COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Lam v. University of British Columbia,* 2010 BCCA 325

Date: 20100625
Docket: CA036918

Between:

Howard Lam

Appellant
(Plaintiff)

And

University of British Columbia

Respondent
(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.

Respondents
(Third Parties)

Before: The Honourable Chief Justice Finch
The Honourable Mr. Justice Hall
The Honourable Madam Justice Bennett

On appeal from: Supreme Court of British Columbia, February 19, 2009
(*Lam v. University of British Columbia*, 2009 BCSC 196)

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Place and Date of Hearing:	Vancouver, British Columbia March 31, 2010
Place and Date of Judgment:	Vancouver, British Columbia June 25, 2010

Written Reasons by:
The Honourable Chief Justice Finch

Concurred in by:
The Honourable The Honourable Mr. Justice Hall
The Honourable Madam Justice Bennett

Reasons for Judgment of the Honourable Chief Justice Finch:

I. Introduction

[1] Howard Lam appeals the 19 February 2009 order of Mr. Justice Butler denying certification of a proposed class action against the University of British Columbia.

[2] Mr. Lam stored a sperm sample in a cryopreservation freezer unit at the University of British Columbia Andrology Lab. The freezer experienced a power failure that rendered the sperm immotile and may have destroyed their genetic material. Mr. Lam sought certification of a class action on his own behalf and on behalf of all others who had sperm samples in the freezer, alleging breach of contract and negligence by UBC.

[3] The chambers judge denied certification on the basis that the common issues would not appreciably advance the proceedings and that a class action is not the preferable procedure for the determination of the common issues that arise in the case.

[4] For the reasons that follow, I would allow the appeal.

II. Background

[5] The chambers judge set out the background facts as follows.

[6] On 24 May 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 its genetic material.

[7] Mr. Lam sought an order before the chambers judge certifying a class action on his own behalf and on behalf of all others who had sperm samples in the freezer. The hearing took place on 25-27 August 2008. 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 provision contained in the Sperm Bank Facility Agreement (the "Agreement") which UBC says the plaintiff and others entered into with the Andrology Lab. 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.

[8] UBC has issued third party notices to a number of 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.

[9] 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. However, the Agreement does require payment of various fees by the client, and also permits the Lab to use small specimens of the stored material for its own purposes.

The Freezer

[10] 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 22 February 2001, to the Lab's new location at VGH.

[11] 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 hardwired 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 should have had 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 indicating the need for a 20 ampere circuit breaker.

[12] It is evident that there are numerous issues that will have to be resolved between UBC and the third parties as to responsibility for the installation of the undersized circuit breaker.

[13] 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. There appears to be evidence that the alarm system was not connected to an internal "Performance Monitor System" in the freezer, and that the Moore Security alarm system did not include a relay. As a result of these or other alleged shortcomings in the system, no alarm was sounded when the power supply to the freezer was interrupted. Failure of the alarm system raises further issues for resolution in the third party proceedings.

The Agreement

[14] 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. No signature page for Mr. Lam has been produced.

[15] 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.

[16] 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.

[17] 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 all individuals before they agreed to store their sperm at the Lab. It will also argue that those individuals for whom no signature page exists agreed to those terms and conditions.

[18] 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.

[19] Mr. Lam notes that these contracting parties are separate legal entities from UBC. Mr. Lam argues 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 the chambers judge. 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.

III. *The Class Proceedings Act*, R.S.B.C. 1996, c. 50

[20] The relevant provisions of the statute are 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.
>
> (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.

IV. Reasons for Judgment Below

[21] The chambers judge concluded that the statement of claim discloses a cause of action, that there is an identifiable class of two or more persons, and that the requirements of ss. 4(1)(e)(i) and (iii) were met.

[22] However, he said that his decision to deny certification was based on three questions:

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?

[23] In answering question 1, the chambers judge was faced with seven common issues proposed by the plaintiff:

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?

[24] With regard to question 1, the chambers judge concluded that there is no question that proposed issues 1, 2, and 3, the "Negligence Issues", are common issues for all members of the proposed class. This conclusion is not challenged on appeal.

[25] The chambers judge then considered proposed common issues 4, 5, 6, and 7, the "Contract Issues", which raise questions relating to the exclusion clause. He concluded that none of these issues was common.

[26] With respect to issues 4 and 5, whether the exclusion clause is unenforceable as being contrary to public policy or as being unconscionable, the chambers judge concluded that in this case both the issues of public policy and unconscionability "can only be considered by examining, on an individual basis, the factual matrix that may be relevant to the formation of the contract" and did not therefore constitute common issues.

[27] In relation to proposed issue 6, whether the exclusion clause is enforceable against someone who did not sign the agreement, the chambers judge concluded that "there is no doubt that this will raise individual issues".

[28] Finally, the chambers judge concluded that proposed issue 7 also requires a consideration of individual circumstances.

[29] Thus, the chambers judge concluded that the common issues were limited to the Negligence Issues.

[30] Having answered the question under s. 4(1)(c), the chambers judge turned to the issue of preferable procedure (s. 4(1)(d)). The chambers judge characterized this as the "real issue raised by this certification application". The chambers judge said that there is little question that the individual issues predominate over the common issues. He also concluded that:

> Given the importance of the questions concerning the exclusion clause to the claim of each and every class member, those questions logically predicate [sic] examination of the Negligence Issues regarding standard of care and the breach thereof.

[31] He concluded that the common issues would not really move the litigation forward, and would result in “substantial individual trials both on liability and damages”. A trial of the common issues, the chambers judge said, “would accomplish very little”. He concluded that it would be preferable to attempt to consider the exclusion clause issues in test cases because “it is only by tackling those issues that the litigation will be able to move forward in a real way”. He said:

> 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.

[32] With regard to whether the proposed litigation plan sets out a workable method of advancing the proceeding, the chambers judge concluded that it does not, due to a lack of detail and an inefficient scheme for dealing with the issues raised by the case. He concluded that the lack of detail in the litigation plan is a product of the difficulty created by the fact that the individual issues would overwhelm the few common issues and, more importantly, that the plan would postpone resolution of the threshold issues regarding the exclusion clause until late in the proceedings.

V. Parties’ Positions

The Plaintiff Lam

[33] Mr. Lam submits that the chambers judge did not give sufficient significance to the common issues and gave too much significance to the those issues that he found not to be common. He says that the judge failed to appreciate the significance of the Negligence Issues, and that these issues lay the basis for any claim against the defendant and should be sufficient to justify certification. He says that even if the only issues to be found to be common issues were the Negligence Issues, the chambers judge ought to have certified the action on that basis alone. To proceed otherwise is to deny access to justice and to promote multiple and mutually inconsistent results.

[34] Second, Mr. Lam submits that the chambers judge erred in his determination of the common issues. He says that proposed common issues 4, 5, 6, and 7 are all common issues. Addressing issue 7 first, the plaintiff says the question, common to all members of the potential class, is whether these Agreements (whatever version is adopted) effectively exclude liability of the defendant UBC? Does the proper construction of those clauses include the defendant UBC as one of “we”, “our”, or “us” or not? The question is, what entity (or entities) would a reasonable person reading these agreements understand to be excluded from liability?

[35] In relation to issue 6, Mr. Lam says that the evidence of Pearlin Chan, an administrative assistant at the Lab, does not support an inference that the clients for whom no signature page exists were treated differently from those for whom a signature page does exist.

[36] On the issue of public policy, Mr. Lam says that a public policy issue cannot by its very nature be defined by individual considerations. He says that in the case at bar the public policy issues would be the same for each member of the proposed class. Further, the plaintiff says that the pre-loss conduct of the defendant UBC in the case at bar may be such that it would be unconscionable to enforce the exclusion clause, and that such conduct would be common to all members of the proposed class and would not constitute an individual issue.

[37] Further, Mr. Lam submits that the chambers judge failed to see the preferability of a class proceeding over multiple test cases. He says that the chambers judge made an erroneous assumption, namely, that the various members of the proposed class had been or were willing to act in concert to prosecute their claims and to share in the cost of the litigation.

[38] Finally, the plaintiff argues that the chambers judge failed to accept the case management plan or to modify it so as to allow certification to proceed.

The Defendant UBC

[39] UBC says that the chambers judge did not err in any of the ways asserted by Mr. Lam, but that if he did so err, none of those errors are such as to be reviewable in this Court.

[40] UBC says that the judge made no error in concluding that the liability exclusion issues could not be divorced from a claimant's particular circumstances and that the question of whether the exclusion clause applies in the plaintiff's circumstances could not be extrapolated to the remainder of the proposed class in a way that would advance the litigation.

[41] With regard to the plaintiff's preferability argument, UBC submits that Mr. Lam is really arguing that this Court should rehear the application and substitute its own findings on preferability for those of the chambers judge, even though his conclusions should be accorded significant deference.

[42] UBC argues that the case management judge is entitled to substantial deference in respect of all the questions at issue on this appeal. It says that the alleged errors are either: errors of mixed fact and law in finding that some of the issues put forward by the plaintiff as common issues were in fact not common issues; or, errors in the exercise of discretion in holding that a class proceeding was not the preferable procedure and that the litigation plan was deficient.

Third Party Respondents

[43] With minor additional submissions, the third party respondents all agree with and adopt the arguments presented by UBC in its factum.

VI. Issues

[44] The issues that arise on this appeal are:

1. Did the chambers judge make a reversible error in his decision on the common issues?

2. Did the chambers judge make a reversible error in his decision on the question of preferability?

VII. Analysis

A. Standard of Review

[45] The standard of review in class proceedings was recently described by this Court in *Pro-Sys Consultants Ltd. v. Infineon Technologies AG,* 2009 BCCA 503:

> [28] Section 4 of the *CPA* states that an action "must" be certified if all of the statutory criteria are satisfied. Accordingly, a judge on a certification application is not exercising a discretionary power in granting or refusing certification of an action as a class proceeding. However, the judge has a measure of discretion in the assessment of the statutory criteria and, absent an error of law, this Court will not interfere with an exercise of judicial discretion unless it is persuaded the chambers judge erred in principle or was clearly wrong: *Campbell v. Flexwatt Corp.* (1997), 44 B.C.L.R. (3d) 343, [1998] 6 W.W.R. 275 (C.A.) at para. 25, leave to appeal ref'd [1998] S.C.C.A. No. 13.

B. Common Issues

[46] Common issues were described by the Supreme Court of Canada in *Hollick v. Toronto (City)*, 2001 SCC 68:

> [18] A more difficult question is whether "the claims...of the class members raise common issues", as required by s. 5(1)(c) of the *Class Proceedings Act, 1992.* As I wrote in *Western Canadian Shopping Centres,* the underlying question is "whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis". Thus an issue will be common "only where its resolution is necessary to the resolution of each class members' claim" (para. 39). Further, an issue will not be "common" in the requisite sense unless the issue is a "substantial...ingredient" of each class members' claims. [Emphasis added.]

[47] *Class Actions Law and Practice,* looseleaf (Markham: LexisNexis, 2010) states at 3.72:

> While the commonality inquiry involves some assessment of whether the proposed common issues are "significant" or a "substantial ingredient", it is not intended to be a preferability analysis.

[48] The assessment of whether an issue is a common issue thus involves a discretionary component because it is necessary for the chambers judge to

determine whether the proposed issue is “significant” or a “substantial ingredient” of the claim.

Proposed Common Issues 4 -7

[49] The four proposed common issues in dispute relate to the exclusion clause:

> (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?

[50] It appears to me most logical to consider the issues in the reverse order, and that is the way I propose to deal with them.

Issue 7

[51] Issue 7, as posed, reads:

> 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?

[52] The exclusion clause is raised as a defence on the pleadings. For that reason, UBC will bear the onus of proving its right to enforce it. I therefore think that issue 7 might have been better framed as follows:

> Is the defendant UBC, which is not named in the contract, entitled to rely on the exclusion clause against any or all of the proposed class members?

[53] Mr. Lam says that this issue, properly understood, is whether the Agreements (whatever version is adopted) operate to exclude liability of the defendant UBC. Does the proper construction of those clauses include the defendant UBC as one of “we”, “our”, or “us” or not? The plaintiff contends that the chambers judge

misunderstood the meaning of issue 7 which led him to state at para. 26 that the plaintiff:

> ... 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.

The plaintiff says that this "ultimate question" is the same as issue 7.

[54] I agree. UBC seems to acknowledge this in its factum when it states at para. 80: "With respect to the question of whether the liability exclusion clause is enforceable as against UBC because UBC was not specifically named in the release ..." [emphasis added]. I would interpret this to ask whether the exclusion clause is enforceable by UBC. This is the correct way to view the question in issue 7.

[55] There is no question that the resolution of this issue would "move the litigation forward" in a material way. As the chambers judge noted, the real question on the common issues analysis for issue 7 is whether there is a need to resort to evidence of matters outside the language of the contract or, alternatively, whether it can be seen that the external context is common across members of the proposed class. In *Class Actions in Canada,* looseleaf (Aurora: Canada Law Book, 2009), Ward Branch states at 5.610:

> ... the prospects for achieving certification are improved if there exists one uniform contract ...

[56] Similarly, at 5.780:

> ... in the common-law provinces, contract-based class actions have found favour with courts where the proposed common issues call for interpretation of a standard form contract or a common representation. However, where the claim requires consideration of individual representations, it is unlikely to be certified.

[57] In *De Wolf v. Bell ExpressVu Inc.* (2008), 58 C.P.C. (6th) 110 (Ont. S.C.J.), Mr. Justice Perell said:

> 32 There can be a common issue about the interpretation of the Bell ExpressVu contract, and, in particular, there can be a common issue about

> the legal characterization of the administrative fee as "interest" or as "liquidated damages" provided that the external context is common or typical across the members of the class. In that situation, there is commonality in the standard contract and in the factual nexus in which that contract is to be interpreted and performed. [Emphasis added.]

[58] This case involves a standard form contract. The issue is simply whether on the contract's true interpretation UBC is entitled to its protection. That interpretation will require an examination of the words of the contract. As UBC concedes, the "liability exclusion clause is written in clear, concise, plain language which anyone with basic knowledge of English should be able to understand". Further, the interpretation will require consideration of the contract's context, which includes the commercial circumstances underlying the contract. That context will be, in the words of Perell J. in *De Wolf,* either "common or typical across the members of the class". This is not a case in which individual assessments will be necessary in order to determine whether UBC is protected by the standard form contract. Contrary to what the respondent says at para. 80 of its factum, that interpretation does not depend on "the understandings of the individual clients". The subjective understanding of a client is irrelevant and inadmissible. What is relevant is what an objective bystander would say the parties intended the contract to mean. That can be determined by looking at the "clear, concise, plain language" of the contract and the common or typical contextual factors surrounding the contract. UBC seems to concede as much by stating:

> What should have been clear to any reader is that neither the Andrology Lab, nor the organization that operated it (whether UBC Hospital, or later UBC) can be liable for breach of contract or negligence in respect of the storage of the samples. [Emphasis added.]

[59] While UBC's interpretation may or may not be correct, what is important for present purposes is that UBC suggests that a proper interpretation of the contract can be achieved "by any reader". This suggests that the proper interpretation can largely be determined, as would be expected of a standard form contract, by reading the standard form document.

[60] The conclusion that issue 7 requires consideration of individual circumstances was clearly wrong and a reversible error. In my respectful opinion, issue 7 is common and its resolution will materially move the litigation forward.

Issue 6

[61] This issue logically follows issue 7, because if issue 7 is answered in the plaintiff's favour, issue 6 need not be addressed. Only if UBC is entitled to rely on the exclusion clause does a consideration of issue 6 become necessary.

[62] Issue 6 is expressed this way:

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

[63] Once again, I think the question is awkwardly expressed. The intent of the question is whether there is a binding agreement or contract between the proposed class members who did not sign a written form of Agreement, and the defendant, and if there is a contract, what are its terms.

[64] The chambers judge concluded at para. 42 that "[t]here is no doubt that this will raise individual issues". Similarly, the respondent submits in its factum, at para. 79, that "[t]he question of whether the exclusion clause is enforceable against someone who did not sign it depends entirely on the nature of the interaction between the person and the staff at the Andrology Lab, and whether the contract which was established between the parties from that interaction included an exclusion of liability". I agree and would not interfere with the chambers judge's conclusion on this issue.

Issues 4 and 5

[65] The questions of whether the exclusion clause is contrary to public policy or is unconscionable, follow logically from issues 7 and 6. These issues would arise as the plaintiff's responses to the defendant's reliance on the exclusion clause, if it is entitled to do so. These questions will only arise if UBC is entitled to rely on the standard form contract.

[66] The chambers judge considered issues 4 and 5 together. In concluding that these issues are not common, the chambers judge stated:

> [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.

[67] In my respectful view, the two questions should not have been considered together. I propose to deal with each separately.

Issue 4

[68] Issue 4 asks:

> Is the exclusion clause in the Agreement unenforceable by being contrary to public policy?

[69] In addressing this issue, the chambers judge referred to two decisions of this Court: *Hobbs v. Robertson*, 2002 BCCA 381, and 2006 BCCA 65, and *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2007 BCCA 592. An appeal from the judgment of this Court in *Tercon* was allowed by the Supreme Court of Canada on 12 February 2010, 2010 SCC 4, about a year after the chambers judge delivered his reasons in this case.

[70] At issue in *Tercon* was the enforceability of an exclusion clause which barred claims for compensation as a result of participating in a public tendering process. Writing for the minority, Binnie J. set out the basis on which a court can decline to enforce an exclusion clause. Binnie J.'s approach was accepted by Cromwell J. for the majority of the Court at para. 62. Binnie J. referred to the decision of the Supreme Court of Canada in *Re Millar Estate*, [1938] S.C.R. 1 at 4, and then said:

> [117] As Duff C.J. recognized, freedom of contract will often, but not always, trump other societal values. The residual power of a court to decline enforcement exists but, in the interest of certainty and stability of contractual

> relations, it will rarely be exercised. Duff C.J. adopted the view that public policy "should be invoked only in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds" (p. 7). While he was referring to public policy considerations pertaining to the nature of the *entire contract*, I accept that there may be well-accepted public policy considerations that relate directly to the nature of the *breach*, and thus trigger the court's narrow jurisdiction to give relief against an exclusion clause.
>
> [118] There are cases where the exercise of what Professor Waddams calls the "ultimate power" to refuse to enforce a contract may be justified, even in the commercial context. Freedom of contract, like any freedom, may be abused. Take the case of the milk supplier who adulterates its baby formula with a toxic compound to increase its profitability at the cost of sick or dead babies. In China, such people were shot. In Canada, should the courts give effect to a contractual clause excluding civil liability in such a situation? I do not think so. Then there are the people, also fortunately resident elsewhere, who recklessly sold toxic cooking oil to unsuspecting consumers, creating a public health crisis of enormous magnitude. Should the courts enforce an exclusion clause to eliminate contractual liability for the resulting losses in such circumstances? The answer is no, but the contract breaker's conduct need not rise to the level of criminality or fraud to justify a finding of abuse.
>
> ...
>
> [120] Conduct approaching serious criminality or egregious fraud are but examples of well-accepted and "substantially incontestable" considerations of public policy that may override the countervailing public policy that favours freedom of contract. Where this type of misconduct is reflected in the breach of contract, all of the circumstances should be examined very carefully by the court. Such misconduct may disable the defendant from hiding behind the exclusion clause. But a plaintiff who seeks to avoid the effect of an exclusion clause must identify the overriding public policy that it says outweighs the public interest in the enforcement of the contract. In the present case, for the reasons discussed below, I do not believe Tercon has identified a relevant public policy that fulfills this requirement.
>
> [Italic emphasis in original; underline emphasis added.]

[71] On Mr. Justice Binnie's analysis, where public policy considerations are relied on to outweigh the public interest in enforcement of the contract, it will be appropriate to address those considerations that "relate directly to the nature of the breach". Whether or not there is an overriding public policy that justifies avoiding the exclusion clause – whether it can be said that the values favouring enforcement of agreements are outweighed by other values important to society – does not, it seems to me, require an assessment of individual circumstances in this case. As the authorities cited by Binnie J. suggest, the defendant's conduct in breaching the

contract is at the center of a public policy analysis. Consistent with that, in oral argument counsel for the appellant suggested that UBC's conduct might be viewed as so flagrant that the exclusion clause cannot be enforced. There is a factual assessment to be done in order to determine that issue, but because it would focus on the defendant's conduct, it is one that is common to all class members. Further, UBC notes in its factum that "[t]he Appellant suggests that because the Andrology Lab was offering a medical service, it was unconscionable and contrary to public policy to require a contractual liability release from the clients before storing their sperm". Regardless of whether or not such a public policy argument is likely to succeed (a merits assessment with which we are not here concerned), it is not an issue that requires individual assessments.

[72] In my respectful view, the judge committed reversible error by conflating the law relating to unconscionability and public policy. In mistaking the inquiry necessary for public policy analyses, he failed to see that the factual background relating to the public policy inquiry is common to all class members.

[73] As will be seen, it is otherwise when one comes to consider the issue of unconscionability.

Issue 5

[74] Issue 5 asks:

> Is the exclusion clause in the Agreement unenforceable by reason of being unconscionable?

[75] As set out above, the chambers judge concluded that the unconscionability issue could only be determined on an individual basis. As stated by Dickson C.J. in *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426 at 462, "Only where the contract is unconscionable, as might arise from situations of unequal bargaining power between the parties, should the courts interfere with agreements the parties have freely concluded". Determining whether the parties are unequal in bargaining power will require an assessment of individual facts. As UBC correctly suggests at para. 74 of its factum, it cannot be said that as a class these were

inherently vulnerable contracting parties. I would not interfere with the chambers judge's conclusion on this issue.

Conclusion on Common Issues

[76] The chambers judge held that all four issues relating to the exclusion clause were not common issues. In my opinion, both issue 4, raising the issue of public policy, and issue 7, raising the issue of whether UBC can claim the benefit of the standard form contract, are common issues, and it was reversible error to conclude otherwise.

C. Did the Chambers Judge err in concluding that a Class Action is not the preferable procedure for the resolution of the Common Issues?

[77] The chambers judge concluded that a class action was not the preferable procedure. Such a discretionary decision is generally afforded considerable deference. However, because I have concluded that the chambers judge erred in his conclusion regarding two of the proposed Contract Issues – issues 4 and 7 – it is necessary to consider whether or not the preferable procedure conclusion was wrong as a result of those errors.

[78] The judge concluded that the class action was not the preferable procedure because the Contract Issues were not common and the issues relating to the exclusion clause were, in his view, the "threshold issues". He stated that it was only by "tackling those issues that the litigation will be able to move forward in a real way". Specifically, it is clear that the critical issue in this case is issue 7, and whether or not UBC is protected by the exclusion clause. Issue 7 is the "ultimate question".

[79] As I have concluded that issue 7 is a common issue, I am of the view that a class action is the preferable procedure. The chambers judge was of the view that the exclusion clause issues had to be dealt with before the Negligence Issues. He concluded that "Given the importance of the questions concerning the exclusion clause to the claim of each and every class member, those questions logically predicate [sic] examination of the Negligence Issues regarding standard of care and the breach thereof". Because I have concluded that issue 7 is common, this concern

can largely be accommodated at the common issues trial. Because the case management judge is able, as was conceded in oral argument, to schedule the resolution of common issue 7 before all the others, issue 7 can be determined first, and the result on that issue will dictate what follows.

[80] For example, it is evident that if UBC is not protected by the clause, then issues 4, 5, and 6 are no longer of interest, and the Negligence Issues can be determined in the common issues trial. Conversely, if it is concluded that UBC is covered by the exclusion clause, then the public policy issue, issue 4, can be examined in the common issues trial. If the public policy argument succeeds, then the negligence issues can be determined. If it fails, the plaintiffs can determine how to proceed with the remaining individual questions. As a result, regardless of how issue 7 is decided at a common issues trial, it will have a considerable impact on the scope and direction of the litigation. Its determination will appreciably move the litigation forward.

[81] I recognize that because issue 6 is an individual issue, those 25 class members who do not have signature pages will still have to resolve the issue of whether they are bound by the exclusion clause individually. Having said that, those individuals will still benefit greatly from a determination of issue 7. If issue 7, for example, is decided against UBC, then issue 6 is a non-issue. All plaintiffs will then benefit from the determination of the Negligence Issues. If issue 7 is decided in favour of UBC, the 25 class members without signature pages will still benefit from that interpretation and will then have to determine individually whether they are bound by the exclusion clause.

[82] In summary, the decision that a class proceeding was not the preferable procedure was based on the erroneous view that none of the Contract Issues were common issues. In my view, two of them are, and, most notably, the question of whether UBC can claim the protection of the exclusion clause.

[83] The exercise of discretion, based on a mistaken view of the considerations affecting its exercise, is subject to review in this Court because the discretion cannot

be said to have been exercised judicially. If the judge had seen issues 4 and 7, in addition to issues 1 and 3, as common issues, I am satisfied he would not have decided the preferability issue as he did.

D. Did the Chambers Judge err in concluding that the Litigation Plan was unworkable?

[84] As noted above, the chambers judge concluded that the litigation plan was unworkable due to a lack of detail and an inefficient scheme for dealing with the issues raised by the case. He concluded, at para. 61, that the lack of detail in the litigation plan is a product of the difficulty created by the fact that the individual issues would overwhelm the few common issues and, more importantly, that the plan would postpone resolution of the threshold issues regarding the exclusion clause until late in the proceedings.

[85] Because common issue 7 can be dealt with first in the common issues trial, this concern no longer exists. While the unconscionability issue and issue 6 remain individual issues, issue 7 is the most important of the Contract Issues and its resolution will meaningfully advance the litigation. Further, it is important to note that the litigation plan can be amended. As stated by Ward Branch at 4.590:

> The court does not scrutinize the plan at the certification hearing to ensure that it will be capable of carrying the case through to trial and resolution of the common issues without amendment. It is anticipated that plans will require amendments as the case proceeds and the nature of the individual issues are demonstrated by the class members.

[86] The litigation plan can also be amended to take into account the chambers judge's concerns that the third parties participate in the common issues trial.

IX. Conclusion

[87] I would allow the appeal and certify the action as a class proceeding.

"The Honourable Chief Justice Finch"

I AGREE:

"The Honourable Mr. Justice Hall"

I AGREE:

"The Honourable Madam Justice Bennett"