IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Lam v. University of British Columbia,*** 2009 BCSC 196

Date: 20090219
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 Butler

Reasons for Judgment

Counsel for the Plaintiff	Sandy J. Kovacs
Counsel for the Defendant	George K. Macintosh, Q.C. Robert B. Kennedy
Counsel for the Third Parties, Arpel Industries Ltd., carrying on business as Arpel Security Systems, Arpel Security Systems Ltd. and Arpel Security and	William G. Neen

Monitoring Ltd.	
Counsel for the Third Party, Enerand Holdings Ltd., carrying on business as Caltech Tech Services	Ward K. Branch
Counsel for the Third Party, Peter Moore, carrying on business as Moore Security Systems	Michael Jackson
Counsel for the Third Party, Vancouver Coastal Health Authority operating as Vancouver General Hospital and UBC Hospital	John Dives
Counsel for the Third Party, Mallinckrodt, Inc.	William A. Ferguson
Counsel for the Third Party, Sanyo Electric Co., Ltd.	Bradley W. Dixon
Date and Place of Hearing:	August 25-27, 2008 Vancouver, B.C.

[1] On May 24, 2002, the supply of electricity to a Forma Scientific Inc. freezer operated by the University of British Columbia Andrology Lab (the "Lab") was interrupted when a circuit breaker tripped. The freezer was a cryopreservation unit for storing cells at a temperature below -130 degrees Celsius. The freezer contained sperm samples belonging to Howard Lam, the plaintiff, and other men who were undergoing chemotherapy or other medical treatments that could adversely affect their reproductive capacity. The freezer's security alarm system failed to function. The freezer was without electrical power for some time. The resulting drastic rise in temperature associated with the power failure rendered the sperm immotile and may have destroyed their genetic material. Mr. Lam is seeking an order certifying this proceeding as a class action, pursuant to the ***Class Proceedings Act***, R.S.B.C. 1996, c. 50 (the "***Act***"), on his own behalf and on behalf of all others who had sperm samples stored in the freezer.

[2] The claims against the University of British Columbia ("UBC") are brought in contract and negligence. UBC's defence to the contract claim is based on the limitation of liability provisions, the exclusion clause, contained in the Sperm Bank Facility Agreement (the "Agreement") entered into with the Lab's clients. In response to the claim in negligence, UBC also relies on the exclusion clause in the Agreement; it further says it was not negligent. It says it met the applicable standard of care for an operator of a sperm storage facility. UBC has issued third party notices to parties involved in the freezer's manufacture and distribution, its installation at the Vancouver General Hospital ("VGH") in 2001, and its security alarm system installation. UBC says that the evidence relating to the liability of

the third parties is critical to determining whether UBC met the appropriate standard of care for a sperm storage facility operator.

[3] UBC opposes the certification on the basis that the threshold issue, enforceability of the exclusion clause in the Agreement, is not a common issue because the effect of that contract provision may differ depending upon the interaction between each client and UBC's employees. The parties agree that the assessment of damages is an individual issue for each claimant. UBC says that where both liability and damages will be determined based on individual issues, a class proceeding is not the preferable procedure for a fair and efficient resolution of the common issues. UBC also says that the proposed litigation plan is unworkable because it proposes consideration of the standard of care issue without the participation of the third parties. It argues that the third parties need to be present at any determination of that issue. It also says that the nature of the third party claims is such that some procedure other than a class proceeding is preferable.

[4] I have concluded that this action is not suitable for certification as a class proceeding. Those issues which could be certified as common issues would not appreciably advance the proceedings. Further, given the importance of the individual damage and liability issues, a class action is not the preferable procedure for determination of any common issues that arise in this case.

Background

[5] Andrology is the study of male reproductive health and dysfunction. The Lab was established in 1981. The clinical work of the Lab has always included sperm storage for men undergoing potentially sterilizing medical treatments. Sperm storage was not carried on as a commercial venture, but rather, as a service to those individuals.

The Freezer

[6] The freezer was purchased by UBC in July 1987. It was initially used for kidney research, but in 1993, it was transferred to the Lab at the Koerner Pavilion at UBC Hospital. The freezer remained in the UBC Hospital until it was moved on February 22, 2001, to the Lab's new location at VGH.

[7] The freezer had a nameplate installed by the manufacturer or distributor that provided some technical information, as well as the name and model of the freezer. The nameplate indicated that the freezer drew 9 amperes. The freezer was hard-wired by the VGH maintenance employees and connected to a 15 ampere circuit breaker, which was appropriate for the amperage shown on the nameplate. It was subsequently learned that the freezer drew 12.5 to 13 amperes, which meant that it needed a 20 ampere circuit breaker. Documentation for the freezer also indicated that it required a 20 ampere circuit breaker; there is an issue, however, as to whether that documentation was in UBC's possession. The freezer also had a plug attached to it that would indicate the need for a 20 ampere circuit breaker.

[8] It is evident that there are numerous issues that will need to be explored between UBC and the third parties regarding responsibility for the installation of the undersized circuit breaker.

[9] Moore Security Systems ("Moore Security") was retained in January 2002 to install and monitor the security alarm system for the freezer. Moore Security's alarm system was intended to create an alarm in the event of a power interruption to the freezer or in the event of an increase in the freezer's internal temperature. Caltech Tech Services was retained by Moore Security to assist with the alarm system installation and to provide technical advice to Moore Security regarding the freezer system. The alarm system was not connected to an internal "Performance Monitor System" in the freezer, nor was a relay included in the Moore Security alarm system. As a result of these or other shortcomings in the system, no alarm was sounded when the power supply to the freezer was interrupted.

The Agreement

[10] Clients who used the storage facilities of the Lab were charged a nominal fee and asked to sign the Agreement. The Lab's administrative assistants and technicians were instructed to ensure that each client signed the Agreement before the Lab would store their sperm. The majority of clients did sign the Agreement. The standard practice of the Lab was to give the signed Agreement to the client and retain a copy of only the signature page in the client's file. UBC has been unable to produce signature pages of the Agreement for approximately 25 of the 161 clients who had sperm stored in the freezer.

[11] Over the years, there were some differences in the form of the Agreement. However, UBC says the provision purporting to limit liability set out in each Agreement did not change. It reads as follows at Article 7:

> 7. LIMITATION OF OUR LIABILITY
>
> By signing this Agreement you agree that neither we nor our successors or assigns nor any of our governors, directors, officers, employees or agents will be liable to you or anyone else for any destruction of, damage or alteration to or misuse of your Specimen for any reason whatsoever, including:
>
> (a) the improper testing of your Specimen;
>
> (b) improper freezing of your Specimen;
>
> (c) improper maintenance and/or storage of your Specimen in a frozen state, or
>
> (d) improper withdrawal and/or delivery of your Specimen.
>
> This exclusion of our liability extends to any damage, misuse or impropriety caused by or resulting from any malfunction of our freezing equipment (whether for causes within our control or not) or from any failure of utilities, strike, cessation of services or other labour disturbances or any failure or similar occurrence in our or any other laboratory or from any fire, earthquake or other acts of nature beyond our control, or caused by or resulting from any act, omission or negligent conduct on the part of us or our successors or assigns or any of our governors, directors, officers, employees or agents.

[12] UBC says that the terms and conditions of the Agreement were brought to the attention of all Lab clients. Each client was asked to read and sign the Agreement. Other provisions in the Agreement were intended to draw attention to the legal significance of Article 7.

[13] Mr. Lam is one of the 25 clients who does not have a signature page in his client file. UBC will argue that the terms of the Agreement and the conditions under which UBC was prepared to store the sperm were brought to the attention of those individuals before they agreed to store their sperm at the Lab. It will also argue that those individuals agreed to those terms and conditions.

[14] There are two different forms of the Agreement, each with a different entity named as the service provider and contracting party. The two parties named are:

(1) Department of Gynecology of the University of British Columbia Health Sciences Centre Hospital; and

(2) Department of Gynaecology of the Vancouveer (sic) Hospital and Health Sciences Centre.

[15] Mr. Lam notes that these contracting parties are separate legal entities from UBC. Mr. Lam will argue that UBC cannot claim the benefit of the contract provisions. In its statement of defence, UBC admitted that it entered into the Agreement. Shortly before the certification hearing, it filed an amended statement of defence to allege that the UBC Hospital was the contracting party with Mr. Lam and that UBC is a successor and assign of UBC Hospital. Mr. Lam argued that UBC must seek leave to withdraw the admission made in its original statement of defence. This issue was not argued before me; the certification hearing proceeded on the basis of the original statement of defence. However, it is

evident there is an issue as to which party or parties may be entitled to rely upon the exclusion clause in the Agreement.

The Common Issues

[16] Here, Mr. Lam initially proposed a determination of the "appropriate range of damages" as one of the common issues for certification. At the certification hearing, that issue was withdrawn as a proposed common issue. There are numerous considerations that will have to be taken into account in any damage assessment. Consequently, that determination will be an individual issue for each claimant. These factors include the following:

(a) some of the claimants may have chosen not to have children;

(b) some claimants may have recovered from the treatment and can now produce viable sperm;

(c) some claimants may have partners who are infertile; and

(d) some of the sperm samples may yet be capable of being used for reproductive purposes.

[17] The questions Mr. Lam now proposes as common issues are:

(1) Did UBC owe a duty of care to class members?

(2) What was the standard of care for an operator of a sperm storage facility?

(3) Did UBC breach the standard of care?

(4) Is the exclusion clause in the Agreement unenforceable by being contrary to public policy?

(5) Is the exclusion clause in the Agreement unenforceable by reason of being unconscionable?

(6) Is the exclusion clause in the Agreement enforceable against a class member who did not sign the Agreement?

(7) Is the exclusion clause in the Agreement enforceable given that it does not name the defendant as a party that can benefit from the exclusion clause?

Statutory Provisions

[18] Sections 4(1), 4(2), and 7 of the ***Act*** state as follows:

> 4(1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
>
> (e) there is a representative plaintiff who

> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

4(2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:

> (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
>
> (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
>
> (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
>
> (d) whether other means of resolving the claims are less practical or less efficient;
>
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

...

7. The court must not refuse to certify a proceeding as a class proceeding merely because of one or more of the following:

> (a) the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;
>
> (b) the relief claimed relates to separate contracts involving different class members;

> (c) different remedies are sought for different class members;
>
> (d) the number of class members or the identity of each class member is not known;
>
> (e) the class includes a subclass whose members have claims that raise common issues not shared by all class members.

[19] Before an action can be certified as a class proceeding, the five requirements in s. 4(1) must be met. If they are, then the action must be certified. Here, UBC bases its opposition to certification on ss. 4(1)(c) and (d), whether common issues are raised and whether a class action is the preferable procedure for a fair and efficient resolution of the common issues. It also says that the plaintiff has not put forward a litigation plan that sets out a workable method of advancing the proceeding on behalf of the class, pursuant to s. 4(1)(e)(ii).

[20] I agree that the statement of claim discloses a cause of action (s. 4 (1)(a)), that there is an identifiable class of two or more persons (s. 4(1)(b)), and that the requirements of ss. 4(1)(e)(i) and (iii) have been met. Accordingly, my analysis will be restricted to the statutory requirements in ss. 4(1)(c), (d) and (e)(ii) that UBC says have not been met by Mr. Lam. My decision to deny certification is based on three issues, each of which is considered below:

1. Are there common issues raised by the claims of the class members?

2. Is a class action the preferable procedure for the fair and efficient resolution of the common issues?

3. Does the proposed litigation plan set out a workable method of advancing the proceeding?

Position of Mr. Lam

[21] Mr. Lam's argument focused on the negligence questions that he says are ideally suited for determination as common issues. In product liability cases, British Columbia courts have frequently certified as common issues the fundamental negligence questions of whether the defendant owed a duty of care and whether the standard of care was met: ***Bouchanskaia v. Bayer Inc.***, 2003 BCSC 1306; ***Campbell v. Flexwatt Corp.*** (1997), [1998] 6 W.W.R. 275, 44 B.C.L.R. (3d) 343 (C.A.) [***Campbell***]; and ***Chace v. Crane Canada Inc.*** (1997), 44 B.C.L.R. (3d) 264, 101 B.C.A.C. 32.

[22] Here, Mr. Lam alleges UBC breached the standard of care for a sperm bank operator in numerous ways. Consideration of these alleged breaches requires examination of factual issues, including the questions referred to above regarding the use of the undersized 15 ampere circuit breaker. Other alleged breaches of the standard of care include:

a) use of an electric freezer to store the sperm, rather than liquid nitrogen dewars;

b) failure to have an uninterrupted or back up power supply;

c) use of a single freezer to store all of an individual's sperm instead of dividing samples and storing them in two or more freezers; and

d) failure to have a protocol in place for regular monitoring of the freezer's function in addition to the alarm system.

[23] Mr. Lam says that the proposed common issues would permit a full examination of the questions raised about the appropriate standard of care and whether it was breached. He says there is little doubt that these questions are indeed common, as they must be determined for all claimants.

[24] In response to UBC's reliance on the exclusion clause in the Agreement as a defence to the claims in negligence, Mr. Lam says that a common issue does not need to resolve liability; it simply must move the litigation forward. As noted by Cumming J.A. in ***Campbell*** at paras. 52-53:

> This question of commonality of issues lies at the heart of a class proceeding, for the intent of a class proceeding is to allow liability issues to be determined for the entire class based on a determination of liability of the defendants to the proposed representative plaintiffs.
>
> When examining the existence of common issues it is important to understand that the common issues do not have to be issues which are determinative of liability; they need only be issues of fact or law that move the litigation forward. The resolution of a common issue does not have to be, in and of itself, sufficient to support relief. To require every common issue to be determinative of liability for every plaintiff and every defendant would make class proceedings with more than one defendant virtually impossible.

[25] Mr. Lam emphasized in argument that the three proposed common questions dealing with the claim in negligence are enough on their own to satisfy the requirement for certification in this case. He argues that a determination of these issues would move the litigation forward in a real way. He says that it does

not matter that the defence arising from the exclusion clause would not be dealt with in considering the negligence issues.

[26] Initially, Mr. Lam proposed common issues designed to consider the extent of UBC's contractual obligation to preserve the sperm and whether that obligation was breached. At the certification hearing he withdrew those questions but proposed that Questions 4 to 7, noted above, be certified as common issues. Mr. Lam's proposed common issues thus attempt to pose some, but not all, of the questions that might be raised regarding the exclusion clause. He specifically does not pose the ultimate question as a common issue – whether the exclusion clause can be relied upon by UBC to defeat the claims of the class members.

[27] Mr. Lam argues that Questions 4 and 5, which raise questions of public policy and unconscionability, are significant common issues because UBC is offering a medical service. He says the decision in ***Hobbs v. Robertson***, 2001 BCSC 162, 85 B.C.L.R. (3d) 114 [***Hobbs***], provides support for considering these as common issues.

[28] Mr. Lam says that Question 6 is a valid common issue for all of those claimants for whom UBC does not have a signed Agreement. He says that Question 7 is common to all of those who did sign the Agreement, and also to those who did not if the answer to Question 6 is affirmative.

[29] In considering commonality, Mr. Lam says that the fact that there will be contentious individual issues regarding both damages and enforceability of the

Agreement should not prevent certification. He emphasizes that the ***Act*** is not directed solely at resolving common issues, but also at simplification and effective management of litigation where there are numerous plaintiffs. He argues that the flexibility provided by the ***Act*** will be lost if the action is not certified.

Issue 1. Are there common issues raised by the claims of the class members?

[30] There is no question that the first three common issues proposed by Mr. Lam, Questions 1, 2 and 3 (the "Negligence Issues"), are common issues for all members of the proposed class. As UBC has conceded, Question 1, whether a duty of care was owed, is not difficult to answer in this case. Questions 2 and 3, however, are contentious questions, the resolution of which would advance the claim in negligence.

[31] UBC and some of the third parties have stressed that a court should avoid framing commonality in overly broad terms. As the Supreme Court of Canada warned in ***Rumley v. British Columbia***, 2001 SCC 69, [2001] 3 S.C.R. 184, it does not serve the ends of fairness or efficiency to certify an action on common issues that are stated in the most general terms. A common issue should be one that avoids duplication of fact finding or legal analysis.

[32] Here, the Negligence Issues, while stated in general terms, would avoid duplication of fact finding and legal analysis in the determination of the standard of care and whether it was breached. Accordingly, the statement of the Negligence Issues as common issues satisfies the requirement of s. 4(1)(c) of the ***Act***.

[33] The other four proposed common issues, Questions 4, 5, 6 and 7 (the "Contract Issues"), raise questions relating to the claim in contract. I have concluded that none of the Contract Issues are common. Questions 4 and 5 ask whether or not the exclusion clause is unenforceable, either as being contrary to public policy or unconscionable. The commonality of those two questions can be considered together. Questions 6 and 7 must be considered separately.

[34] Before considering these questions, it is worthwhile to set out principles relevant to all of the proposed Contract Issues. It is possible for standard form contracts to raise common issues for determination in class proceedings. However, this is only the case where there is no need to resort to evidence of matters outside of the language of the contract, or, alternatively, where it can be seen that the external context is common across members of the proposed class: ***De Wolf v. Bell ExpressVu Inc.***, [2008] O.J. No. 592, 2008 CarswellOnt. 818 (S.C.J.) at paras. 30-33. Where the real questions raised by the interpretation of the standard contract require an examination of the factual matrices that are different for each individual, it is not possible to state or resolve common issues.

[35] This issue arose in ***Koo v. Canadian Airlines International Ltd.***, 2000 BCSC 281, where the representative plaintiffs claimed on behalf of airline passengers for breach of contract in circumstances where it was alleged that flights were deliberately oversold. One of the issues raised was whether the Tariffs, the conditions of carriage filed by the defendant airline with the Canadian Transportation Agency, could be relied upon to defeat or limit the passengers'

claims. The court accepted that the issue invited "an inquiry into the question of whether a particular passenger is bound by terms that were not adequately brought to his or her attention." (para. 57). The court concluded that the contract issue was an individual issue that involved consideration of the circumstances of each ticket purchase.

[36] Where the question before the court involves the enforceability of an exclusion clause, it is very likely that the issues raised will require examination of individual circumstances. This is because the interpretation of a waiver or exclusion clause cannot be divorced from the evidence pertaining to the individual parties: ***Goodspeed v. Tyax Mountain Lake Resort Ltd.***, 2005 BCSC 1577, and ***Ochoa v. Canadian Mountain Holidays Inc.***, [1996] B.C.J. No. 2026 at para. 136, 1996 CarswellBC 2034 (S.C.).

[37] The difficulty with all of the Contract Issues proposed by Mr. Lam is that they cannot be divorced from the particular circumstances of each claimant. In that respect, the issues in this case are similar to those considered by the court in ***Koo***.

[38] Mr. Lam has argued that there are reasons of public policy or unconscionability that would preclude UBC from having the benefit of the exclusion clause. He says that the basis for the inquiry into these common issues is the onerous nature of the wording of the exclusion clause and the issue of whether, as a matter of public policy, UBC can exclude itself from liability when it is offering services of a medical nature. In support of this argument, he relies

upon ***Hobbs*** and ***Tercon Contractors Ltd. v. British Columbia (Ministry of Transportation and Highways)***, 2006 BCSC 499, 53 B.C.L.R. (4th) 138.

[39] Exclusion clauses are not generally contrary to public policy. However, it is possible that individual contractual circumstances might raise issues of public policy or unconscionability. However, such issues can only be raised by considering the particular circumstances of the plaintiff. The arguments that could be raised by members of the class would be based on the reasonable expectations of the individuals and their sophistication, English competency and mental state at the time of depositing sperm with the Lab. In other words, these proposed issues can only be considered by examining, on an individual basis, the factual matrix that may be relevant to the formation of the contract.

[40] Mr. Lam's reliance on the two decisions referenced above is misplaced. Both cases were overturned on appeal. Indeed, ***Hobbs*** was considered on two occasions by the Court of Appeal at ***Hobbs v. Robertson***, 2002 BCCA 381, 172 B.C.A.C. 282, rev'g 2001 BCSC 162, 85 B.C.L.R. (3d) 114, and at ***Hobbs v. Robertson***, 2006 BCCA 65, 265 D.L.R. (4th) 537, rev'g 2004 BCSC 1088. In both instances, the Court of Appeal overturned decisions of this court due to the failure of the court to ensure that the record before it properly reflected the factual circumstances pertaining to the plaintiff. In other words, the issue as to whether or not the exclusion clause was unenforceable by reason of public policy depended upon an examination of the individual circumstances.

[41] In ***Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)***, 2007 BCCA 592, 73 B.C.L.R. (4th) 201, rev'g 2006 BCSC 499, 53 B.C.L.R. (4th) 138, leave to appeal to S.C.C. granted (10 July 2008), 32460, the Court of Appeal overturned the finding that an exclusion clause was unconscionable. Both the lower court and the Court of Appeal undertook consideration of issues individual to the parties. Similarly, in this case, the court would need to consider the circumstances unique to the individual claimants to answer the questions of public policy and unconscionability.

[42] Question 6 asks whether the exclusion clause is enforceable against someone who did not sign the Agreement. There is no doubt that this will raise individual issues. The response of UBC to the assertion of a claimant that he did not enter into an agreement will be to attempt to prove through evidence of the interactions between the claimant and UBC staff that the claimant waived his right to bring an action against it.

[43] Question 7 also requires a consideration of individual circumstances. This is evident in other cases where defendants have attempted to rely upon an exclusion clause when they were not specifically named in the contract under consideration. For example, in ***Stein v. Exec-U-Fit Personal Fitness Training Centres Inc.***, [2007] O.J. No. 1827, 2007 CarswellOnt 2967 (S.C.J.), the plaintiff was injured in a rock climbing incident. The court considered whether two individuals who were not named in the exclusion clause could rely upon it. The exclusion clause referred to "participants". The plaintiff stated in an affidavit being

utilized for summary judgment that it did not occur to her that the release applied to two individuals. The court decided that the case could not be heard on a motion for summary judgment and stated as follows at para. 17:

> If accepted, this expectation of the plaintiff, in conjunction with her status as a beginner to the activity, the distinct contractual relationship between Ms. Stein and Exec-U-Fit and Ms. Lewis and the wording of the release may result in a finding that Mr. Shannon is not protected by the release. The issue of whether the release protects Tim Shannon against the claim by Ms. Stein is, in my view, dependant on findings of fact with respect to the reasonable expectations of the parties in all of the circumstances. It cannot be resolved on a motion for summary judgment.

[44] In arriving at that decision, the court referred to two decisions of this court, ***Quick v. Jericho Tennis Club*** (1998), 40 B.L.R. (2d) 315 (B.C.S.C.) and ***Lafontaine (Guardian ad litem of) v. Prince George Auto Racing Association***, [1994] B.C.J. No. 176, 1994 CarswellBC 2387 (S.C.). In both of those cases the court considered the individuals' circumstances, including the plaintiffs' reasonable expectations.

[45] In summary, Mr. Lam has established that the claims raise common issues. However, those common issues are limited to the Negligence Issues. The question as to whether the exclusion clause applies to limit any claim must be determined on an individual basis. For each claimant, that may involve consideration of the issues raised by proposed Questions 4 to 7, all of which require consideration of individual circumstances.

Issue 2. Is a class action the preferable procedure for the fair and efficient resolution of the common issues?

[46] The real issue raised by this certification application is whether, in accordance with s. 4(1)(d) of the ***Act***, a class proceeding is the preferable procedure for the fair and efficient resolution of the common issues. The proper approach to this question was considered by McLachlin C.J. in ***Hollick v. Toronto (City)***, 2001 SCC 68 at para. 29, [2001] 3 S.C.R. 158:

> The Act itself, of course, requires only that a class action be the preferable procedure for "the resolution of the common issues" (emphasis added), and not that a class action be the preferable procedure for the resolution of the class members' claims. I would not place undue weight, however, on the fact that the Act uses the phrase "resolution of the common issues" rather than "resolution of class members' claims". As one commentator writes:
>
> > The [American] class action [rule] requires that the class action be the superior method to resolve the "controversy." The B.C. and Ontario Acts require that the class proceeding be the preferable procedure for the resolution of the "common issues" (as opposed to the entire controversy). [This] distinctio[n] can be seen as creating a lower threshold for certification in Ontario and B.C. than in the U.S. However, it is still important in B.C. and Ontario to assess the litigation as a whole, including the individual hearing stage, in order to determine whether the class action is the preferable means of resolving the common issues. In the abstract, common issues are always best resolved in a common proceeding. However, it is important to adopt a practical cost-benefit approach to this procedural issue, and to consider the impact of a class proceeding on class members, the defendants, and the court.
>
> See Branch, *supra*, at para. 4.690. I would endorse that approach.

[47] This is a case where the determination can only be made by assessing the litigation as a whole, including the individual hearing stage. As McLachlin C.J. also indicated in ***Hollick*** at para. 28, the term "preferable" is meant to capture two

ideas: whether the class proceeding is a fair, efficient and manageable method of advancing a claim, and whether it would be preferable to other procedures such as joinder, test cases, consolidation, etc.

[48] The question of predominance of individual issues is significant in this case. There is little question that the individual issues predominate over the common issues. Mr. Lam has conceded that the question of damages is an individual issue for each claimant. The question of liability for each class member is also an individual issue because the application of the exclusion clause must be considered in relation to the claims in both negligence and contract.

[49] Given the importance of the questions concerning the exclusion clause to the claim of each and every class member, those questions logically predicate examination of the Negligence Issues regarding standard of care and the breach thereof. While it would be possible to have a litigation plan that considered the common issues first, it is difficult to see how that exercise would "move the litigation forward". There would still have to be substantial individual trials both on liability and damages. As Donald J.A. observed in ***Tiemstra v. Insurance Corp. of British Columbia*** (1997), 149 D.L.R. (4th) 419 at para. 17, 38 B.C.L.R. (3d) 377 (C.A.), "[a] class action which will break down into substantial individual trials in any event does not promote judicial economy or improve access to justice, and is not the preferable procedure."

[50] Here, that is exactly what would happen. A trial of the common issues would accomplish very little. At the conclusion of the common issue trial, there

would still have to be a process to consider the exclusion clause issues for each claimant. As I have suggested below, it would be preferable to attempt to consider those issues in test cases. It is only by tackling those issues that the litigation will be able to move forward in a real way. Such a process will also permit the litigation to move forward efficiently and without the complexity of a class action.

[51] The caution given by Newbury J.A. in ***Parsons v. Coast Capital Savings Credit Union***, 2007 BCCA 247 at para. 38, 69 B.C.L.R. (4th) 204, is particularly relevant to the present case:

> The relevance of individual circumstances to the plaintiff's proof of the claims or to defences asserted by [the defendant] should not in my view be brushed aside merely in order to fit the action into the mould of a class proceeding. Whilst the "flexibility" of the Act is an important feature and in some instances decertification or the creation of sub-classes may be useful procedural tools, the objectives of this remedial legislation will not be well served if the court at the certification stage routinely delays addressing structural difficulties that will inevitably arise, in the hope they can be dealt with "when the time comes" in the midst of a complex trial.

[52] The exclusion clause issues in this case should not be brushed aside by trying to fit these cases into the class action mould. Here, litigating the proposed Negligence Issues in a common issues trial would begin the litigation in the wrong place. It would ignore the threshold questions regarding the exclusion clause. The result would be greater complexity and more expense for the parties.

[53] The preferability analysis requires consideration of the extent to which the proposed proceeding will achieve the goals of the ***Act***: judicial economy,

improved access to the courts, and deterrence. I have considered each of these in turn.

[54] As I have indicated above, a class proceeding would not promote judicial economy. Starting the proceeding with a consideration of the Negligence Issues would require a lengthy common issues trial that would require the participation of the third parties to be effective. Once concluded, the proceeding would break down into individual trials to consider the exclusion clause defence. For those claimants who were successful, there would then have to be individual damage assessments through discoveries and trial. If UBC was successful in the individual trials, the original common issues trial would have been for naught. This is the risk in ignoring the threshold issues.

[55] If the class members, or some of them, were successful in the individual trials or test cases considering the exclusion clause, there would then have to be some way to resolve which of the parties, as between UBC and the third parties, were at fault. However, a single trial would resolve those issues for the benefit of the claimants who succeeded on the exclusion clause trials. At this stage, UBC and the third parties would know how many claims survived the exclusion clause defence and the likelihood of settlement would be increased. If the trial to determine fault must proceed, it would likely proceed more efficiently than would a common issues negligence trial. With either method of proceeding, there would still be a risk of individual trials of the damage issues.

[56] I view improved access to the courts as a neutral factor in the circumstances of this case. The potential class members are a known group of approximately 165 men. There are no notice issues arising in this case. An action in which 50 of the proposed class members are named as plaintiffs has already been commenced in this court (the Breisnes action, Action No. S046754). That action would be ideal for advancing one or more test cases. The parties would be able to take advantage of case management to streamline the procedure. The plaintiffs have the ability to share litigation costs. Mr. Lam says that the range of damages for the plaintiffs is $20,000 to $100,000 per claim. By aggregating the claims in an action, such as the Breisnes action, the claimants can effectively access the courts at a reasonable cost.

[57] Deterrence is not a significant concern in this case. There is no question of future or general application that needs to be addressed. The case involves the failure of a single piece of equipment in unique circumstances. To the extent that deterrence is a goal, it can be achieved in the context of continuation of the Breisnes action or the present action.

[58] In considering preferability, it should be apparent that I have considered the matters set out in s. 4(2) of the ***Act***. The most important in this case are the factors set out in ss. 4(2)(a), (b) and (d):

> (a) Whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members. As I have indicated above, the individual questions of fact

and law predominate over the common questions. More importantly, the questions relating to the enforceability of the exclusion clause are threshold questions that must be determined on an individual basis and should be considered before embarking on those issues that are common.

(b) Whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions. As a result of the importance of the individual issues regarding both damages and enforceability of the exclusion clause, the members of the proposed class all have a valid interest in controlling the prosecution of those issues, either in a separate action or in an action where the claims of several plaintiffs have been aggregated.

(c) Whether other means of resolving the claims are less practical or less efficient. As I have indicated, the practical and efficient way to deal with these claims is to start with the threshold questions relating to the exclusion clause. This could be accomplished by trying two test cases, one for a claimant who signed the Agreement and one for a claimant who did not. Depending upon the result of the test cases, discoveries or interrogatories of other claimants could determine if those claimants would be successful on the exclusion clause issues. It may be that there will have to be trials for

> numerous plaintiffs as it may not be possible to resolve the exclusion clause issues on the basis of two test cases. Once the results of these test cases and trials are known, then it would be possible to have a trial to determine if UBC breached its duty of care and, if any of the third parties were at fault.

Issue 3. Does the proposed litigation plan set out a workable method of advancing the proceeding?

[59] The proposed litigation plan lacks detail and puts forward an inefficient scheme for dealing with the issues raised by the case. It provides that the third party claims are to be stayed following discovery but before the common issues trial. After the common issues trial is concluded, it suggests that "an orderly process for the resolution of any remaining issues may be required." That process is described in the most general terms:

> Individual hearings will need to be scheduled to resolve remaining quantum of damages issues for the class members and any individual contractual issues.

It then proposes that the third party claims be set for hearing following determination of the individual issues.

[60] It would be extremely inefficient to put the parties through extensive discoveries on the Negligence Issues and hold a trial on those issues without the third parties present. At the conclusion of those proceedings, the litigation would not be advanced in any real way. It is difficult to see how the Negligence Issues could be heard, or what could be accomplished, without the third parties present.

The question as to whether UBC breached the standard of care for a sperm storage facility operator is so closely intertwined with the issues raised between the third parties and UBC that this approach is unworkable.

[61] The lack of detail in the proposed litigation plan is a product of the difficulty created by the fact that the individual issues would overwhelm the few common issues. However, the principal problem with the plan is that it would postpone resolution of the threshold issues regarding the exclusion clause until late in the proceedings. The real trial for the claimants, UBC, and the third parties would be the proposed "individual hearings" to resolve the contract and damage issues. To borrow the language from Donald J.A. in ***Tiemstra*** at para. 17, the case would have broken down into "substantial individual trials in any event".

Summary

[62] In summary, this action is not suitable for a class proceeding. A class action is not the preferable procedure for the fair and efficient resolution of the common issues. The application for certification is dismissed.

"Butler J."

March 6, 2009 – ***Revised Judgment***

Corrigendum to the Reasons for Judgment issued advising that in paragraphs 19 and 20 of my Reasons for Judgment, wherever s. 4(2) appears it shall be replaced with a s. 4(1). Paragraphs 19 and 20 shall be deleted and replaced as follows:

[19] Before an action can be certified as a class proceeding, the five requirements in s. 4(1) must be met. If they are, then the action must be certified. Here, UBC bases its opposition to certification on ss. 4(1)(c) and (d), whether common issues are raised and whether a class action is the preferable procedure for a fair and efficient resolution of the common issues. It also says that the plaintiff has not put forward a litigation plan that sets out a workable method of advancing the proceeding on behalf of the class, pursuant to s. 4(1)(e)(ii).

[20] I agree that the statement of claim discloses a cause of action (s. 4(1)(a)), that there is an identifiable class of two or more persons (s. 4(1)(b)), and that the requirements of ss. 4(1)(e)(i) and (iii) have been met. Accordingly, my analysis will be restricted to the statutory requirements in ss. 4(1)(c), (d), and (e)(ii) that UBC says have not been met by Mr. Lam. My decision to deny certification is based on three issues, each of which is considered below:

1. Are there common issues raised by the claims of the class members?
2. Is a class action the preferable procedure for the fair and efficient resolution of the common issues?
3. Does the proposed litigation plan set out a workable method of advancing the proceeding?