

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

Jeffrey Charles Bondy and Nicolas John
MacPherson

Plaintiffs/Responding Party

- and -

Toshiba of Canada Limited and Toshiba
Corporation

Defendants/Moving Party

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)
) Allan Rock, Q.C. and Jasminka Kalajdzic,
) for the Plaintiffs
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) David F. O'Connor and Jay Adam Dewyer,
) Assistant, for the Defendants
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) HEARD: June 19, 2007
)

DECISION RE LEAVE TO APPEAL

Patterson J.:

[1] It was alleged in the certification application on behalf of the proposed representative plaintiffs' Bondy and MacPherson that a certain type of computer, namely, a Toshiba Satellite 5000 Series notebook (Notebook) had a common design problem namely, that its cooling system was inadequate and which caused the unit to overheat and shut down or otherwise not perform as advertised.

[2] Toshiba has yet to file a statement of defence, but in the interim, responded to the certification application with a Rule 21 motion to strike out the statement of claim in which they were not successful. They also were not successful in a leave to appeal the rule 21 decision.

[3] Toshiba then attempted to strike the plaintiffs' pleadings for lack of particulars and did not succeed.

[4] The certification motion was heard by Justice Brockenshire in December 2006. Justice Brockenshire released his decision on March 2, 2007, certifying the matter. I have reviewed Justice Brockenshire's decision and I am satisfied that he applied standard, settled law to the particular facts of the case before him and he exercised his discretion to certify the action as a class proceeding. I am further satisfied that, in the exercise of his discretion he did not conflict with any other decision and that he made no error in law in reaching his decision.

[5] His Honour reviewed the factual basis on which he believed that s. 5(1) criteria of the *Class Proceedings Act (CPA)* was established.

[6] In examining Toshiba's notice of motion seeking leave and the grounds for that motion, including oral argument, it is my opinion that they were attempting to argue the merits of the action. Among the various arguments made by Toshiba, it was apparent, for obvious reasons, that they prefer their own expert to the expert of the plaintiffs, including the argument that the plaintiffs' expert is not qualified. Both experts were qualified and it will be for the trial judge to determine what and whose evidence he or she accepts.

[7] Justice Brockenshire was clearly satisfied that there was "some basis and fact" as to the dispute about the computers overheating problem and that there was a triable issue as to whether it performed as advertised. Therefore, Justice Brockenshire found that these issues clearly would represent a common issue for trial.

[8] There was evidence before Justice Brockenshire as to the plaintiffs' making a complaint during the warranty period as to the performance of the Notebook.

[9] Toshiba requested that a new affidavit by Michelle Booth be considered part of this leave application. It referred to other class actions in Canada against manufacturers for alleged shoddy goods and other class actions in Canada brought against manufacturers and/or distributors of allegedly dangerous goods. I denied Toshiba's request to include the Booth affidavit as part of the leave application as I did not accept the fact that the matters outlined in the affidavit were of such public importance that it be considered by me. The matter before the court in this class action is whether or not certain Toshiba laptops performed as advertised, having regard to the allegation that they lacked the appropriate cooling system and therefore shutdown or did not perform as advertised. The class action is an interlocutory procedural order. There is no need at this stage to consider an additional affidavit filed concerning a generic issue concerning defectively manufactured or shoddy works.

[10] The motion's judge making a certification order is to be accorded substantial deference and, in particular, a decision as to preferable procedure is "entitled to special deference because it involves weighing and balancing a number of factors." *Pearson v. Inco Ltd.* (2006), 78 O.R. (3d) 641. *Pearson* also establishes that a motion's judge can make findings of fact and those findings are not reviewable absent palpable and overriding error.

[11] Section 30(2) of the *CPA* requires leave from a Superior Court Judge from an order certifying a class proceeding in order to establish leave to appeal, the *Rules of Civil Procedure*, Rule 62.02(4) applies.

[12] Leave 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 that it is 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.

[13] In order to establish under s. 62.02(4)(b) there is good reason to doubt the correctness of the order in question it must be a question is open to "very serious debate." *Ash v. Lloyd's Corporation* (1992), 8 O.R. (3d) 282.

[14] If the judge applies correct principles, there is no reason to doubt the correctness of the order in question.

[15] Also, the matter must be of such importance that in the court's opinion leave to appeal should be granted. The courts have repeatedly said importance transcends the interest of the immediate parties to litigation and involves matters relevant to the development of the law and the administration of justice. *Greslik v. Ontario Legal Aid Plan*, (1988), 65 O.R. (2d) 110 (Div. Ct.).

[16] Just because the matter is a class action that does not in itself, engage the issue of matters of public importance. It has been held that any intervention by an Appellant Court at the certification level should be restricted to matters of general principle or error in law. The fact that the class action involves similar claims of product liability, does not satisfy the public importance requirement of s. 62.02(4)(b), since class actions necessarily turn on their particular facts. Swinton J. in *Boulanger v. Johnson & Johnson Corp.*, [2007] O.J. No. 1991 (S.C.J.) at paras. 13 and 15 stated:

While the decision is of great importance to the parties, in my view, there is no issue of general public importance that requires the attention of the appellate court. The certification motion is procedural and interlocutory in nature. The motions judge applied well-established principles of law to the facts of the case before her.

[17] These comments, in my opinion, are equally applicable to the case before me.

[18] The defendants various arguments appear to me to be in disagreement with the conclusion Justice Brockenshire reached when he applied correct principles of law.

[19] In my opinion, it cannot be said that there is any “very serious debate” about the correctness of Justice Brockenshire’s order. There have been product liability cases previously certified and it is not unusual that the parties’ respective experts disagree.

[20] It is not the function of the court at the certification stage to decide disputed questions of fact that would be raised by the proposed common issues or for those that are otherwise directly relevant to the merits of the plaintiffs’ claim. *Andersen v. St. Jude Medical Inc.* [2003] O.J. No. 4314 (S.C.J.).

[21] Justice Nordheimer in *Hague v. Liberty Mutual Insurance Co.* (2005), 13 CPC (6th) 31 at para. 75 stated the following:

Given that fundamental fact (the *Class Action Proceedings Act*, 1992 “does not require preliminary merits showing”) I conclude that it is inappropriate on a certification motion to engage in an evaluation of the strength or weakness of a given party’s evidence, especially expert evidence. That is properly the function of a trial judge. Other than being satisfied that there is “some evidence” to support a party’s assertions, the certification judge should not engage in a weighing of competing evidence. To do so would not only embark on a preliminary merits review, it would also ignore the recognized reality that a motion is generally an unsuitable forum in which to make such evaluations.

[22] This was recently supported by the Court of Appeal in *Cloud v. Canada (Attorney General)*, [2004], 73 O.R. (3d) 401 (C.A.).

[23] Toshiba argues as to whether or not there is an existence of a class other than those who are plaintiffs. A similar argument was dealt with by Nordheimer J. in *Hague v. Liberty Mutual Insurance Co.* (2005), 13 C.P.C. (6th) 31 where he found an identifiable class and that it was obvious that the proposed class consisted of two or more persons and stated that there was “no obligation on the representative plaintiffs to have contacted members of the proposed class to prove they exist when the facts axiomatically establish that is the case.”

[24] There is no reason to doubt the correctness of Justice Brockenshire’s finding that there existed an identifiable class. In my opinion, it was based on objective criteria that was neither overly broad nor under inclusive.

[25] In regard to the adequacy of the action plan, Justice Brockenshire directly applied the appropriate principles in determining that the representative plaintiffs had produced a workable plan for advancing the proceeding utilizing the approach of the Court of Appeal in *Cloud v. Canada (Attorney General)*, *supra*. An action plan may be subject to amendment as the case proceeds.

[26] The issue of one of the representative plaintiffs having his Notebook stolen and him receiving insurance proceeds, or the fact that another of the class plaintiffs may have spilled

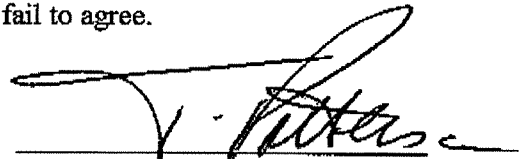
ginger ale on his Notebook, are issues that can be dealt with at trial. There is no basis for granting leave of this appeal on this ground.

[27] Aggregate damages are to be left to the trial judge. Justice Brockenshire speculated that he had no difficulty imaging a possible aggregate award of damages in some amount. There is no reason to doubt His Honour's order on this ground.

[28] There is no serious debate as to the correctness of Justice Brockenshire's order. Whether the plaintiffs will be successful in proving negligence and recovering pure economic loss for non-dangerous shoddy goods is an issue for trial in this action and is wholly irrelevant to determining whether other product liability class actions are appropriate cases for certification. *Boulanger v. Johnson & Johnson, supra.*

[29] It is therefore ordered that the defendants' motion for leave is dismissed.

[30] I may be spoken to on the matter of costs if the parties fail to agree.



Terrence L.J. Patterson
Justice

Released: July 10, 2007

COURT FILE NO.: 03-CV-1679
DATE: July 10, 2007

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