

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Lam v. University of British Columbia*,
2008 BCSC 990

Date: 20080725
Docket: S035269
Registry: Vancouver

Between:

Howard Lam

Plaintiff

And:

University of British Columbia

Defendant

And:

Arpel Industries Ltd., carrying on business as Arpel Security Systems, Arpel Security Systems Ltd., Arpel Security and Monitoring Ltd., Enerand Holdings Ltd., carrying on business as Caltech Tech Services, Peter Moore, carrying on business as Moore Security Systems, Thermo Forma Inc., Vancouver Coastal Health Authority, operating as Vancouver General Hospital and UBC Hospital, Mallinckrodt Inc., and Sanyo Electric Co. Ltd.

Third Parties

Before: The Honourable Mr. Justice Savage

Reasons for Judgment In Chambers

Counsel for the Plaintiff:	S.J. Kovacs
Counsel for the Defendant UBC:	R.B. Kennedy R. Panton
Counsel for the Third Party Enerand Holdings Ltd.:	W.K. Branch C. Rhone
Counsel for the Third Party Vancouver Coastal Health Authority:	J. Dives
Counsel for the Third Party Arpel Industries Ltd.:	W.G. Neen
Counsel for the Third Party Peter Moore and Moore Security:	M.J. Jackson
Counsel for the Third Party Mallinckrodt Inc.:	W.A. Ferguson
Counsel for the Third Party Sanyo Electric Ltd.:	No Appearance
Date and Place of Hearing:	July 17, 2008 Vancouver, B.C.

Introduction

[1] This is an application by a third party Enerand Holdings Ltd. (“Enerand”) for a stay of certain third party proceedings, in an action in which there is a pending application for certification of certain questions pursuant to the ***Class Proceedings Act***, R.S.B.C. 1996, C.50. The application is supported by some of the third parties and the plaintiff but not by Sanyo Electric or Mallinckrodt.

[2] The plaintiff Howard Lam (the “Plaintiff”) seeks damages from the defendant University of British Columbia (“UBC”) as a result of an alleged loss of sperm samples held in UBC’s freezer. The samples were held to guard against the risk of infertility following cancer treatment.

[3] The Plaintiff in his Certification Motion seeks to certify certain questions as common issues including whether UBC was negligent in respect of the storage of class members sperm. UBC has third partied six parties (exclusive of related entities) that arguably had involvement with the storage. It pleads the provisions of the ***Negligence Act***, R.S.B.C. 1996, C.333.

[4] UBC opposes the stay application. UBC says that a stay should not be pre-emptively granted in circumstances where there is a pending application for certification of a matter under class proceedings legislation.

[5] UBC says that there is no authority to grant a stay in such circumstances, and that a stay would potentially prejudice UBC’s ability to properly defend its interests. UBC says that there is no prejudice arising to the third parties requiring them to wait the outcome of the Certification Motion. In the alternative, it says that the application should be denied.

[6] For reasons of economy I determined to hear argument concurrently on both issues, namely whether the application is premature and whether a stay should be granted.

Order Sought

[7] Enerand seeks the following orders:

1. This proceeding be stayed against the Third Party, Enerand Holdings Ltd. (“Enerand”) until the conclusion of the trial of any certified common issues;
2. That Enerand shall not be bound by findings of fact made at the trial of the common issues and is granted an opportunity to introduce contrary evidence at the trials of the third party claims, except that rulings on any certified common issues will be binding on Enerand;
3. The Plaintiff, Defendant and Enerand are at liberty to apply to lift the stay in whole or in part as circumstances may require; and
4. Costs.

The Authorities

[8] The parties referenced the decisions of Hutchison J. in **Campbell v. Flexwatt** [1996] B.C.J. No. 1487 (“**Flexwatt No. 1**”) and **Campbell v. Flexwatt** [1996] B.C.J. No. 2052 (“**Flexwatt No. 2**”).

[9] In **Flexwatt No. 1** Hutchinson J., having come to, *inter alia*, the general conclusion that a means other than a class proceeding is not more practical and efficient for resolving the issues, described the order of his deliberations as follows:

48 Having come to these general conclusions then I must deal with which of the common issues and what question or questions should be posed first, whether the action should or should not be certified as against some defendants and not others, and if certified, whether they should be stayed until some of the common issues are tried and disposed of.

[10] In **Flexwatt No. 1**, then, the order of deliberations involved consideration of the general question of certification, determination of which common issues and questions should be posed, whether the action should be certified against some defendants and not others, and if certified, whether certain proceedings should be stayed.

[11] UBC argues that in **Flexwatt No. 2**, implicit in Hutchinson J. reasons, is that it would not be possible to make stay determinations regarding some third parties before

determining the exact issues to be determined at the common issues trial.

Hutchinson J. said:

6 In making my decision regarding certification, I stayed the proceedings as against both the municipal defendants and the municipal third parties pursuant to s.13 of the C.P.A. Unfortunately, my previous reasons do not make it clear whether that order means that those municipalities will be bound by any findings of fact made after a trial of the preliminary common issues.

[12] It is clear that in *Cooper v. British Columbia (Registrar of Mortgage Brokers)*, [1999] B.C.J. No. 1360 Tysoe J., as he then was, considered the issue of a stay only after the proceeding had been certified. Tysoe, J. noted:

11 If the action is certified as a class proceeding, there will also be issues of whether, and on what terms, the third party proceedings should be stayed until the outcome of the trial of the common issues.

[13] After concluding that the requirements of section 4(1) of the *Class Proceedings Act* had been met, and the action should be certified, Tysoe J. then went on to consider whether the claims against the third parties should be stayed pursuant to section 13 of the Act. He concluded that they should be stayed, disagreeing with the position of the defendants that a significant portion of the trial of the common issues would be involved with an investigation into the activities of the third parties.

[14] Of course, a stay under section 13 of the Act presupposes there is a class proceeding. Section 13 of the Act provides:

13 The court may at any time stay any proceeding related to the class proceeding on the terms the court considers appropriate.

[15] The term “class proceeding” is defined in section 1 of the Act. It means:

"class proceeding" means a proceeding certified as a class proceeding under Part 2;

[16] Thus, section 13 only authorizes the court granting a stay of proceedings once *the* proceeding has been certified. The proceeding has not been certified as a class proceeding so section 13 of the Act is of no assistance. It does, however, indicate that

within the context of the ***Class Proceedings Act*** the power to grant a stay of proceedings as derived from the Act is consequent upon certification.

[17] UBC cites authorities from Ontario that come to a similar conclusion.

[18] In ***Attis v. Canada (Minister of Health)*** (2005), 75 O.R. (3d) (S.C.J.), Winkler J. considered certain applications in the context of an intended class proceeding against Canada. The issue arose in the context of a case conference dealing with a scheduling motion. The defendant and third party objected to the scheduling of the certification motion, seeking that the third party's intended motion to strike the third party notice be scheduled and decided in advance of the certification motion.

[19] Winkler J., as he then was, opined:

[7] As a matter of principle, the certification motion ought to be the first procedural matter to be heard and determined. This may be inferred from s. 2(3) of the *Class Proceedings Act*, 1992, S.O. 1992, c. 6 ("CPA") which provides that a certification motion shall be made within 90 day after the last statement of defence, except with leave of the court. While this time limit is more often observed in the breach in that it is rarely achieved in practice, it does serve to emphasize the rationale for an early determination of certification because of the ramifications of the CPA to the proceeding, not the least of which is the binding effect on the class members of the determination of the common issues in a common issues trial.

[20] Sections 2(3) and 13 of the ***Ontario Act*** are similar in these respects to section 2(3) and 13 of the British Columbia statute.

[21] In the result, the motion on the third party claim was stayed until the certification motion was heard and determined.

[22] In ***Baxter v. Canada (Attorney General)*** (2005) 139 A.C.W.S. (3d) 627, [2005] O.J. No. 2165, the Ontario court reiterated its view that the certification motion should generally be heard in priority to other motions.

[23] While there are instances where there can be exceptions to the rule, such as where the determination of preliminary motion would benefit all parties, or further the

objective of judicial efficiency, those exceptions have the positive effect of “narrowing the issues, focusing the case and moving the litigation forward” (paragraph 14).

[24] In ***Drady v. Canada (Minister of Health)*** [2007] O.J. No. 2812, Cullity J. opined in obiter dicta that, were the question not moot, the stay of third party proceedings should await the final disposition of certification proceedings, approving the principles in ***Baxter*** and ***Attis***.

[25] The third parties argue that this court, in any event, has the jurisdiction to stay third party proceedings pursuant to its inherent power to control its own process reasonably, and pursuant to the rules of court: ***Aylesworth v. Richardson Greenshields*** [1987] B.C.J. No. 2358, Rules 22(17), (18) and (19).

[26] As noted in ***Aylesworth*** and ***Module Resources Inc. v. Sookochoff*** (1997), 41 B.C.L.R. (3d) 319, if third party proceedings will lengthen the trial significantly the plaintiff will suffer prejudice and delay. The timely access to justice is an essential factor which represents the *raison d'être* for class action legislation generally: ***Hollick v. Metropolitan Toronto***, [2001] 3 S.C.R. 158.

[27] While I agree with these general principles, in my view, in the context of this proceeding, in which an application for certification is has been made and has been scheduled, the application for a stay of the third party proceedings is premature.

[28] The terms of the proposed orders presuppose the application for certification is successful. For example, the proposed order that “this proceeding be stayed against the Third Party, Enerand Holdings Ltd. (“Enerand”) until the conclusion of the trial of any certified common issues”, does not specify any time, if certification is not successful. UBC in this application says it will oppose certification.

[29] If the application for certification is successful then the application for a stay is properly heard pursuant to section 13 of the Act, concurrent with or consequent upon and taking into consideration the precise questions certified by the court. In the circumstances, I would adjourn the application for a stay of proceedings which is more appropriately heard concurrently with or following the Certification Motion.

The Merits of the Stay Application

[30] In light of my determination on the preliminary matter it would be inappropriate for me to comment on the merits of the stay application.

Order

[31] The application for a stay of proceedings is adjourned until the hearing of the Certification Motion.

“The Honourable Mr. Justice Savage”