

CITATION: Allott v. AVX Corporation, 2021 ONSC 2753
COURT FILE NO.: 1272/16CP
DATE: 20210413

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Sean Allott, Plaintiff

AND:

AVX Corporation; Elna Co., Ltd.; Elna America Inc.; Hitachi Chemical Co., Ltd.; Hitachi Chemical Company America, Ltd.; Hitachi Canada; Hitachi AIC Inc.; Kemet Corporation; Kemet Electronics Corporation; Matsuo Electric Co., Ltd.; Nichicon Corporation; Nichicon (America) Corporation; Nippon Chemi-Con Corporation; United Chemi-Con Corporation; Nissei Electric Co. Ltd.; Nitsuko Electronics Corporation; Okaya Electric Industries Co., Ltd.; Okaya Electric America, Inc.; Panasonic Corporation; Panasonic Corporation of North America; Panasonic Canada Inc.; ROHM Co., Ltd.; ROHM Semiconductor U.S.A., LLC f/k/a ROHM Electronics U.S.A., LLC; Rubycon Corporation; Rubycon America Inc.; Shinyei Kaisha; Shinyei Technology Co., Ltd.; Shinyei Capacitor Co., Ltd.; Shizuki Electric Co., Ltd.; American Shizuki Corporation; Soshin Electric Co., Ltd.; Soshin Electronics of America Inc.; Taitso Corporation; Taitso America, Inc.; Toshin Kogyo Co., Ltd.; Holy Stone Enterprise Co., Ltd.; Milestone Global Technology, Inc. d/b/a Holystone International; and Vishay Polytech Co., Ltd. f/k/a Holystone Polytech Co., Ltd., Defendants

BEFORE: Justice R. Raikes

COUNSEL: Jonathan Foreman, Sarah Bowden, Anne Legate-Wolfe, Counsel for the Plaintiffs

John Rook, Emrys Davis and Ian Thompson, Counsel for Panasonic Defendants
Eric Dufour, Pascale Cloutier and Brian Whitwham, Counsel for AVX Defendants

Kevin Wright, Todd Shikaze and Emily Snow, Counsel for the Elna Defendants
Katherine Kay, Eliot Kolers and Mark Walli, Counsel for the Hitachi Defendants
Davit Akman, Moshe Grunfeld and Carolyn Wong, Counsel for the Kemet Defendants

Adam Goodman and Chloe Snider, Counsel for the Matsuo Defendants
Neil Campbell and William Wu, Counsel for the Nichicon Defendants
Gordon Capern, Michael Fenrick and Daniel Rosenbluth, Counsel for the Nippon Chemi-Con and United Chemi-Con Defendants

Paul Martin and Vera Toppings, Counsel for the ROHM Defendants
Michael Osborne and Jessica Kuredjian, Counsel for the Rubycon Defendants
Robert Kwinter, Counsel for the Soshin Defendants

Donald Houston, Peter Leigh and Gillian Kerr, Counsel for Holystone Defendants
Mark Evans and Sandra Walker, Counsel for the Shinyei Defendants

Nicholas Hooge, Robert Anderson and Ludmila Herbst, Counsel for Shizuki Defendants
Kenji Kasahara, Counsel for Toshin Kogyo Defendant
Kevin Chen, Counsel for Nissei Electric Defendant

HEARD: February 25, 2021

ENDORSEMENT

- [1] This endorsement will deal with two motions heard separately on February 25, 2021.
- [2] First, the plaintiff moves for an order approving a settlement with the Panasonic defendants pursuant to s. 29(2) of the *Class Proceeding Act, 1992*, S.O. 1992, c. 6, as am. (“CPA”). The settlement agreement is dated October 12, 2020.
- [3] The second motion is brought by plaintiff’s counsel. If the settlement with the Panasonic defendants is approved, they seek approval of their retainer agreement with the representative plaintiff and payment of counsel fees of 25% of the settlement plus HST and payment of disbursements and applicable taxes from the settlement funds.
- [4] This action is one of three parallel class proceedings in Ontario, Québec and British Columbia. Between them, all jurisdictions in Canada are covered. The Québec and British Columbia actions assert claims on behalf of residents of those provinces. The Ontario action is a national class excepting those in Québec and British Columbia.
- [5] The settlement is contingent on approval of the courts in all three jurisdictions to be effective. If any court declines to approve the settlement, all orders made for certification or approving the settlement will be automatically rescinded. The action will proceed as against the Panasonic defendants as if no settlement ever occurred.

Motion to Approve Settlement

The Action

- [6] This action was commenced by statement of claim issued May 13, 2016.
- [7] It is a conspiracy price fixing action. The plaintiff alleges that the defendants participated in an unlawful conspiracy to fix, maintain, increase or control the price for the supply of film capacitors (“Film Capacitors”), and/or to enhance unreasonably the price of Film Capacitors, and/or to lessen unduly competition in the sale of Film Capacitors in Canada.
- [8] On December 7, 2018, I approved two partial settlements reached with the Okaya defendants and Nitsuko Electronics Corporation, respectively. Those settlements were also approved by courts in Quebec and British Columbia.

[9] Since then, little has transpired to progress this action. It remains at the pre-certification stage. Some of the delay is attributable to the pandemic, some to the pending Supreme Court of Canada decision in *Godfrey* (since released), and some to inertia. Thus, despite being five years old, this action has not advanced far. It is hoped that this matter will proceed with more dispatch.

Certification for Settlement Purposes

[10] On November 20, 2020, I certified this action for settlement purposes as against the settling defendants only. I also approved the notices for the settlement approval hearing and the plan of dissemination to provide notice to class members of the settlement reached including the date and time for the settlement approval hearing. Class members were notified how to object to the settlement.

[11] No objections to the settlement were made by any class members.

Class Definition

[12] The class definition in the November 20, 2020 certification order is:

All persons in Canada who purchased Film Capacitors or a product containing a Film Capacitor during the Film Class Period other than (1) all BC Settlement Class Members and (2) all Quebec Settlement Class Members.

Film Capacitor means: capacitors which use insulating plastic film and one of two conductive materials, propylene and/or polyester. Film Capacitors include, but are not limited to, the following four generations: (1) film and aluminum foil capacitors, (2) film and other metal capacitors, (3) layered capacitors, and (4) surface-mount capacitors (i.e. capacitors without leaves ; and

Film Class Period means: January 1 2002 to December 31, 2014.

(The capitalized terms in the class definition correspond to definitions found in the settlement agreement.)

Law – Settlement Approval

[13] Settlement of a class proceeding requires court approval: s. 29 *CPA*. Once approved, the settlement binds all class members: s. 29(3) *CPA*.

[14] On a motion for court approval of a settlement of a class proceeding, the applicable test is whether, in all the circumstances, the settlement is fair, reasonable and in the best interests of those affected by it. The following principles apply to the consideration of a proposed settlement:

- the resolution of complex litigation through compromise of claims is encouraged by the courts and is consistent with public policy

- a settlement negotiated at arms' length by experienced counsel is presumptively fair
- to reject the terms of the settlement and require that litigation continue, a court must conclude that the settlement does not fall within a range of reasonable outcomes
- a court must be assured that the settlement secures appropriate consideration for the class in return for the surrender of litigation rights against the defendants. The court must recognize that there are a number of possible outcomes within a range of reasonableness
- it is not the court's function to substitute its judgment for that of the parties or to attempt to renegotiate a proposed settlement
- it is also not the court's function to litigate the merits of the action or simply rubber stamp a settlement.

(See *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598 (Ont. C.J. (Gen. Div.)) at para.9; *Nunes v. Air Transat AT Inc.* (2005), 20 C.P.C. (6th) 93 (Ont. S.C.) at para. 7; *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2643 at para. 31.)

[15] There are several factors which the courts have considered to assess the reasonableness of a proposed settlement. These factors include:

- the likelihood of recovery or likelihood of success, sometimes referred to as litigation risk
- the amount and nature of discovery, evidence or investigation
- the proposed settlement terms and conditions
- the recommendation and experience of counsel
- the likely duration of the litigation
- the number of objectors and the nature of the objections
- the presence of arms' length bargaining and the absence of collusion
- the positions taken by the parties in the litigation and during negotiations.

(See *Marcantonio v. TVI Pacific Inc.* (2009), 82 C.P.C. (6th) 305 at para. 12; *Parsons v. Canadian Red Cross Society* (1999), 40 C.P.C. (4th) 151 at paras. 71 – 73.

- [16] The court must be satisfied that there is both substantive and procedural fairness. Procedural fairness deals with the manner in which the settlement has been reached. It requires a consideration of the process followed. Hard-fought arms' length negotiations go a long way to satisfy the requirement of procedural fairness.
- [17] The burden of satisfying the court that a settlement should be approved is on the party seeking approval: *Nunes*, para. 7 citing *Ford v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1118 (S.C.J.).

Settlement Terms

- [18] Pursuant to the settlement agreement, the Panasonic defendants are required to
- Pay CDN \$1,350,000 to plaintiff's class counsel for deposit to a trust account for the benefit of class members.
 - Provide cooperation to plaintiff's counsel as described generally below.
- [19] The cooperation to be provided includes:
- a. An attorney proffer, which involves a candid, condensed assessment of events that occurred in the alleged conspiracy, identifies documents for production, and provides context for documents that will assist the plaintiff through further anticipated documentary discovery;
 - b. employee witness interviews regarding underlying facts relevant to the alleged conspiracy;
 - c. document production, including documents produced by Panasonic in US litigation, and deposition transcripts and answers to interrogatories which Panasonic will use its best efforts to authenticate;
 - d. transactional data, including downstream and finished product data, which plaintiff's counsel anticipate will assist with an aggregate economic damage assessment; and
 - e. affidavit and testamentary evidence of an employee knowledgeable of the conspiracy for use at certification, trial or a contested hearing in the actions.
- [20] The documentation and information being provided through the cooperation package would not otherwise be available to the plaintiff at this stage of the litigation. Plaintiff's counsel anticipate that the information and documentation will provide them with strategically valuable assistance to prosecute the action against the remaining defendants.
- [21] In return, Panasonic will receive a national standard form of release and a dismissal of the actions as against them. The settlement and release will be binding on all members of the plaintiff class.

- [22] The settlement agreement and draft order submitted contain standard bar order provisions to protect the non-settling defendants. As a result, the non-settling defendants take no position on the motion for settlement approval.

Negotiations

- [23] The settlement agreement is the product of lengthy, adversarial, arm's length negotiations between counsel. Counsel on both sides are experienced class action litigators with track records in this kind of litigation.
- [24] As mentioned, the settlement comes at an early procedural point in the litigation. It is pre-contested certification and discovery. Plaintiff's counsel have whatever information and documentation was obtained through the cooperation provided by the Okaya and Nitsuko defendants, as well as whatever their independent investigation has yielded. They recommend this settlement as fair and reasonable.
- [25] The settlement agreement resolves the Panasonic defendants' potential exposure in two conspiracy price fixing actions: this one and *Cygnus Electronics Corporation v. Panasonic Corporation et al* (London Court File No.: 3795/14CP). Because there are two classes, one for each action, the settlement agreement specifies a different dollar figure paid in each. The difference reflects the different amount of global sales generated in the class period by the two products.
- [26] In any event, the settlement in this action must be assessed independent of the other action. Is the settlement fair, reasonable and in the best interests of the class in this action?

Evidence of Reasonableness

- [27] The motion materials filed include the affidavit of an associate lawyer with Foreman & Company. She deposed that plaintiff's counsel negotiated the settlement agreement with three considerations in mind: 1) appropriate monetary recovery based on counsel's assessment of Panasonic's potential liability, 2) gaining Panasonic's cooperation to provide helpful information and evidence, and 3) an assessment of the alternatives to a settlement including risk factors.
- [28] Counsel estimates Panasonic's potential economic exposure to be CDN \$3.29 million. That figure is derived from Panasonic's estimated global sales during the class period (USD \$1.5 billion), the estimated share of Panasonic sales reaching Canada (3% of global sales), the estimated overcharge (6.7%), a pass-through estimate (85%), and a conversion from US dollars to Canadian dollars. The equations looks roughly as follows:

$$((1.5 \text{ B} \times 3\%) \times 6.7\%) \times 85\% = \text{US } \$2.57 \text{ million}$$

$$\text{US } \$2.57 \text{ million} \times 1.28 = \text{CDN } \$3.29 \text{ million.}$$

- [29] Each of the elements comprising the calculation is based on information obtained by counsel through their investigation with some compromise to be conservative. That \$3.29 million figure is before any discount for risk in the litigation.
- [30] The same approach was taken by plaintiff's counsel to assess the potential economic exposure of the Panasonic defendants in the other action. It is not the case that counsel adopted a different or lesser standard or approach to this settlement.
- [31] As indicated, counsel place value on the cooperation to be obtained through the settlement. They are hopeful that the material and information from Panasonic will assist in resolving with other defendants and/or pushing this action to a successful conclusion. Advance access to inside information will assist that effort.
- [32] The Panasonic defendants and non-settling defendants do not accept either the methodology or the figures used to rationalize the economic recovery for the class. It is a calculation done by plaintiff's counsel. It is not a formal damages assessment, nor is it likely that it could be used as such in a trial.

Analysis

- [33] This settlement took more than a year to negotiate. Both sides were represented by experienced counsel. No mediator was involved. The negotiations were arm's length and adversarial. I see no reason to doubt the procedural fairness of the settlement achieved.
- [34] When I approved the Okaya and Nitsuko settlements, I wrote at para. 27:
- There is no question that this litigation is fraught with risk. Quite apart from whether the action will be certified, the plaintiff has taken on an industry or at least its principal players. The defendants are large corporations who are well resourced. They have engaged very capable counsel and to this point show every intent to vigorously defend this litigation. Success is far from assured.
- [35] Nothing has changed since then to mitigate the risk inherent in this litigation. Will this action be certified on a contested basis? If it is, will aggregate damages be certified as a common issue? If not, how and when will damages be determined? Will the action be dismissed as against some defendants for jurisdictional reasons? Will there be appeals from the certification decision as is commonplace? Will the plaintiff succeed on the merits at the common issues trial? How long will it take to get to that trial? Will that be appealed? These questions raise only some of the risks faced by the plaintiff class.
- [36] The evidence adduced by counsel to provide an economic justification for the settlement amount must be considered in context. This is not a settlement reached on the eve of trial after aggregate damages have been certified, after documentary and oral discovery, and after expert reports have been exchanged. This settlement takes place early in the procedural life of this action. The plaintiff does not have access to information needed for an expert report and may never have that material depending on what is certified and the outcome of a common issues trial.

[37] The amount to be paid by the Panasonic defendants is modest, especially as it is an all-in number; *viz.* it includes prejudgment interest and costs. If the potential liability of Panasonic is \$3.29 million before interest and costs, it must surely be at or greater than \$4 million if those factors are included. The settlement amount is less than 50% of the 3.29 million and even less than that if prejudgment interest and costs are considered.

[38] At the end of the day, experienced counsel, who have expended significant effort to date, have explained why they consider the settlement to be of genuine benefit to the class, and why the monies to be paid are within the zone of reasonableness. Their recommendation must be given weight.

[39] The settlement must also be considered as a whole, including the value of the cooperation to be provided. In *Osmun*, Strathy J. (as he then was), wrote at para. 36:

[36] I have set out above the key terms of the settlement. In this case, the court is dealing with a partial settlement that resolves the plaintiffs' claims against two of the defendants but leaves three remaining defendants in the action. There are direct financial benefits from the settlement, in that there will be significant monetary recovery for the class. In addition, securing the cooperation of Cadbury and ITWAL is an important and immeasurable non-pecuniary benefit. This would be significant in any case, but in a conspiracy action, where the allegation is that the defendants share a dark secret, obtaining the cooperation of two of the alleged conspirators to assist the plaintiff in pursuing the alleged co-conspirators is of inestimable value.

...

[40] In this case, there are several large corporations remaining in the action. The prospect of future partial settlements is unknown. The settlement provides a very modest but real financial benefit to class members and provides assistance for the fight that remains. The value of the cooperation to be provided cannot be assessed except with hindsight perhaps years in the future.

[41] I am concerned that the amount to be paid is so heavily discounted; however, my concern is offset to a large measure by the cooperation benefits obtained. Frankly, this is a close call but I find that the settlement achieved falls within the zone of reasonable outcomes. Accordingly, the settlement is approved.

[42] The draft order provided is fine except para. 21. The following should be removed:

“... and, subject to approval of this Court, after the Effective Date, the Settlement Amount can be used to pay Class Counsel Disbursements incurred for the benefit of the Settlement Classes in the continued prosecution of the Ontario Film Action against the Non-Settling Film Defendants”.

[43] Counsel are requested to provide a clean copy of the revised order for my signature.

Motion to Approve Counsel Fees and Retainer Agreement

[44] Plaintiff's counsel moves for an order approving their retainer agreement with the representative plaintiff pursuant to s. 32 of the *CPA*, and approving class counsel fees and disbursements.

Retainer Agreement

[45] When this action was commenced, Mr. Foreman and his team were members of Harrison Pensa LLP (hereafter "HP"). In 2020, they left that firm to form Foreman & Company. It was an amicable separation. There is a transition agreement between the two firms that addresses the fees and disbursements incurred in this action while the representative plaintiff was represented by HP.

[46] The retainer agreement between Mr. Allott and HP was previously reviewed and approved by me when counsel applied for approval to be paid from the proceeds of the Okaya and Nitsuko settlements.

[47] Mr. Allott has entered into a new retainer agreement with Foreman & Company. It mirrors the previous retainer agreement with HP. Nothing has changed, just the firm acting for the plaintiff and plaintiff class.

[48] I am satisfied that the new retainer agreement with Foreman & Company meets the requirements of s. 32 of the *CPA* for the same reasons the retainer agreement with HP did. The retainer agreement is approved.

Class Counsel Fees

[49] Counsel seeks approval for a payment of class counsel fees of \$337,500 plus applicable taxes. That amount is 25% of the settlement to be paid by the Panasonic defendants.

[50] The retainer agreement provides that counsel shall be entitled to be paid up to 30% of any monies paid for the benefit of the class, subject to court approval.

[51] The affidavit filed in support of this motion indicates that class counsel in the three parallel actions are working together. They will be dividing any fees recovered on some basis not disclosed to the court. The motion seeking court approval of counsel fees is contingent on approval of all three courts.

[52] The affidavit filed indicates that the three firms have accrued \$611,456 in docketed time since the actions were started. They have been paid \$177,225 pursuant to earlier fee approvals for the Okaya and Nitsuko settlements. Thus, the value of docketed time unpaid is \$434,231. The lion's share of the time expended is in the Ontario action. That time includes time spent at HP and at Foreman & Company.

[53] The dockets have not been provided given their privileged nature and the ongoing litigation.

[54] In determining the reasonableness of class counsel fees, courts have traditionally considered the following factors:

- a. the factual and legal complexities of the matters dealt with;
- b. the risk undertaken, including the risk that the matter might not be certified;
- c. the degree of responsibility assumed by class counsel;
- d. the monetary value of the matters in issue;
- e. the importance of the matter to the class;
- f. the degree of skill and competence demonstrated by class counsel;
- g. the results achieved;
- h. the ability of the class to pay;
- i. the expectations of the class as to the amount of fees; and
- j. the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.

(See *Osmun*, para. 23; *Abdulrahim v. Air France*, 2011 ONSC 512 at para. 8.)

[55] Having regard to the above factors, I find that:

1. The action is factually and legally complex, although those complexities have yet to be meaningfully confronted to this point;
2. There is significant risk taken by counsel. My observations above approving the settlement raise some of those risks. In addition, counsel are indemnifying the representative plaintiff against an adverse cost award;
3. Counsel have assumed significant responsibility for the carriage and conduct of the action;
4. The monetary value of the matters in issue is difficult to estimate at this stage. Suffice to say that there is a lot of money at stake;
5. The matter is important to the class;
6. The resolution of the claim as against the Panasonic defendants involved skill and diligence by counsel;
7. The results achieved are discussed above. I need not repeat same;

8. There is no evidence as to the ability of the class to pay;
9. The amount requested conforms to the terms of the retainer agreement. The representative plaintiff supports the fee request; and
10. Plaintiff's counsel expended time and energy to advance this matter to a partial resolution. That time and energy could have been spent on other matters where fees could be generated.

[56] I am troubled by the lack of meaningful progress of this action. It is hoped that the settlement with the Panasonic defendants will be the catalyst needed for other settlements or, at least, the scheduling of the certification and jurisdiction motions. While interim payments incentivize class counsel and provide the means to carry on the litigation, this litigation has hardly advanced beyond the starting blocks notwithstanding the docketed time.

[57] In view of my concerns, I approve the class counsel fee request subject to the following:

1. The first \$225,000 of fees plus applicable taxes shall be paid upon approval of the requested fees by the three courts; and
2. The balance of the fees requested, \$122,500 plus applicable taxes, shall be paid 30 days before the hearing of the contested certification motion in the Ontario action.

[58] I have decided to split the timing of the payment of counsel fees to send a message that this action cannot continue to saunter along. I am mindful that the delay to this point does not rest entirely on plaintiff's counsel and some of the delay is beyond the control of anyone. However, it seems to me that achieving a partial settlement must be considered in the context of the progress of the action as a whole and that progress is modest.

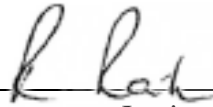
Disbursements

[59] Plaintiff's counsel seek approval of disbursements of \$31,673.70 plus applicable taxes. The disbursements are categorized at para. 35 of the affidavit of Ms. Legate-Wolfe sworn February 19, 2021. The largest expenses are notice costs (\$16,679.82) and process server (\$8,765.40). Many of the defendants are foreign companies which undoubtedly explains the latter expense.

[60] Counsel previously received \$43,932 plus applicable taxes for disbursements pursuant to my order of December 10, 2018.

[61] The retainer agreement provides that counsel will be reimbursed for out-of-pocket expenses paid for the class – disbursements – from the proceeds of any monies recovered on behalf of the class.

- [62] I am satisfied that the disbursements shown are appropriate and should be paid to counsel. Therefore, I approve payment to plaintiff's counsel of \$31,673.70 plus applicable taxes from the settlement funds received from the Panasonic settlement.
- [63] Counsel have provided a draft order which needs to be modified to reflect the terms attached to the timing for payment of counsel fees. Counsel are requested to provide me with a further draft order.



Justice R. Raikes

Date: April 13, 2021