

CITATION: Allott v. Panasonic Corporation, 2020 ONSC 6251
COURT FILE NO.: 1899-2015 CP
DATE: 20201015

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Sean Allott, Plaintiff

AND:

Panasonic Corporation; Panasonic Corporation of North America; Panasonic Canada Inc.; KOA Corporation; KOA Speer Electronics, Inc.; ROHM Co. Ltd.; ROHM Semiconductor U.S.A., LLC.; Vishay Intertechnology, Inc.; Hokusiku Electric Industry Co.; HDK America Inc.; Kamaya Electric Co., Ltd.; Kamaya, Inc.; Alps Electric Co., Ltd.; Alps Electric (North America), Inc.; Midori Precisions Co., Ltd.; Midori America Corporation; Susumu Co., Ltd.; Susumu International (USA) Inc.; Tokyo Cosmos Electric Co.; and Tocos America, Inc., Defendants

BEFORE: Justice R. Raikes

COUNSEL: Counsel, for the Plaintiffs – Jonathan J. Foreman, Jean-Marc Metrailler, Sarah Bowden, and Linda Visser

Counsel, for the Panasonic Defendants – John Rook and Emerys Davis

Counsel, for the KOA Defendants – Katherine Kay and Sinziana Hennig

Counsel, for the ROHM Defendants – Paul Martin

Counsel, for Vishay – Donald Houston and Gillian Kerr

Counsel, for the Hokusiku Defendants – Paul Wearing and Robert F. Tighe

Counsel, for the Kamaya Defendants – Sandra Forbes and Maura O’Sullivan

Counsel, for the Alps Defendants – Kyle Taylor, James Orr, and Annie Tayyab

Counsel, for Midori America – Tetsuya Takahashi and Arwin Atae

Counsel, for Midori Precisions – Kazuhisa Sato and Arwin Atae

Counsel, for DLA Piper – Kevin Wright, Todd Shikaze, and Wendy Sun

Counsel, for Tokyo Cosmos and Tocos – David Kent and Samantha Gordon

HEARD: October 9, 2020

ENDORSEMENT

- [1] This is a price fixing class action. The plaintiff alleges, *inter alia*, that the defendants conspired together to raise, fix, maintain, stabilize and/or enhance unreasonably the price of linear resistors in Canada between July 9, 2003 and September 14, 2015.
- [2] According to the plaintiff's Factum at para. 10, "Linear resistors are electronic components that provide a specific amount of resistance to an electronic circuit, in which the current produced is directly proportional to the applied voltage, including without limitation, chip and other fixed resistors, and variable resistors". Linear resistors are components found in a wide range of electronic products.
- [3] The plaintiff commenced two proposed class proceedings in Ontario as against different defendants in respect of the same alleged conspiracy. The two actions were consolidated on January 31, 2020.
- [4] There are parallel class proceedings in Quebec and British Columbia where similar allegations are made.
- [5] The plaintiff and the Panasonic defendants have entered into a settlement of the three actions as against the Panasonic defendants. The settlement is conditional on approval by the courts in all three Provinces.
- [6] The plaintiff brings a motion in this action seeking certification for settlement purposes and approval of the form and method of notice to the class of certification and the settlement including how to opt-out. The plaintiff also seeks to schedule the date for the settlement approval hearing. The Panasonic defendants support the motion.
- [7] The remaining defendants, also called the Non-Settling Defendants, take no position on the motion. The proposed order contains the following provision to make the order and any reasons given expressly without prejudice to their interests:

...this Order, including but not limited to the certification of this action against the Settling Defendants for settlement purposes and the definitions of the Ontario Settlement Class, Class Period and Common Issue, and any reasons given by the Court in connection with this Order, is without prejudice to the rights and defences of the Non-Settling Defendants in connection with the ongoing Ontario Action and, without restricting the generality of the foregoing, may not be relied upon by any Person to establish jurisdiction, the criteria for certification including class definition or the existence or elements of the causes of action asserted in the Ontario Action, as against the Non-Settling Defendants. Nothing in this paragraph shall affect the efficacy of the opt-out process provided for in this Order.

Certification

- [8] The requirements for certification found in section 5(1) of the *Class Proceedings Act* ("CPA") may be summarized as follows:

- (a) the pleadings disclose a cause of action;
- (b) there is an identifiable class of two or more persons;
- (c) the claims or defences of the class members raise common issues;
- (d) a class proceeding would be the preferable procedure for resolution of the common issues; and
- (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 and of notifying class members of the proceeding, and
 - (iii) does not have, on the common issues, an interest in conflict with the interests of other class members.

[9] The test for certification is relaxed in the context of a settlement approval. The same factors are considered but the test is not as rigorously applied: *Currie v. McDonald's Restaurants of Canada Ltd.*, 2006 CarswellOnt 1213 (S.C.J.), at para. 18; *CSL Equity Investments Ltd. v. Valois*, 2007 CarswellOnt 2521 (S.C.J.), at para. 5; *Gariepy v. Shell Oil Co.*, 2002 CanLII 12911, (S.C.J.), at para. 27; *Bona Foods Ltd. V. Ajinomoto U.S.A. Inc.*, 2004 CanLII 17525 (S.C.J.), at para. 20.

[10] As mentioned, the Panasonic defendants consent to certification for the purpose of settlement only. If the settlement is not approved in this action and in the British Columbia and Québec actions, the parties will proceed as if this motion and the settlement never occurred.

[11] I am satisfied on my review of the statement of claim and the evidence filed on the motion for certification that:

- the statement of claim discloses a cause of action in conspiracy;
- there is an identifiable class of two or more persons;
- there is a common issue to be certified;
- a class proceeding in this case is a fair, efficient and manageable method of advancing the claim and is preferable to the alternative which would require individual class members to bring individual actions for amounts which are not economically feasible; and
- Mr. Allott is an appropriate representative plaintiff to represent the class in respect of the common issue and settlement.

[12] With respect to the class definition, the parties have negotiated the following:

All Persons in Canada who purchased Linear Resistors or a product containing a Linear Resistor during the Class Period other than (1) all BC settlement class members (2) Québec settlement class members and (3) Excluded Persons.

Linear Resistors means: electronic components that provide a specific amount of resistance to an electronic circuit, in which the current produced is directly proportional to the applied voltage, including without limitation, chip another fixed resistors, and variable resistors;

Class Period means: July 9, 2003 to September 14, 2015

[13] The proposed class definition sets out objective criteria by which putative class members can readily ascertain whether they are members of the class and does so without reference to the merits or outcome of the action. It is not over-broad or over-inclusive. There is a rational relationship between the class definition, the causes of action asserted and the common issue.

[14] The agreed upon common issue is:

Did the Settling Defendants conspire to fix, raise, maintain or stabilize the price of, or allocate markets and customers of, Linear Resistors directly or indirectly in Canada during the class period? If so, what damages, if any, did Settlement Class Members suffer?

[15] The issue as framed is one that is common to all members of the class. It flows from the claim pleaded and will avoid duplication of fact-finding necessary to each class member's individual claim. The proposed common issue is satisfactory for purposes of settlement.

[16] The plaintiff has provided a draft order that is approved by the Panasonic defendants and to which no objection is taken by the Non-Settling Defendants. Paragraph 9 states as follows:

...that any Ontario Settlement Class Member who has not validly opted-out of this action will be bound by any Settlement Agreement approved by the court and may not opt-out of this action in the future.

[17] The effect of this provision is that there is a one time only opt-out opportunity for putative class members. They will not be able to opt-out later in respect of future settlements that they find less agreeable. If they do not opt-out at this point, they are forever bound by the outcome of this litigation.

[18] Counsel have provided me with various case authorities which support the principle of a single opt-out: see *Eidoo v. Infineon Technologies AG*, 2012 ONSC 7299, at paras. 30 and 31; *Nutech Brands Inc. v. Air Canada*, [2008] O.J. No. 1065 (S.C.J.), at paras. 17-21; *Guercio v. Stone Paradise*, (December 2006), London 46460CP/45604CP (Ont. S.C.J.);

Urlin Rent a Car v. Furukawa Electric, 2016 ONSC 7965, at paras. 21 and 22. I accept the rationale underpinning that principle.

- [19] If the class definition in subsequent settlements is wider, a further opt-out notice for those additional persons may be appropriate: *Bancroft-Snell v. Visa Canada Corporation*, 2018 ONSC 5166, at para. 79.

Notice Plan

- [20] The plaintiff proposes a multi-media notice program that includes, *inter alia*, a national news release with links to social media feeds, weekday newspaper publication in English and French in two national newspapers, voluntary postings by three not-for-profit organizations, a digital media campaign through Canadian community news websites and Google's display advertising, posting to class counsel's websites and social media accounts, and some direct communication with potential class members.

- [21] The short and long form notices and settlement agreement will be posted on Ontario class counsel's dedicated Linear Resistors Class Action webpage. The above advertising and communications will direct interested class members to that webpage for more detail. The webpage is in English and French. Class counsel in British Columbia and Quebec will likewise posts the notices on their websites.

- [22] I have reviewed the notice program and am satisfied that it will widely disseminate the notice regarding certification, opt-out and the settlement to putative class members through various media. It achieves the goal of bringing the certification order and settlement approval hearing to the attention of class members. It provides a viable mechanism for class members to learn about the litigation, the consequences of opting out or staying in the action, how to do so, how to object to the proposed settlement, and when and how the settlement approval hearing will proceed.

- [23] The notice plan is approved with the following additional requirements:

1. The certification/authorisation for settlement purposes order(s) shall also be posted on class counsel's website and on the dedicated Linear Resistors webpage;
2. This endorsement and any endorsement made by the courts in British Columbia and Quebec on certification and the settlement approval process will likewise be posted on class counsel's website and on the dedicated Linear Resistor's webpage; and
3. The short and long form notices shall specify that the settlement approval hearing will be conducted virtually via Zoom and shall provide the connection particulars.

Short and Long Form Notices

- [24] Subject to the preceding paragraph, the proposed notices are approved. The settlement approval hearing will be held on February 2, 2021 at 3 p.m.. That date and time were canvassed with counsel and agreed upon. It allows sufficient time for the 60 day opt-out period and the report of the Administrator. It also allows time for objections to be made.
- [25] RicePoint Administration Inc. is known to this court for administration of class proceeding settlements. Based on past experience, I am satisfied that it is capable of doing the necessary work in a timely fashion at a reasonable cost. It is appointed Administrator for the purpose of disseminating the required notice per the Plan of Dissemination.
- [26] I asked counsel whether a joint hearing was desired and appropriate under the CBA protocol. Counsel advised that the case management judge in British Columbia has earlier expressed that he is content to await the decision of this court and will deal the British Columbia settlement approval by written submission. Counsel also expressed concern that doing a joint hearing could cause delay given the need to accommodate the schedule of three judges in three Provinces.
- [27] My experience with a joint hearing is limited to one case but I found it to be helpful and efficient. Nevertheless, I am persuaded that the settlement approval hearings should be done separately. The Ontario hearing date is set out above. Counsel are directed to advise this court as to the dates for the hearings/submissions in the other two actions.

Conclusion

- [28] Plaintiff's counsel provided a draft order. The terms of the order are satisfactory but small changes are needed to Schedules "B" and "C" to reflect the modest additions above. Counsel may re-submit the revised order to me by email.



Justice R. Raikes

Date: October 15, 2020