size and extent of involvement of the proposed representative plaintiffs;
- the relative priority of the commencement of the class actions;
- the resources and experience of counsel;
- the presence of any conflicts of interest;
- funding;
- definition of class membership;
- definition of class period;

⁸ *Jonathan Cruz v. LG Chem et al.*, VLC-S-S-128141. The B.C. Action is brought on behalf of a provincial class only.

⁹ See also *Settingington v. Merck Frosst Canada Ltd.*, [2006] O.J. No. 376 (S.C.J.), at para. 13.

- joinder of defendants;
- the correlation between plaintiffs and defendants; and
- prospects of certification.

See *McSherry*, at para. 129.

[19] Although the determination of a carriage motion will decide which counsel will represent the plaintiff, the task of the court is not to choose between different counsel according to their relative resources and expertise; rather, it is to determine which of the competing actions is more, or most, likely to advance the interests of the class: *Smith*, at para. 19.

Analysis

[20] I have concluded that the best interests of the class members will be served by awarding carriage to Sotos/Siskinds in the Shah Action. The Wilson Action is stayed.

[21] Although Sotos/Siskinds has somewhat more experience in the area of price-fixing, which might be advantageous to the class, I state at the outset that both sets of counsel are highly capable and experienced class action counsel. I have no doubt that each set of counsel would be able to serve the class well.

[22] Both sets of counsel have ongoing relationships with counsel in the U.S. Action. This is a neutral factor. In any event, I do not place much weight on this factor. While the case does allege an international price-fixing conspiracy, the fact remains that this case is being prosecuted in Canada. It is the role of Canadian counsel that is critical.

[23] Both claims have been served on the North American defendants. They are both in the process of being served overseas. Both sets of counsel now have experts involved. Both sets of counsel have apparently completed their certification materials. Again, these are neutral factors.

[24] Apart from the additional causes of action pleaded in the Wilson Action (discussed below), there is no significant difference in counsel's theory of the case in the two actions.

[25] There are no significant differences between the proposed representative plaintiffs, although I note that the Shah Action has two plaintiffs – a direct purchaser of Lithium Batteries and an indirect purchaser. The Wilson Action has only one plaintiff, an indirect purchaser.

[26] Rochon/Consumer submits that it should obtain carriage because it is already prosecuting the Québec Action. It submits that having one firm prosecute the actions in Ontario and Québec will create a coordinated, synergistic approach that will benefit the class.

[27] I am not persuaded by this submission. First, I agree with Mr. Sterns that awarding carriage in Ontario to counsel simply because it already started an action in Québec imports the "first to file" rule into Ontario. It provides an advantage to counsel who files first in Québec and then in Ontario, regardless of what steps it actually takes to prosecute the action in Ontario.

[28] Second, there is no reason why different firms in Ontario and Québec cannot work cooperatively with one another in prosecuting their proposed class actions. Awarding carriage to Rochon/Consumer will not eliminate other counsel from the Lithium Battery litigation in Canada – there is already separate counsel in the B.C. Action. Nor will it eliminate a multiplicity of proceedings – defendants will still face litigation in Ontario,¹⁰ Québec and B.C. Finally, counsel's submissions about synergies and benefits to the class are vague and not substantiated by any evidence.

[29] I have considered the differences in the claims. At this stage of the proceedings, those differences are not sufficient to favour one action over the other.

[30] Both claims assert causes of action in civil conspiracy, breach of Part VI of the *Competition Act*,¹¹ tortious interference with economic interests and unjust enrichment. The Wilson Action asserts three others – waiver of tort, permanent injunction and constructive trust. I am not persuaded that the addition of these causes of action enhances the prospects of certification or otherwise benefits the class. In particular, I note that the Supreme Court of Canada recently struck a claim for constructive trust in an anti-trust case: *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57, at para. 92. With respect to the waiver of tort claim, the Supreme Court of Canada upheld it, but only on the basis that it was not plain and obvious that the claim would fail: *Pro-Sys*, at paras. 93-97. Given the present uncertainty in the law on waiver of tort, I do not consider its exclusion from the Shah Action to be a determinative factor.

[31] There are differences in the start and end dates of the class period as between the two actions. Each side argues that this will make certification more difficult for the other. The Wilson side argues that the start date of 2000 in the Shah Action is not sustainable and that the Wilson start date of 2002 should be preferred. It points to the recent court decision in the U.S. Action that struck the part of the consolidated pleading alleging a conspiracy in 2000 and 2001. On the other hand, the Shah side points out that this was a pleadings motion only and that the court granted leave to amend the pleading.¹²

[32] In my view, it is premature at this point, based on the record before me, to say that the class period is overly broad and will make certification more difficult. This issue will have to be determined based on the record before the court at the time of the certification motion. Likewise, the Shah side argues that the Wilson end date goes beyond the date that proposed class members could have suffered any damage from the alleged conspiracy. Again, this must be determined based on the evidentiary record presented on the certification motion.

¹⁰ The proposed class in both the Shah and Wilson actions is a national one. Both sets of counsel acknowledge that adjustments will have to be made to the national class definition to avoid overlap if the B.C. and/or Québec actions are certified for residents of those provinces.

¹¹ R.S.C. 1985, c. C-34.

¹² The Wilson side submits that the court, in striking the parts of the U.S. pleading, noted that it had been drafted with the benefit of substantial document production. The Shah side notes that further document production was ordered in December 2013, after the consolidated pleading was drafted. It states that its understanding is that U.S. counsel intends to amend the allegations of conspiracy to plead further and better facts regarding the 2000-2001 period.

[33] There are differences in the proposed class definition. Sotos/Siskinds states that, after consulting with Dr. Reutter, it will be narrowing the class definition to refer only to specific (not all) consumer products containing Lithium Batteries. I cannot assess whether this narrowing of the class definition will or will not make a difference at the certification stage. However, it does reflect Sotos/Siskinds' efforts to work with an expert to analyse and refine its claim for purposes of certification.

[34] With respect to the addition of defendants in the Shah Action, it is relevant only in one respect. It reflects Sotos/Siskinds' monitoring of the developments in the U.S. Action and updating the Shah Action to move it forward.

[35] Overall, I find that there has been a more proactive and considered approach in the Shah Action than in the Wilson Action. Sotos/Siskinds (together) issued the claim in June 2013. It kept abreast of developments in U.S. Action. It claimed against the additional defendants in July 2013 when those parties were identified. It sought out case management. It was involved in instructing Dr. Reutter in preparing his report in the B.C. Action. It then consulted with him to refine the claim in the Shah Action.

[36] By contrast, the Wilson Action was filed by Consumer in February 2013.¹³ Little appears to have been done until the carriage motion was raised, at which time Rochon Genova LLP became involved. Mr. Rochon was not involved in preparing the pleading and, while he considers the content to be excellent, he proposes to revise it from a style perspective (as it is based on the U.S. style). Rochon/Consumer has not yet added the other defendants, although it proposes to do so. It only just recently consulted Mr. Schwarz. It is in the process of catching up. I find that it is in the interests of the class to continue with the progress that Sotos/Siskinds has made in the Shah Action.

[37] Considering the relevant factors set out above, I conclude that granting carriage to Sotos/Siskinds in the Shah Action is in the best interests of the class.

Disposition

[38] Order accordingly.

[39] On the agreement of counsel, there are no costs awarded on this motion.


Conway J.

Date: March 24, 2014

¹³ Consumer confirmed that it did not register the Wilson Action on the Canadian Bar Association registry of class actions as required by the Practice Direction of the Superior Court of Justice of Ontario.