

COURT FILE NO.: 03-CV-1679

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: JEFFREY CHARLES BONDY and NICOLAS JOHN MacPHERSON
(Plaintiffs/Respondents) – and – TOSHIBA OF CANADA LIMITED and
TOSHIBA CORPORATION (Defendants/Moving Parties)

BEFORE: JUSTICE G. E. TAYLOR

COUNSEL: D. O. Connor and A. Dewar, for the Applicant

W. Sasso and J. Kalajdzic, for the Respondent

HEARD: June 29, 30, and July 5, 2006

ENDORSEMENT

Introduction

[1] Toshiba seeks leave to appeal from the Order of the Honourable Mr. Justice Brockenshire dated April 21, 2006 dismissing a motion to strike the Statement of Claim as disclosing no cause of action.

[2] The order sought to be appealed, being an interlocutory order, this motion is governed by Rule 62.02(4) of the *Rules of Civil Procedure* which reads as follows:

Leave to appeal shall not be granted unless:

- (a) there is a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal and it is, in the opinion of the judge hearing the motion, desirable that leave to appeal be granted; or
- (b) there appears to the judge hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in his or her opinion, leave to appeal should be granted.

[3] Toshiba argues that leave to appeal ought to be granted under either of the two tests as contained in Rule 62.02(4).

The Litigation

[4] The plaintiffs commenced this action by way of Notice of Action dated October 31, 2003. They bring this action pursuant to the *Class Proceedings Act, 1992*. The Statement of Claim was

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dated December 1, 2003. It was amended on February 25, 2005. No Statement of Defence has as yet been delivered.

[5] The claim is based on the alleged deficient performance of notebook computers designed, manufactured and distributed by the defendants. The Statement of Claim alleges negligence, breach of warranty, breach of section 52 of the *Competition Act* and negligent misrepresentation. There have been two Demands for Particulars to which the plaintiffs have responded.

[6] Justice Brockenshire is the case management judge for this lawsuit.

Reasons of Brockenshire J.

[7] Justice Brockenshire declined to strike any portions of the Statement of Claim. He recognized that the plaintiffs' claim was for pure economic loss. He specifically noted at para. 4 that:

This motion was brought before any of the usual affidavits, cross-examinations or examinations, usual in preparation for a Certification Motion had taken place, ...

He applied the test that a pleading should only be struck if it is plain and obvious that no reasonable cause of action is disclosed, that the facts pleaded are to be taken as proven, that the novelty of a proposed cause of action is no bar to a proceeding and the Statement of Claim is to be read generously to accommodate drafting deficiencies. This is the test set out in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.

[8] From a reading of Justice Brockenshire's Reasons, it appears that he was alive to the issue that the claim is one for pure economic loss without the potential to cause injury to persons or property. At paragraph 15 of his Reasons, he appears to acknowledge that this claim potentially raises a novel cause of action in that it involves a claim of negligent design and manufacture combined with a claim of negligent misrepresentation.

[9] With respect to Toshiba's argument that the claim for breach of section 52 of the *Competition Act* is statute barred, Brockenshire J. took the position at paragraph 20 of his Reasons that a Statement of Defence and Reply, if any, should be delivered before that issue could be properly addressed

[10] With respect to the claim for negligent misrepresentation, Justice Brockenshire ordered that the plaintiffs provide further particulars.

[11] In summary, from my reading of Justice Brockenshire's Reasons, it appears to me that he came to the conclusion that it was premature to strike any portions of the Statement of Claim but recognized that the question of whether the plaintiffs' claims are valid and properly pleaded might be revisited at a future date.