CITATION: Duong v. Stork Craft Manufacturing Inc., 2011 ONSC 2534
COURT FILE NO.: CV-09-46962CP
DATE: 2011/05/12

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
DAVID DUONG, RINKU SINGH and CHRISTINA WOOF Plaintiffs	Nicholas Robinson, for the Plaintiffs
– and –	
STORK CRAFT MANUFACTURING INC., FISHER-PRICE CANADA INC., FISHER-PRICE INC., SEARS CANADA INC., SEARS, ROEBUCK AND CO., WAL-MART CANADA CORP., and WAL-MART STORES INC. Defendants	Dana M. Peebles / Sharon Kour, for the Defendants Stork Craft Manufacturing Inc., Sears Canada Inc., Sears, Roebuck and Co., Wal-Mart Canada Corp. and Wal-Mart Stores Inc. D. Michael Brown, for the Defendants Fisher-Price Canada Inc. and Fisher-Price Inc. **HEARD:** February 8, 2011

AMENDED REASONS FOR JUDGMENT

R. SMITH J.

This is an amendment to the Reasons for Judgment released April 21, 2011. The amendment occurs in paragraph [2] and now reads as follows: The defendant Stork Craft

Manufacturing Inc. referred to as ("Stork Craft") has brought a motion to enforce the alleged settlement agreement between counsel to discontinue the class proceeding in Ontario.

[1] This motion raises issues of whether there was a settlement agreement to discontinue the class proceeding in Ontario, whether the limitation period for class members would be suspended for any period of time if the class proceeding is discontinued, and finally should the court approve the discontinuance where the limitation period for Ontario class members may expire before they can opt into the British Columbia class proceeding.

[2] The defendant Stork Craft Manufacturing Inc. to as ("Stork Craft") has brought a motion to enforce the alleged settlement agreement between counsel to discontinue the class proceeding in Ontario.

[3] The representative plaintiffs ("plaintiffs") oppose the motion on the grounds that the parties had not agreed on all of the terms for the discontinuance. Alternatively, they submit that the discontinuance should not be approved because it would cause significant prejudice to class members in Ontario due to their loss of the suspension of the limitation period in Ontario, and the resulting expiry of the limitation period, before they can opt into the class proceeding in British Columbia.

[4] The following issues must be decided:

(a) Did the parties reach a settlement agreement to discontinue the Ontario class proceeding? and if so,

(b) Should the discontinuance of the Ontario class proceeding be approved without notice to class members, where there could be prejudice to Ontario class members due to the expiry of their limitation periods before they can opt into the class proceeding in British Columbia?

Background Facts

[5] In November of 2009, Stork Craft announced a recall of certain of its baby cribs. On November 24 and 25, 2009, The Merchant Law Group ("MLG") commenced six very similar proposed class actions against Stork Craft and various retailers in different provinces regarding baby cribs. MLG commenced class proceedings against these defendants in British Columbia and Alberta on November 24, 2009, and in Saskatchewan, Manitoba, Ontario and Québec on November 25, 2009 with different representative plaintiffs.

[6] The firm of McCarthy Tétrault LLP was retained by Stork Craft and certain retailer defendants to defend the cases in British Columbia, Alberta, Ontario and Québec. Other firms have been retained by Stork Craft through the McCarthy Tétrault firm to represent Stork Craft and other defendants in Manitoba and Saskatchewan.

[7] The Québec, Saskatchewan, Manitoba and Ontario actions all sought certification of a national class. British Columbia is an opt-in jurisdiction for residents of other provinces.

The British Columbia Class Proceeding

[8] On August 13, 2010, the Merchant Law firm, represented by Darren Williams of Victoria, filed a request for the appointment of a trial judge to case manage the British Columbia action. Justice Geoffrey Gaul was appointed as the case management judge.

The Proposed Settlements

[9] On September 21, 2010, Darren Williams wrote to counsel for Stork Craft and confirmed his instructions to discontinue the class proceedings commenced in all provinces other than British Columbia and to proceed to certification in British Columbia.

[10] On September 30, 2010, the parties attended a case conference in the British Columbia action before Gaul J. Following the appearance, Stork Craft confirmed its understanding by letter of October 1, 2010 to Mr. Williams setting out that in Alberta, the plaintiff would file a discontinuance; in Manitoba, the plaintiff would file a discontinuance; and in Ontario, the plaintiff would move for court approval to file a discontinuance or a consent dismissal order.

[11] The letter dated October 1, 2010 ended with the following words "*If any of these items are not in keeping with your understanding of the hearing before Gaul J., please notify us immediately so that we may arrange to order the transcript of that hearing and thereby resolve any issues.*" Mr. Williams never replied or indicated that he did not agree with the terms of the agreement as set out in this letter.

[12] The Merchant Law firm filed a notice of discontinuance in Manitoba on November 29, 2010 and in Alberta on October 29, 2010. On September 20, 2010, at a case conference before myself, counsel for the plaintiffs in the Ontario action indicated that it was their intention to put the Ontario action "on hold" and as a result, a further case conference was scheduled for December 14, 2010.

[13] On October 21, 2010, counsel for Stork Craft wrote to both Mr. Williams, the counsel handling the British Columbia class proceeding and Ms. Sadaghianloo, counsel for the plaintiffs in the Ontario action, and set out his instructions to consent to a discontinuance in Ontario on the following terms:

> 1. the discontinuance will be with prejudice (no further action can be commenced on these facts, and/or these allegations, against any of my clients or their affiliates, in an Ontario Court);
> 2. the discontinuance will be without prejudice to any Ontario resident participating in a settlement or Judgment in any other jurisdiction in which they are otherwise entitled to participate;
> 3. our clients will consent to a motion for such an Order, without costs of the action or the motion, provided there is only a single appearance required. If a second appearance is required because of any defect in the Plaintiffs' filed materials necessary to obtain the Order, costs of the entire motion will be due to each of my clients, as agreed, ordered or assessed;

4. if the Court orders any notice of the motion, or of an Order, to be made to class members, that notice shall be at the sole expense of the Plaintiffs.

[14] Later on October 21, 2010, Darren Williams replied stating that points three and four were never discussed and indicated that he did not agree. Mr. Williams then sent a further e-mail on October 21, 2010 stating that he did not agree on point number one either. Mr. Williams stated that "[t]*he deal made with the defendants through their BC counsel was a discontinuance in the ordinary sense of the word, applying only to that particular Ontario action, and the actions in Alberta and Manitoba.*"

[15] On October 27, 2010, counsel for the Ontario plaintiffs served draft motion materials to obtain an order approving the discontinuance. In her cover e-mail, she stated that the plaintiffs agreed to seek an order without costs and without notice. In the materials supplied by Ms. Sadaghianloo, she enclosed an affidavit of Darren Williams stating that MLG had agreed with the defendants to discontinue the class proceedings in Alberta, Manitoba and Ontario without costs. He also stated in his affidavit that "*I believe the discontinuance will not prejudice the rights of the plaintiffs or class members in the Ontario action.*"

[16] Counsel for Stork Craft responded that the motion materials should indicate that his clients did not oppose the motion but should not indicate that Stork Craft consented to the discontinuance or that Stork Craft had agreed that notice to class members was not required. Stork Craft also suggested that affidavits be obtained from all of the representative plaintiffs confirming their instructions to proceed with the motion to discontinue. Counsel then added a third term, namely, that the discontinuance should be "with prejudice" to the three individual representative plaintiffs, who would however be free to participate in any other class proceeding commenced elsewhere.

[17] On November 1, 2010, Ms. Sadaghianloo replied to counsel for Stork Craft and advised that her clients were largely in agreement and that she agreed to discontinue provided notice to class members was not ordered.

[18] On December 8, 2010, counsel for the plaintiffs forwarded the draft motion materials seeking a discontinuance and indicated that the plaintiffs were willing to discontinue only if notice to the potential classes was not ordered and further, they advised they would raise their concern about limitation periods before the judge hearing the motion.

[19] In their draft notice of motion, the plaintiffs stated that they agreed to discontinue the class proceeding in Ontario and stated they wished to rely on the Court's determination of whether a discontinuance could give rise to any prejudice or unfairness to the class, including whether or not limitation periods would resume running. Their agreement was also conditional on notice of discontinuance not being ordered to be given to the class members.

[20] The affidavit of the representative plaintiff, Ms. Woof, as well as the letter to the other two representative plaintiffs contain statements to the effect that they understood that the court would not approve the discontinuance if it gave rise to any prejudice or unfairness to potential class members.

[21] On December 15, 2010, counsel for the plaintiffs advised the defendants that they had been unable to agree on the terms for approval of the discontinuance of the class proceeding in Ontario, particularly with respect to the limitations issue. As a result, they advised the defendants that the plaintiffs would not be applying for an order approving the discontinuance of the Ontario class proceeding.

[22] In her letter of December 15, 2010, Ms. Sadaghianloo stated: "*When our firm informed you we would discontinue the proceedings in the three jurisdictions, we had not fully considered the limitations issues. As a firm, we apologize, but we are not able to put the interests of class members second to carrying forward with some agreement, which does not in any event prejudice the Defendants.*" The letter from the plaintiffs' counsel goes on to state that the filing of a claim under the *Class Proceedings Act* in Ontario was required in order to suspend the running of the limitation period in Ontario for class members. She submitted that limitation periods are a matter of substantive law and therefore the applicable limitation period for each class member is that of their own jurisdiction. The class action legislation of British Columbia, which is procedural, would not suspend the running of limitation periods for class members in Ontario.

[23] Counsel for the Ontario plaintiffs further advised the defendants that they would also resist bringing a certification motion in Ontario on the basis that they were already undertaking steps towards a certification hearing in British Columbia.

[24] The plaintiffs through their solicitors, the Merchant Law Group, agreed with the defendants to discontinue the class proceeding in Ontario on a without costs basis and agreed that they would proceed to certification of the British Columbia class proceeding. However, before the solicitors for the plaintiffs brought the motion to discontinue, they discovered that there would be prejudice to the Ontario class members if the action was discontinued.

[25] Class proceeding legislation is procedural and the limitations periods are matters of substantive law governed by the jurisdiction in which each class member resides. The plaintiffs' law firm discovered that there would be prejudice to the Ontario class members if the matter was discontinued as their limitation periods may expire in Ontario before certification of the British Columbia proceeding occurs, which would prevent them successfully joining the British Columbia class proceeding.

Issue #1 **Did the parties reach a settlement agreement to discontinue the Ontario class proceeding?**

[26] The defendants submit that a settlement agreement was reached between counsel as set out in the e-mail of November 1, 2010 from plaintiffs' counsel to Stork Craft's counsel stating that the Ontario plaintiffs agreed to put the motion for discontinuance before me for my consideration only if notice was not ordered. The e-mail from Ms. Sadaghianloo was a response to a letter from counsel for Stork Craft dated October 1, 2010 which proposed three amendments to the draft documents which were sent to them. The plaintiffs made the three amendments proposed by the defendants to their motion materials.

[27] The defendants submit that counsel for the plaintiffs agreed with the three proposed amendments as indicated in her letter of November 1, 2010 and ultimately, on December 8, 2010 when the draft motion materials were forwarded to the defendants including the three proposed amendments.

[28] However, in her December 8, 2010 letter, counsel for the representative plaintiffs indicated that they would raise their concern about the limitation periods before me at the scheduled case management conference. The plaintiffs also submit that they never reached a mutual agreement with Stork Craft on clearly defined essential terms.

[29] The cases of *Olivieri v. Sherman* (2007), 86 O.R. (3d) 778 and *Cellular Rental Systems Inc. v. Bell Mobility Cellular Inc.*, [1995] O.J. No. 721 (Gen. Div.), aff'd [1995] O.J. No. 3773 set out the requirements to establish a settlement agreement. At paragraph 41 of *Olivieri*, *supra*, Gillese J.A. stated as follows:

> [41] A settlement agreement is a contract. Thus, it is subject to the general law of contract regarding offer and acceptance. For a concluded contract to exist, the court must find that the parties: (1) had a mutual intention to create a legally binding contract; and (2) reached agreement on all of the essential terms of the settlement: …

[30] A determination of whether an agreement was concluded does not depend on a party's subjective intention but rather on an objective reading of the language used to reflect the agreement. At paragraph 44 of *Olivieri, supra*, the court stated:

> Where, as here, the agreement is in writing, it is to be measured by an objective reading of the language chosen by the parties to reflect their agreement.

[31] Based on the initial exchange of correspondence, I find that there was an initial agreement between Darren Williams, counsel for the Merchant Law Group, and the defendants that MLG would discontinue the class proceedings in all provinces other than British Columbia and proceed to certification in British Columbia. In his reply of October 1, 2010 MLG confirmed their clients' agreement subject to obtaining the required approval of the Ontario Superior Court.

[32] The defendants then sought to add additional terms to the initial agreement by their letter of October 21, 2010, adding the condition that the discontinuance be with prejudice, that the motion be without costs provided that there would only be a single appearance, and if notice was required, then notice would be at the sole expense of the plaintiffs.

[33] The plaintiffs' counsel replied that they had not agreed to those terms but would consider the defendants' proposals. I find that based on the exchange of correspondence, the parties had not reached a complete agreement as there were essential terms of the settlement such as notice, cost of notice, cost of proceedings, and number of hearings, all of which were not included or specified in their original agreement.

[34] On October 31, 2010, the defendants proposed that the discontinuance be with prejudice only to the three individual representative plaintiffs. They proposed two other amendments namely: that the motion to discontinue not indicate that it was made on consent of Stork Craft or indicate that the defendants agreed that notice was not required. The defendants further suggested that an affidavit be obtained from each of the three representative plaintiffs confirming their awareness and instructions to discontinue the class proceeding in Ontario.

[35] In her reply of November 1, 2010, counsel for the plaintiffs agreed to amend her motion materials to remove the statement that the discontinuance was made "on consent" of Stork Craft. She also agreed to remove the statement that Stork Craft agreed that notice was not required and advised the defendants that she was preparing affidavits for the other two representative plaintiffs. Finally, she confirmed that the three representative plaintiffs were prepared to discontinue "with prejudice" to themselves only.

[36] I find that at this point in time, viewed objectively, the parties had reached an agreement on all of the essential terms. Plaintiffs' counsel had agreed to the proposed amendments of counsel for the defendants. As a result, I find the parties reached an agreement on all of the essential terms of the discontinuance of the class proceeding in Ontario, provided the discontinuance was without costs and that notice was not ordered. This settlement agreement was an amendment to the original agreement between Mr. Williams, plaintiffs' counsel in British Columbia and counsel for the defendants wherein it was mutually agreed that the plaintiffs would proceed with the class action in British Columbia and discontinue in Alberta, Manitoba and Ontario.

[37] I find that some time after November 1, 2010, the plaintiffs became aware of potential prejudice to Ontario class members because the limitation periods are a substantive issue governed by the law of Ontario. The limitation period for Ontario class members would not be suspended by commencing a class proceeding in British Columbia, as class proceeding legislation is only procedural. This concern was indicated in their draft materials delivered on December 1, 2010 and in their letter of December 8, 2010.

[38] The motion materials sent by the plaintiffs' solicitors on December 8, 2010, contained an additional provision from those set out in the draft notice of motion sent to the defendants on October 27, 2010. By December 8th, the plaintiffs had added paragraph (b) to the motion stating that "*The Plaintiffs rely on the Court's determination of whether discontinuance will give rise to prejudice or unfairness to the Class, including whether or not limitation periods will resume running.*" Similar wording was contained in the letters to the representative plaintiffs and in the affidavit of the representative plaintiff, Mr. Duong.

Disposition Regarding Issue #1

[39] For the above reasons, I find that a settlement agreement was reached between the parties on all of the essential terms to discontinue the class proceeding in Ontario and to proceed with the class proceeding in British Columbia, with prejudice to the three representative plaintiffs and provided notice was not given to Ontario class members. I also find that before the motion for discontinuance was brought, the plaintiffs' counsel became aware of the potential prejudice to

Ontario class members as a result of the possible expiry of the limitation periods for the Ontario class members before the class in British Columbia was certified. The representative plaintiffs ultimately opposed the motion for discontinuance for this reason.

Issue #2 **Should the discontinuance of the Ontario class proceeding be approved without notice to class members, where there could be prejudice to Ontario class members due to the expiry of their limitation periods before they can opt into the class proceeding commenced in British Columbia?**

[40] The issue of whether the plaintiffs should be permitted to stay the class proceeding commenced in Ontario for the purpose of suspending the limitation period from running for Ontario class members, and then proceed with certification of the class proceeding in British Columbia was not fully argued. I raised the possibility of further submissions on this issue during the hearing but I did not specifically request additional submissions. The defendants requested an opportunity to address this issue if it was necessary for me to decide this motion. I am not prepared to decide this issue without hearing full argument by all parties.

Prejudice to Class Members

[41] Stork Craft submitted that the Ontario class members would not suffer any prejudice related to limitation periods expiring if the discontinuance was approved without notice. They submitted that the limitation period was suspended from the date the class proceeding was commenced in Ontario, namely, on November 25, 2009 until the notice of discontinuance was approved, whereupon the limitation periods would start to run again. Since the notice of the recall of the cribs was given in November of 2009, only approximately a month of the limitation period would have had expired, leaving Ontario class members a further 23 months to opt into the class proceeding in British Columbia.

[42] However, in the case of *Coulson v. Citigroup Global Markets Canada Inc.*, 2010 ONSC 1596, Perell J. came to a contrary conclusion. He held that where a class action was discontinued or dismissed, "[…] *the calculation of the running of the limitation period resumes at the time when the suspension started - not at the time when the suspension ended.*"

[43] If the reasoning of Perell J. is correct the Ontario class members would not benefit from any suspension of their limitation period, after the Ontario class proceeding was commenced, if the class proceeding is discontinued. The *Coulson* decision contradicts the submissions of the defendants and greatly increases the prejudice that the Ontario class members would suffer, because their limitation period would expire in November of 2011, which would likely be before the British Columbia proceeding is certified.

[44] The solicitors for the plaintiffs indicated their concern that the Ontario class members would be prejudiced if the court approved the discontinuance, because their limitation periods would not be suspended from the date the class proceeding was initially issued in Ontario, namely, November 25, 2009 until the present. The certification motion in the British Columbia class proceeding is set to be heard in the Fall of 2011. The two year limitation period for Ontario

class members will expire in November of 2011, possibly before the British Columbia certification hearing is held.

[45] If the Ontario limitation period expires before the Ontario members can opt into the British Columbia class proceeding they will suffer prejudice. The defendants did not propose to waive reliance on a limitation defence in the British Columbia class proceeding for all Ontario class members.

[46] In *Hudson v. Austin*, [2010] O.J. No. 2015 (S.C.J.), Perell J. granted leave to discontinue a class action at a future date and ordered that notice be given to class members. The *Hudson* case involved allegations of professional negligence against an obstetrician and gynaecologist and others, where leave was granted to continue the proceeding as an individual action. Perell J. ordered that notice of the Intent to Discontinue be published through various media outlets and ordered the discontinuance to become effective some four months after his order was made and after notice was published.

[47] In *Hudson, supra*, notice was given to class members before discontinuance was approved, however there was some evidence that a number of individuals had contacted Ms. Hudson's solicitor and may have been relying on the suspension of the limitation periods which occurred as a result of a class action having been commenced.

[48] In the *Hudson* case the news media had initially published information about the class proceeding and individuals may have relied on this proceeding. I do not have any evidence before me of whether there has been any published notice of the fact that this class proceeding has been commenced in Ontario.

[49] It is reasonably foreseeable that the limitation period for Ontario class members will have expired before a decision is released on the British Columbia certification motion, and as a result, before any notice can be given to the Ontario class members to allow them to opt into the British Columbia class proceeding.

[50] The defendants also submit that the Ontario class members would not be prejudiced by a discontinuance because the Ontario class members do not have knowledge that a class action has been commenced in Ontario or that their limitation periods have been suspended for some 16 months as a result of commencement of the Ontario class proceeding, and therefore they have not altered their position in consequence.

[51] In *Sollen v. Pfizer Canada Inc.* (2008), 290 D.L.R. (4th) 603 (S.C.J.) aff'd 2008, 63 C.P.C. (6th) (Ont. C.A.), the Court of Appeal affirmed a decision of Cullity J. where he approved a discontinuance of a class proceeding at the request of the representative plaintiffs without giving notice to class members. The *Sollen* situation is distinguishable because in that case the representative plaintiffs sought the discontinuance in Ontario to avoid incurring litigation costs. They chose instead to proceed in Saskatchewan which is a "no costs" jurisdiction. In the case before me the Ontario representative plaintiffs oppose the discontinuance due to concerns about the expiry of Ontario class members' limitation periods. This was not the situation in *Sollen, supra*.

[52] In addition, in *Sollen*, *supra*, the motion judge was under the impression that the limitation period continued to be suspended in Saskatchewan for Ontario class members. At p. 614 of his decision he stated:

> Although the limitation period in Ontario will recommence, there was no evidence and there was no suggestion that it will not continue to be suspended in the Saskatchewan action …

[53] This is an important difference and this issue was not argued in *Sollen*, *supra*, which was decided before the *Coulson* decision was released.

[54] I am not prepared to grant the motion to approve the discontinuance of the Ontario class proceeding because I am satisfied that there would be substantial prejudice to all Ontario class members who would be deprived of having the limitation period suspended in Ontario, and they would potentially lose their ability to participate as an "opt-in" class member in the British Columbia class proceeding. If the representative plaintiffs wished to obtain approval to discontinue the class proceeding (which they do not) in circumstances where there would be substantial prejudice to all Ontario class members, then reasonable notice would have to be given to the Ontario class members.

[55] I also infer that it was an essential term of the settlement agreement between the parties that the Ontario class proceeding would be discontinued on the understanding that the parties would proceed to a certification hearing in British Columbia and that the Ontario class members would be able to opt into the British Columbia class proceeding if it was certified. If this discontinuance is approved with the effect that Ontario class members would be deprived of their right to opt into the British Columbia class proceeding because of the expiry of their Ontario limitation period, then this would be inconsistent and contrary to the terms of the settlement agreement.

[56] The issue of whether the representative plaintiffs are permitted to commence a class proceeding in Ontario, obtain the benefit of suspending the running of the limitation periods for Ontario class members, and then stay a class proceeding in Ontario while they seek certification of a class proceeding in a separate province, has not been decided. The parties may bring a motion to have this issue determined if they wish.

Disposition on Issue #2

[57] The motion to approve the discontinuance of the Ontario class proceeding without first providing reasonable notice to all Ontario class members is dismissed, as it would cause prejudice to all Ontario class members due to the potential expiry of their limitation periods before they could opt into the British Columbia class proceeding, which was an essential term of the settlement agreement.

Costs

[58] The plaintiffs shall have ten (10) days to make submissions on costs, the defendants shall have ten (10) days to respond and the plaintiffs shall have seven (7) days to reply.

R. Smith J.

Released: May 12, 2011

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Plaintiffs

– and –

STORK CRAFT MANUFACTURING INC., FISHER-PRICE CANADA INC., FISHER-PRICE INC., SEARS CANADA INC., SEARS, ROEBUCK AND CO., WAL-MART CANADA CORP., and WAL-MART STORES INC.

Defendants

AMENDED REASONS FOR JUDGMENT

R. Smith J.

Released: May 12, 2011