

**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.

### Positions of the Parties

[12] Mr. O'Connor, for Toshiba, argues that it is necessary for me, as the judge hearing the motion for leave to appeal, to consider the cases dealing with the principles of law underlying the plaintiffs' claims. He submits that there are both conflicting decisions and good reason to doubt the correctness of Justice Brockenshire's Order. He goes on to submit, as he must, that it is desirable that leave to appeal be granted or that the proposed appeal involves matters of general importance.

[13] Mr. Sasso, for the plaintiffs, takes the position that Justice Brockenshire applied the correct test, namely whether it is plain and obvious at this stage of the proceeding that the plaintiffs cannot succeed with their claims as pleaded. He says that the law with respect to claims for pure economic loss is in a state of flux as a result of which there probably are decisions which might be said to conflict with the Order of Brockenshire J. However, he submits that I should approach my task on the basis that, at best, from the defence perspective, the Statement of Claim pleads a novel cause of action, which, it cannot be said, at this stage, is doomed to fail.

### Argument of the Motion for Leave to Appeal

[14] The argument before me was thorough, well-prepared and comprehensive. I have no doubt that the same comments would apply to the argument before Justice Brockenshire. As I commented to counsel during the course of submissions, I find it ironic that the argument for leave to appeal took at least as long as the argument before Brockenshire J. Now four plus days of court time have been devoted to arguments regarding the sufficiency of the Statement of Claim prior to the delivery of the Statement of Defence. While I appreciate the importance of these issues to the parties, I cannot help but feel that this result was not intended by the drafters of the Rule dealing with leave to appeal from interlocutory orders.

### Discussion

[15] I have come to the conclusion that the correct approach for me to take is that suggested by the plaintiffs. The test to be applied is that set out in *Hunt v. Carey, supra*. As stated at page 980 of that decision, the test to be applied in determining whether a Statement of Claim should be struck is whether, assuming the facts as pleaded can be proved, is it "plain and obvious" that the plaintiffs' Statement of Claim discloses no cause of action. That is the test applied by Justice Brockenshire. There are no conflicting decisions with respect to the test to be applied when dealing with the issue of whether a Statement of Claim discloses a cause of action. There is also no reason to doubt the correctness of the Order of Brockenshire J.. I note also that in *Hunt v. Carey*, when dealing with the conspiracy claim that was an issue in that case, Justice Wilson asked the question: "Is it plain and obvious that allowing this action to proceed amounts to an abuse of process?". While Justice Brockenshire did not use that same language, it is clear that he did not feel that the claim in this proceeding was an abuse of process.

[16] Mr. O'Connor submits that the case of *Zidaric v. Toshiba of Canada Ltd.*, [2000] O.J. No. 4590 is a decision that directly conflicts with the Order of Brockenshire J. I disagree. That case dealt with a claim for allegedly faulty computers designed, manufactured and distributed by

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the same defendants as in the present case. The decision does not specify the precise wording of the allegations in the Statement of Claim which were held not to disclose a reasonable cause of action. The plaintiff in *Zidaric*, in addition to a rebate of part of the purchase price, sought injunctive relief, an accounting of profits made by the defendants and rescission. In addition, the decision makes it clearer that there was no claim based on misrepresentation or collateral contract. Such claims are present in the Statement of Claim in this action. I therefore do not read *Zidaric* as being anything more than a decision based on the particular facts in that case.

[17] A considerable amount of time was spent during the course of argument dealing with the question of whether a claim for pure economic loss with no allegation of potential damage to persons or property is a viable claim in Canada. Numerous authorities were cited in support of both sides of that argument. I do not intend to review those authorities in detail. I do not believe that is the role of the judge hearing a motion for leave to appeal from an interlocutory order. I will simply say that based on my review of the cases referred to by counsel, there is a slight possibility that a claim for pure economic loss, as pleaded in the present statement of claim, will be recognized as a viable claim in Canada. See *Haskett v. Equifax Canada Inc.* (2003), 63 O.R. (3D) 577 and *Gariepy v. Shell Oil Co.* (2002), 23 C.P.C. (5<sup>th</sup>) 360.

[18] It would appear that the approach I have adopted differs from the approach taken by the judges hearing the motions for leave to appeal in cases such as *Mitchell (Litigation Administrator) v. Ontario* [2003] O.J. No. 3313, *Klein v. American Medical Systems Inc.* [2006] O.J. No. 2188 and *Serhan Estate v. Johnson & Johnson* [2004] O.J. No. 4580. In those cases it is clear that the judge hearing the motion for leave to appeal addressed the underlying legal principles applicable to the causes of action alleged in the Statements of Claim. Leave to appeal in each of those cases was then granted on the basis that the judge hearing the original motion made an order which conflicted with one or more other orders or that there was reason to doubt the correctness of the original order.

[19] If the correct approach is that set out in *Mitchell, Klein and Serhan*, then the defendants have satisfied the first branch of each of the tests as set out in Rule 62.04. However, I am not satisfied that the second branch of the two tests has been met.

[20] In *Greslik v. Ontario Legal Aid Plan* (1998), 65 O.R. (2d) 110, Associate Chief Justice Callaghan, as he then was, had occasion to remind judges hearing motions for leave to appeal from interlocutory orders that "general importance" relates to matters of public importance and matters relevant to the development of the law and the administration of justice as opposed to matters of importance only to the litigants. See also *Rankin v. McLeod, Young, Weir Ltd.* (1986), 57 O.R. (2d) 569.

[21] Mr. O'Connor argues that it is important for the Divisional Court to rule on the issue of whether a claim for pure economic loss without the possibility of damage to persons or property is a viable cause of action. In my view, it is possible that the Divisional Court would simply conclude, as did Justice Brockenshire, that at this stage of the proceedings, it is premature to strike the Statement of Claim. I note that this is essentially the result obtained in *Serhan v. Johnson & Johnson*, [2006] O.J. No. 242 (Div. Ct.). There is no question that this is an important issue as between the parties but I do not see that there is any overriding public interest

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in whether this Statement of Claim is struck, struck leave to amend, requires particulars or is allowed to proceed forward to the stage of certification. Unlike cases such as *Mitchell, Klein, Cooper v. Hobart*, [2001] S.C.J. No. 76 and *Edwards v. Law Society of Upper Canada*, [2001] S.C.J. No. 77, the present case does not involve the potential liability of a public or quasi public body. The present case involves a dispute between private individuals and corporations, only.

[22] Further, and perhaps more importantly, in my view, it is not desirable that leave to appeal be granted. It is for good reason that the Legislature directed that class proceedings be case managed by a judge. It is preferable that the case management judge deal with motions with respect to the sufficiency of pleadings. It is not desirable that proceedings and in particular, class proceedings be delayed by appeals to the Divisional Court. As stated previously, I do not read the reasons of Justice Brockenshire as foreclosing future motions with respect to the claims being asserted by the plaintiffs in this action. Rather, he simply stated that the record should be more complete before dealing with those issues. He is in a better position, as case management judge, than myself or the Divisional Court to address these matters.

[23] Finally, in my view, it is not desirable that protracted litigation be encouraged with respect to the sufficiency of pleadings, particularly prior to delivery of a Statement of Defence and particularly when this same issue can, and undoubtedly will, be raised at the certification hearing on a more complete record. It is not desirable that valuable court time be expended on three occasions to argue the same legal issues; once on the original motion, once on the leave to appeal motion, and if leave is granted, before the Divisional Court. I recognize that if the result before Justice Brockenshire had been different, the plaintiffs would have had an automatic right of appeal but the requirement for leave to appeal an interlocutory order is appropriate because the defendants are still entitled to present their case subsequently. Had the plaintiffs been unsuccessful, their action would have been at an end.

### Conclusion

[24] For these reasons the motion for leave to appeal the Order of Justice Brockenshire dated April 21, 2006 is dismissed. The plaintiffs are entitled to costs. I will entertain written submissions with respect to costs. Submissions on behalf of the plaintiffs are to be delivered within 14 days. Responding submissions from the defendants are to be delivered within 14 days of the plaintiffs' submissions.



Justice G. E. Taylor

DATE: July 25, 2006