Citation: Harrington et al. v. Dow Corning Corp. et al 2002 BCSC 511

Date: 20020408
Docket: C954330
Registry: VANCOUVER

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

**HELEN HARRINGTON and BETTY GLADU,
AS REPRESENTATIVE PLAINTIFFS**

PLAINTIFFS

AND:

DOW CORNING CORPORATION, DOW CORNING CANADA INC., THE DOW CHEMICAL COMPANY, DOW CORNING-WRIGHT CORPORATION, McGHAN NUSIL CORPORATION, McGHAN MEDICAL CORPORATION, MINNESOTA MINING AND MANUFACTURING COMPANY (3M), INAMED CORPORATION, UNION CARBIDE CHEMICALS AND PLASTICS COMPANY INC., UNION CARBIDE CORPORATION, BAXTER INTERNATIONAL INC., BAXTER HEALTHCARE CORPORATION, MENTOR CORPORATION, BRISTOL-MYERS SQUIBB COMPANY, MEDICAL ENGINEERING CORPORATION, THE COOPER COMPANIES, INC.

DEFENDANTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE EDWARDS

Counsel for the Plaintiff: David Klein, Mark R. Steven

Counsel for the Defendants, Bristol-Myers Squibb Company, Medical Engineering Corporation, The Cooper Companies, Inc.: Allan P. Seckel, Andrew D. Borrell

Counsel for the Defendants, Baxter Healthcare Corporation.:	Oleh W. Ilnyckyj
Counsel for the Defendant, Minnesota Mining and Manufacturing Company (3M):	J. Kenneth McEwan
Date and Place of Hearing:	March 15 and 28, 2002 Vancouver, BC

[1] The defendants Bristol-Myers Squibb Company (“Bristol”), Medical Engineering Corporation (“MEC”)and the Cooper Companies Inc. (“Cooper”) apply pursuant to Rule 19 and the ***Class Proceedings Act*** (“the ***Act***”) for an order that:

> 1. the Certification Orders in these proceedings be amended to decertify the claim against the Defendant Bristol-Myers Squibb Company Inc., and
>
> 2. the plaintiffs be required to deliver particulars which plead the material facts upon which they claim the common issue certified in these proceedings arises.

[2] I note that the first of these defendants is referred to in the style of cause in these proceedings as “Bristol-Myers Squibb Company”, but is defined under the name “BRISTOL-MYERS SQUIBB and COMPANY” as “Bristol” at paragraph 150 of the Amended Statement of Claim and referred to as Bristol-Myers Squibb Company Inc.” in that part of the Notice of Motion quoted above. Since counsel made no mention of these minor discrepancies in the name of this defendant, I assume there is one corporate entity only, Bristol-Myers Squibb Company, and the other versions of the name are erroneous.

[3] Mr. Seckel, for the applicants, in response to a question form the court, agreed that if the claim were decertified against Bristol-Myers Squibb Company, that company would be

indifferent to the requested particulars of material facts upon which the common issue certified in these proceedings arises, but stated that the other two defendants he represents, MEC and Cooper, required these particulars since they would still be obliged to defend on the certified common issue.

[4] That is also the position of Mr. Ilnyckyj and Mr. McEwan, counsel representing the other defendants, who supported the applicants' request for particulars.

[5] After submissions by counsel on March 15, 2002, I sent them a memo dated March 18, 2002, requesting further submissions. As a result, on March 28, 2002, counsel made further oral submissions. At that time counsel for the plaintiffs provided the court and defendants' counsel with a "Plaintiffs' Revised Plan" ("the Plan") as a response to the motion for particulars. It included a schedule for, among other things, examinations for discovery and exchange of expert reports leading to a six-week trial in October 2003.

[6] Since defendants' counsel were unprepared to deal with the proposed Plan presented to them just before the court convened, consideration of it was postponed. The motion for particulars has been effectively subsumed into an anticipated application to approve the Plan. I therefore adjourn the

motion for particulars for consideration at the same time as the application to approve the Plan.

[7] I next consider the motion for decertification of the claim against Bristol.

[8] On April 11, 1996, after a five day hearing March 25-29, 1996, Mr. Justice Mackenzie, then of this court, issued 57 paragraphs of reasons and certified this as a class action. An appendix to his reasons set out 18 “common questions” proposed by the plaintiff. At para. 35 Mackenzie J. found all but one of the 18 questions “fail the test of commonality” necessary for certification under s. 4(1)(c) of the ***Act***.

[9] At para. 41 Mackenzie J. determined that the question “Are silicone gel breast implants reasonably fit for their intended purpose?” raised “…a threshold issue which is common to all intended members of the class … and to the several manufacturers of such implants.” [my emphasis].

[10] At para. 50 Mackenzie J. concluded that “claims in conspiracy, fraud, misrepresentation, and joint venture against defendants collectively are vague and devoid of the specificity required for those claims to stand”, which I take to mean that they are unsuitable for certification as common issues.

[11] At paras. 51 and 53 Mackenzie J. stated :

> The primary cause of action to which the common issue relates is negligent manufacture and distribution. Negligence is a cause of action which involves the manufactures severally and it may be appropriate to divide the class into subclasses by manufacturer, with separate representatives for each subclass. ... I will hear further submissions on this aspect of class representation after counsel have had an opportunity to consider their position in the light of the common issue set.
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> . . .
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> The claims against the defendants Union Carbide and McGhan Nusil rest on the supplying of raw or semi-processed silicone materials to other defendants to be used in the manufacture of breast implants. On the pleadings as they stand, I do not think that limited involvement imposes a duty as manufacturer. There are no particulars of any representations by those defendants associated with the use of their products, usually reprocessed by others, in breast implants. A position as shareholder, even a controlling shareholder, in a manufacturer is an insufficient foundation in itself to impose a manufacturer's duty. Accordingly, the defendants Inamed Corporation, Baxter International Inc., Union Carbide Corp., Union Carbide Chemicals and Plastics Company Inc., and McGhan Nusil Corporation will be excluded from any certification order.

[12] The position of Bristol on this application is that Bristol was no more than a controlling shareholder of the defendants MEC and Cooper and, therefore, that the reasoning of Mackenzie J. dictates that the case ought not to be

certified against Bristol in the absence of any express finding by Mackenzie J. that Bristol was a manufacturer.

[13] The reasons for judgment of Mackenzie J. disclose no express finding that Bristol was or was not a manufacturer or a distributor or was or was not more than a mere passive shareholder of MEC and Cooper.

[14] Counsel for Bristol argued that the Amended Statement of Claim, paragraphs 21 and 132-144 make the similar allegations against the defendant Baxter International Inc. (“Baxter”) and its subsidiaries as paragraphs 26 and 145-163 make against Bristol and its subsidiaries, and yet Baxter is not included as a defendant manufacturer under the class certification order.

[15] In support of the contention that Bristol was no more than a shareholder, Bristol filed a three paragraph affidavit sworn by Sandra Leung, corporate secretary of Bristol, who states that “Bristol is not and at no time has been a manufacturer of breast implants” and that MEC, which has been wholly owned by Bristol since 1982, purchased Cooper in 1988. It is not disputed that MEC and Cooper were manufacturers.

[16] The plaintiffs filed an affidavit to which are appended 65 documents obtained from the Plaintiffs’ Steering Committee

in the United States Federal Court Multi-District Litigation ("MDL 926") that is dealing with the U.S. silicone breast implant litigation. These documents indicate, among other things, that Bristol employees acted in concert with MEC employees to respond to Canadian media reporting about breast implants in 1988 and 1989.

[17] From these documents, plaintiffs' counsel argued the inference should be drawn that Bristol was more than a mere passive shareholder and took an active part in protecting the market for breast implants from the consequences of adverse publicity. This, plaintiffs' counsel characterized as evidence of Bristol's participation in a "joint venture" with its subsidiaries MEC and Cooper to market breast implants.

[18] Bristol's counsel argued that even if Bristol participated in the sale and distribution of implants, that involvement did not go to the certified issue of the "fitness" of breast implants, noting that Mackenzie J. rejected the joint venture claims as a basis for certification.

[19] Plaintiffs' counsel pointed to paragraph 159 of the Amended Statement of Claim which alleges that Bristol conducted research into the hazards of breast implants and that its Technical Evaluation and Services Department performed audit and review functions for MEC and found a

number of conditions regarding production of breast implants that needed corrective action. No parallel allegation is made regarding Baxter.

[20] Notwithstanding the close parallel between the allegations pleaded against Baxter and Bristol (apart from paragraph 159 just noted) and notwithstanding the fact that Bristol's counsel did not agree to the form of order dated February 14, 1997 and entered December 1, 1997, giving effect to the April 11, 1996 judgment of Mackenzie J., which expressly states "this proceeding ... is hereby certified as a class proceeding against ...Bristol" (and others) and "this proceeding is not certified against ... Baxter" (and others), the point now raised, that Bristol was not a manufacturer, was not raised when the certification issue was before the Court of Appeal. At para. 1 of the Court of Appeal reasons of Madam Justice Huddart, this case is characterized as follows:

> ... The claim is against manufacturers of silicone breast implants and Bristol-Myers Squibb Company, a supplier of silicone.

suggesting Huddart J. did not regard Bristol as a manufacturer of implants.

[21] However, the point advanced by Bristol on this application, that the entered order did not properly reflect

the reasons for judgment of Mackenzie J. when it included rather than excluded Bristol as a defendant in respect of the certification, was not taken before the Court of Appeal. Bristol's counsel submitted there was no need to take this point before the Court of Appeal since it would have been moot had the appeal succeeded and had the certification order been overturned in its entirety by the Court of Appeal.

[22] He further submitted that in any event Bristol's failure to take the point in the Court of Appeal did not derogate from this court's express authority in s. 10 (1) of the ***Act*** to decertify or to amend the certification order in s. 8(3).

[23] In my memo to counsel dated March 18, 2002, I asked for submissions as to whether I was precluded from granting the decertification order sought by Bristol in light of the Court of Appeal decision in this case, even if I was persuaded that the entered order did not properly reflect the reasons of Mackenzie J. I referred counsel to ***Horvath v. Thring*** 2000 BCSC 123 (paras. 30 and 31), 2001 BCCA 551 (para. 16).

[24] In a written submission Bristol's counsel distinguished ***Horvath*** on the basis that case involved an application to vary an entered order after a trial on the merits, whereas the present application is one to change an order on a procedural point.

[25] I accept that distinction. If ss. 8(3) and 10 (1) of the ***Act*** are to have any effect, the court cannot be precluded by the entry of an order from reviewing the order. I find the court has jurisdiction to reconsider an entered certification order and to decertify or amend the certification order.

[26] The ***Act*** also provides for appeal of a certification order in s. 36. In this case Bristol did not raise the point now before the court so the Court of Appeal did not rule on the question of whether Bristol was a manufacturer properly included in the certification order.

[27] Bristol could have asked the Court of Appeal to review the certification order on the basis Bristol was not properly included because it was not a manufacturer. Normally, estoppel precludes a litigant from raising an issue which could have been dealt with on facts and law known or discoverable when an earlier proceeding, including an appeal, could have decided the issue. See ***Archipelago (Township) v. Shawanaga First Nation***, [1994] O.J. No. 1703 at para. 8.

[28] Neither plaintiffs' nor Bristol's counsel contended issue estoppel did not apply.

[29] Plaintiff's counsel argued it applied to preclude the court from altering the certification order.

[30] Bristol's counsel argued that the findings to which issue estoppel applied were that the action would be certified on the specified question engaging manufacturers alone and that Bristol was not a manufacturer. As a result, he argued, it was not now open for the plaintiffs to introduce evidence to persuade the court Bristol was a manufacturer. If that is so, then Ms. Leung's affidavit must also be disregarded.

[31] I find issue estoppel operates here to preclude the court from granting Bristol an order decertifying the case against it even if it was not a manufacturer.

[32] Underlying issue estoppel are the principles of finality and avoidance of a multiplicity of proceedings. Issue estoppel prevents parties from litigating in tranches and from raising afresh issues which were or ought to have been decided when all relevant facts and law could have been put before the court.

[33] The entered order reflects an implicit finding that Bristol was a manufacturer, even if the reasons for judgment underlying the order do not make an express finding to that effect. Under ss. 1 and 6 of the ***Court of Appeal Act***, orders, not reasons for judgment, are the subject of appeals. The Court of Appeal had jurisdiction to rectify any error in the order of Mackenzie J.

[34] In ***Laye v. College of Psychologists (British Columbia)*** (1998), 105 B.C.A.C. 214 (C.A.), Rowles J.A. (in Chambers) observed regarding reasons for judgment under appeal, at para.11:

> A reviewing court may refer to the reasons for judgment in order to ascertain whether the decision from which the appeal is brought has been arrived at by a reviewable error but the appellate review process relates to attacks on the order that has been made, not the reasons for judgment. If an appeal is successful, it is the order that is set aside, not the reasons or a portion thereof that is "overturned". To suggest otherwise does not accord with well-accepted appellate practice and procedure.

[35] Here, Bristol had three opportunities to argue that the certification order should not apply to it since it was not a manufacturer, once before Mackenzie J., again when the formal order was under consideration before entry and again when that order was before the Court of Appeal.

[36] Finality and avoidance of a multiplicity of proceedings are less a concern in a case such as this where there has been no determination on the substantive merits of the plaintiffs' claim. The order Bristol seeks to vary is essentially a procedural one. There is specific authority in the ***Act*** for this court to amend the order and to decertify. The parties have taken no significant procedural steps in the six years since the order was entered in reliance on it.

[37] Nevertheless, I am of the view that in the absence of any new facts or law (and none were alleged by Bristol) this court should not exercise its authority under ss. 8(3) and 10(1) of the ***Act*** to grant the relief sought in light of the doctrine of issue estoppel and the binding effect of the judgment of the Court of Appeal.

[38] If I am wrong in that finding, I would not exercise this court's discretion to amend or decertify because the practical consequences of the certification order are not particularly onerous on Bristol. Bristol will be involved in the litigation of the certified issue so as to be subject to discovery procedures in respect of the certified issue.

[39] Bristol's two subsidiaries MEC and Cooper are subject to those procedures. If the documents from the MDL 926 proceeding are any indication, many potentially relevant documents are discoverable in their hands. These documents are in any event available to the plaintiffs from the MDL 926 proceeding. They have been disclosed by Bristol or its subsidiaries in that litigation and are apparently in the public domain.

[40] Further, as Bristol's counsel acknowledged, the decertification it seeks would not result in dismissal of the action against it. Bristol is therefore subject to discovery

on the whole of the allegations against it in the pleadings, whether Bristol is subject to the certification order or not. Therefore decertification would not necessarily reduce the ultimate scope of discovery against Bristol in this action, although as a practical matter the likelihood of the action proceeding against Bristol otherwise than as a class action is low.

[41] Bristol's application for decertification of the action against it is dismissed.

[42] Plaintiff's counsel sought costs. Bristol's counsel did not address the issue of costs. Counsel may address the issue of costs in written submissions.

"E.R.A. Edwards, J."
The Honourable Mr. Justice E.R.A. Edwards

April 12, 2002 – ***Corrigendum to the Reasons for Judgment*** issued by Mr. Justice E.R.A. Edwards advising that Mr. Oleh Ilnyckyj is wrongly identified as appearing for Baxter International Inc. The correct designation has been shown.