COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Williams v. Audible Inc.,*
2023 BCCA 475

Date: 20231219
Docket: CA48333

Between:

John Williams

Appellant
(Plaintiff)

And

Audible Inc. and Apple, Inc.

Respondents
(Defendants)

Before: The Honourable Mr. Justice Willcock
The Honourable Justice Griffin
The Honourable Justice Skolrood

On appeal from: An order of the Supreme Court of British Columbia, dated May 18, 2022 (*Williams v. Audible Inc.*, 2022 BCSC 834, Vancouver Docket S1810561).

Counsel for the Appellant:	D. Klein A. Calvert
Counsel for the Respondent Audible Inc.:	M. Sampson A.S. Goodman
Counsel for the Respondent Apple, Inc.:	C. Woodin E. Davis
Place and Date of Hearing:	Vancouver, British Columbia November 17, 2023
Place and Date of Judgment:	Vancouver, British Columbia December 19, 2023

Written Reasons by:
The Honourable Mr. Justice Willcock

Concurred in by:
The Honourable Justice Griffin
The Honourable Justice Skolrood

Summary:

This is an appeal from an order dismissing the appellant's application for certification of a class proceeding. During the course of the certification hearing, certain evidentiary deficiencies in the appellant's materials became apparent. The appellant sought an adjournment pursuant to s. 5(6) of the Class Proceedings Act (CPA) to permit him to obtain and tender supplemental expert evidence addressing the deficiencies. The chambers judge refused his request and dismissed the certification application. The appellant contends the chambers judge misapprehended his adjournment proposal and made several errors in principle in the exercise of her discretion. Held: Appeal dismissed. It is not apparent there was any misapprehension. And, in any event, the chambers judge properly addressed the fundamental question before her: whether an adjournment ought to be granted so as to permit the appellant to try to obtain further evidence. The statutory discretion provided by s. 5(6) of the CPA to adjourn an application for certification must be exercised judicially but is not otherwise constrained. The chambers judge properly considered several relevant factors in denying the adjournment request. She made no error in principle in the exercise of her discretion which would warrant appellate intervention.

Reasons for Judgment of the Honourable Mr. Justice Willcock:

Introduction

[1] In February 2022, the appellant applied for certification of a class proceeding founded upon an allegation that exclusivity provisions in a 2006 agreement between the defendants, Audible Inc. and Apple, Inc., relating to the distribution and sale of digital downloadable audiobooks in Canada, violated the *Competition Act*, R.S.C. 1985, c. C-34 and the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2, and the agreement constituted a civil conspiracy.

[2] The appellant initially asserted the respondents had violated s. 45 of the *Competition Act* by including two exclusivity provisions in the agreement:

> Clause 4.8(a): a provision that prohibited Audible from integrating its audiobook content with any online store or distribution service offering digital downloading or streaming, other than Apple's iTunes Store, unless that store or distribution service did not offer digital music or video downloads (the "Restrictions on Audible"); and

> Clause 4.8(b): a provision that, with very limited exceptions, required Apple to source audiobooks exclusively from Audible (the "Restrictions on Apple").

[3] The appellant sought to certify the class action as one brought on behalf of persons in Canada who purchased audiobooks from the iTunes Store or the Audible website between March 12, 2010 and January 15, 2017.

[4] Two developments which are germane to this appeal came about during the course of the certification hearing in February 2022.

[5] First, the appellant advised he no longer alleged the Restrictions on Apple violate s. 45 of the *Competition Act*. Accordingly, he sought to focus the proposed class action on the Restrictions on Audible.

[6] Second, the appellant sought to revise the proposed aggregate damages common issue, so that it would be possible to identify some portion(s) of the class period for which damages could be determined on an aggregate basis. This proposal, necessitated by a statutory limitation defence plead by the respondents, was intended such that aggregate damages could still be determined and awarded on a class-wide basis for only a portion of the class period if some of the class claims were determined to be time barred.

[7] At the certification hearing, counsel for the appellant took the position the proposed class action, as modified, might still be certified on the record before the chambers judge. In the alternative, at the conclusion of the certification hearing, he sought an adjournment in order to address a shortcoming in his evidence pursuant to s. 5(6) of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*], which provides:

> The court may adjourn the application for certification to permit the parties to amend their materials or pleadings or to permit further evidence.

[8] That shortcoming was the absence of evidence of a credible and plausible methodology to assess aggregate damages (i) resulting solely from the Restrictions on Audible, which had become the sole focus of the appellant's case; and (ii) for only

a portion of the class period, which could have become necessary depending on the outcome of the limitation defence.

[9] The shortcoming resulted from the developments at the hearing. That is, the expert evidence the appellant had relied on to support the existence of a plausible methodology to assess aggregate loss to class members—the report of an expert economist, Dr. Roger Ware—did not address the appellant's latest theory (which focused on the Restrictions on Audible alone), nor was it capable of being used to assess aggregate damages for only some portion(s) of the class period.

[10] For reasons indexed as 2022 BCSC 834, the chambers judge refused to grant an adjournment and dismissed the certification application. The appellant contends she erred in law in refusing the adjournment by imposing too great a burden upon a plaintiff who seeks to address evidentiary deficiencies on a certification application.

[11] For the reasons that follow, I would dismiss the appeal. In my opinion, the chambers judge was required to exercise her discretion in a manner that balanced the interests of the appellant and the respondents. As the case-management judge, she was very familiar with the evolution of this case and the interests of the parties. She made no apparent error of law. In particular, she did not, as suggested by the appellant, limit the circumstances in which a certification hearing may be adjourned to cases where there is only a technical evidentiary defect that can be easily addressed.

[12] The factual background including the history of the agreement, the creation of the exclusivity provisions in 2006 and their termination of in 2017, and the protracted and complicated procedural history of these proceedings is comprehensively set out in paras. 6–31 of the judge's reasons for judgment. I will not repeat that history here, but I refer to salient facts in the course of my discussion below, as necessary.

Discussion and Analysis

Standard of review

[13] When she refused to adjourn the application for certification, the chambers judge was exercising her discretion. The parties agree the decision must be afforded deference.

[14] The respondents, citing the following passage from the judgment of Levine J.A. in *Bodnar v. The Cash Store Inc.*, 2007 BCCA 366 (Chambers), contend the standard is particularly high:

> [16] As for a decision to adjourn a matter, Wood J.A. said in *Andersson v. Andersson* (8 May 1990), Vancouver CA012399, quoted in *British Columbia (Pharmacare Program) v. Shah*, [1992] B.C.J. No. 2208 at para. 21 (CA.)(QL):
>
> > Of all the interlocutory matters that come before this Court seeking leave to appeal, there is none more discretionary than that where one party seeks and is either granted or refused an adjournment of some proceeding at the trial level. Whether to grant or to refuse an adjournment of a trial is a question which the trial judge before whom the application originates is best suited to answer. To attempt to interfere with the exercise of a trial judge's discretion in such a matter is an exercise which is to be avoided at all costs unless there is evidence that the judge clearly misdirected himself in law or failed to act judicially in the exercise of his discretion….
>
> Those words are equally apt in the circumstances of this chambers application.
>
> [Emphasis added.]

[15] The appellant concedes he has to meet a high standard. He acknowledges he is called upon to establish the chambers judge acted on a wrong principle by, for example, misdirecting herself, acting upon irrelevant considerations or giving insufficient or no weight to relevant considerations: *M. McIsaac Family Holdings Ltd. v. Tolam Holdings Ltd.*, 2020 BCCA 371 at para. 60. In my view, that is a fair description of the standard of review.

Did the chambers judge misapprehend the adjournment proposal?

[16] The first ground of appeal is based on the assertion the chambers judge misdirected herself as a result of a misapprehension of the nature of the appellant's adjournment proposal.

[17] The appellant says his proposal constituted an invitation to the chambers judge to make findings in respect of some certification criteria, but to adjourn a final ruling on the certification application pending the receipt of supplemental expert evidence addressing the deficiencies.

[18] In the appellant's submission, the judge misapprehended his application by mistaking his proposal for a suggestion that she rule on certification for a subset of the common issues, but postpone judgment only with respect to whether the proposed common damage and interest issues (issues 8, 9 and 10 on the following list) could be set out as common issues for the class in the certification order. The proposed common issues, as identified at the certification hearing, were:

> ***Competition Act***
>
> (1) During the Class Period, were the defendants' agreements with respect to Audiobooks contrary to s. 45 of the *Competition Act*?
>
> (2) If the answer to common issue #1 is yes, are class members entitled to damages pursuant to s. 36 of the *Competition Act*?
>
> **Conspiracy**
>
> (3) Did the defendants conspire to harm the class thereby causing loss to the class?
>
> (4) If the answer to common issue #3 is yes, did the conspiracy involve unlawful acts?
>
> (5) If the answer to common issue #3 is yes, was the predominant purpose of the conspiracy to harm the class?
>
> **Unjust Enrichment**
>
> (6) Were the defendants unjustly enriched by their conduct and, if so, should the court order restitution or disgorgement?
>
> **Breach of [the *Consumer Act*]**
>
> (7) Did the defendants breach s. 8 of the [*Consumer Act*], irrespective of whether the specific factors in subsection (3) are present in any individual case? If so, should the court make a restoration order under s. 172 for residents of British Columbia?

Damages and distribution

(8) If the defendants are found liable to the class, should the court make a n aggregate award and in what amount?

(9) What is the appropriate distribution of damages or disgorgement to the class, and should the defendants pay the costs of distribution?

Interest

(10) Are the defendants liable to pay interest on the award?

Joint and Several Liability

(11) Are the defendants jointly and severally liable for the award?

Limitation Period

(12) Can the limitation period be determined on a class-wide basis?

(13) If the answer to the preceding question is yes, when did the limitation period begin to run?

[19] According to the appellant, the procedure he proposed was akin to that adopted in *Vester v. Boston Scientific Ltd*., 2015 ONSC 7950: ruling on some criteria for certification but postponing the decision whether to make a certification order pending receipt of further evidence. In *Vester*, Perell J. concluded the pleadings disclosed a cause of action for negligent design and failure to warn claims, but the plaintiffs had not proposed common issues of fact or law in relation to those claims. In the circumstances, he considered it appropriate to adjourn the certification application so as to permit the plaintiffs to provide further evidence to establish some basis-in-fact for common issues in the negligent design and failure to warn claims, to establish some basis-in-fact a class action would be the preferable procedure for the determination of the common issues and to revise the litigation plan: see paras. 3, 151.

[20] The appellant acknowledges the chambers judge “would have been correct to reject” a proposal to certify some common issues without being satisfied there was a plausible methodology to assess aggregate damages, but says that is not what he was seeking. He contends the misapprehension of his adjournment proposal was an error that compromised the exercise of discretion and which “looms large in the certification judge’s analysis”.

[21] The respondents say there was confusion with respect to what the appellant was seeking at the end of the certification application, but no misapprehension. They emphasize the appellant only sought an adjournment in reply oral submissions (and in the alternative). There was no formal adjournment application and, as noted below, there was lack of clarity in the submissions. They contend the appellant's assertion on appeal that he sought a particular type of adjournment is not borne out by the transcript, and, in particular, in exchanges between the chambers judge and appellant's counsel.

[22] At the hearing, the judge described the appellant's request as follows:

> THE COURT: All right. And then you're still proposing an adjournment of the determination of proposed common issues 8 and 9 I think at least so that your proposal is that Dr. Ware would provide additional evidence before -- sorry. I'm –
>
> CNSL D. Klein: No that's fine. That's the second part of my submission.
>
> [Emphasis added.]

[23] In my view, this passage is ambiguous. It suggests the judge understood the appellant wished to adjourn the question of whether damages questions could be certified as common issues, but does not clarify whether he sought to adjourn the certification hearing generally, without certifying a class action. An attempt at clarification was made later in submissions:

> THE COURT: … Mr. Klein [is] proposing an adjournment of the revised common issues 8 and 9 to allow further evidence from Dr. Ware to be adduced and then a decision on certification, but the hearing of the common issues will be sequence[d] so that the liability issues get heard in advance of the damages issues? Just -- Mr. Klein, do I have that right?
>
> CNSL D. Klein: Yes, that's exactly right. The reference to adjudication of common issues 8 and 9 being after the rest is -- maybe we could say adjudication at the common issues trial if we wanted to be more specific. …
>
> [Emphasis added.]

[24] In this passage, the appellant's position was still not entirely clear (because it was complicated by submissions with respect to the order in which issues would be addressed at a common issues trial). However, counsel for the appellant agreed with

the judge's description of what was being sought: an adjournment of the revised common issues 8 and 9.

[25] The respondents say these exchanges are consistent with the chambers judge's description of the appellant's position as a request that he be permitted "to bifurcate the certification hearing" (at para. 149), and with the following passage in the reasons for judgment:

> [143] The plaintiff's proposed solution to the remainder of the evidentiary deficiencies in his case is for the court to order the certification of common issues (1)–(7) and (11)–(13), and to direct that the plaintiff's application to certify common issues (8)–(10) be adjourned pending receipt of a new affidavit from Dr. Ware that more specifically focusses on the competitive effects of the Restrictions on Audible. The plaintiff says that such an order is authorized by s. 5(6) of the *CPA* which provides that the court may adjourn a certification application to permit the parties to "amend their materials or pleadings or to permit further evidence".

[26] The respondents also argue that, in any event, and regardless of how the adjournment request was formulated, the judge did not err in refusing to adjourn the certification hearing so as to permit supplemental evidence to be obtained. No matter how the chambers judge understood the proposed adjournment, they argue, her task was to assess whether to adjourn the certification application to permit further evidence to be obtained.

[27] They submit the judge committed no error in principle in refusing to adjourn the certification application. Her reasons demonstrate that she properly and reasonably considered and denied a request for an adjournment because she found:

a) the appellant had "entirely revised his theory of the case shortly before the hearing of the certification application, and further revised it in the course of the certification hearing itself" (at para. 148);

b) Dr. Ware's report, which addressed the methodology for proving aggregate damages on a class-wide basis, "was not responsive to the plaintiff's evolved claim or to the defendants' pleaded limitation defence" (at para. 140) because (i) he did not address the implications of the abandonment by the appellant of

the claim as it pertained to the Restrictions on Apple, (ii) he assumed in his report that Amazon was a party to the alleged conspiracy and he was not asked to address the implications of removing Amazon for his methodology, and (iii) he did not give evidence of a "methodology capable of assessing aggregate damages for only a portion of the class period" (at para. 141); and

c) if the appellant was permitted to obtain additional expert evidence, the respondents would "have to start afresh in retaining and instructing experts to respond to the new theory. Such a process would be unfair and prejudicial to the defendants" (at para. 148).

[28] In my opinion, the respondents are correct to say, first, it is not apparent there was a misapprehension but, second, the judge properly addressed the fundamental question that had to be answered regardless of how the request was formulated: whether an adjournment ought to be granted so as to permit the appellant to try to obtain further evidence of a methodology for proving damages.

[29] Whether an adjournment should be granted pursuant to s. 5(6) of the *CPA* turned on whether it was in the interests of justice to grant an adjournment for that purpose. For reasons set out in more detail below, I would not accede to the argument that any misapprehension affected the consideration of whether the certification hearing should have been adjourned.

Did the chambers judge act on a wrong principle?

[30] The appellant contends the chambers judge erred in principle by taking the view that a certification application should only be adjourned to permit further evidence pursuant to s. 5(6) of the *CPA* in order to redress evidentiary deficiencies "of a technical nature". At a minimum, he contends, the judge was of the view the plaintiff must be able to point to unusual or exceptional circumstances in order to be granted an adjournment.

[31] Either perspective, he says, should be rejected as representing the overly restrictive approach to class proceedings legislation the Supreme Court of Canada

cautioned against in *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 15 and *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at paras. 24–29, 46.

[32] The appellant contends that, congruent with the Supreme Court of Canada's direction, the appropriate approach to certification procedure is what he calls the "fluid, flexible" approach. This approach is recognized, he says, in this Court's guidance in *Halvorson v. British Columbia (Medical Services Commission)*, 2010 BCCA 267 at para. 23, that "[t]o hold plaintiffs strictly at the certification stage to their pleadings and arguments as they were initially formulated would in many cases defeat the objects of the [*CPA*]".

[33] He says this approach is exemplified by the decision of the Federal Court of Appeal in *Canada (Attorney General) v. Jost*, 2020 FCA 212, where Mactavish J.A. wrote, when addressing a motion for leave to amend the pleadings:

> [49] … [T]he Supreme Court has held that an overly restrictive approach to the application of class action certification legislation is to be avoided so that the benefits of class actions can be fully realized. Indeed, leave to amend a pleading in a proposed class proceeding will only be denied in the clearest cases where it is plain and obvious that no tenable cause of action is possible on the facts as alleged, and there is no reason to suppose that the party could improve his or her case by an amendment: [citations omitted].

[34] The approach is also reflected in the manner in which inadequacies in a plaintiff's case and consequential adjournment applications have been addressed in a number of cases cited by the appellant*: Bittner v. Louisiana-Pacific Corp.* (1997), 43 B.C.L.R. (3d) 324 (S.C.); *Alves v. First Choice Canada Inc.*, 2011 SKCA 118; and *Mackinnon v. Volkswagen*, 2021 ONSC 5941.

[35] The appellant submits, correctly in my view, that the narrowing of claims following an exchange of evidence and argument is one of the desired results of an effective certification process. He contends that, as a consequence of the chambers judge's ruling, plaintiffs in this province will now modify their claims at the certification stage "at their peril" because in doing so they risk creating a "mismatch with the evidence" that they will be unable to rectify by adjournment unless they are able to label the resulting evidentiary deficiencies as merely technical.

[36] This, he says, illustrates that the approach taken by the chambers judge in this case is antithetical to the “fluid, flexible” approach and to the objectives of class proceedings legislation.

[37] There is no doubt a chambers judge has the discretion to adjourn a certification application to permit amendments to pleadings and the filing of further evidence; doing so is expressly contemplated by s. 5(6) of the *CPA*: *WN Pharmaceuticals Ltd. v. Krishnan*, 2023 BCCA 72 at paras. 68, 79, 81 [*Krishnan C.A.*].

[38] As this Court made clear in both *Douez v. Facebook, Inc.*, 2018 BCCA 186 and *Krishnan C.A.*, a judge a hearing certification application has wide latitude to manage the litigation. In *Krishnan C.A.*, I wrote:

> [79] … [C]hambers judges are entitled to use their experience in managing certification applications—the judge has the power to reformulate definitions, the class or the common issues, and, consistent with s. 5(6) of the *CPA*, to permit amendments to pleadings and the filing of further evidence: *Douez v. Facebook*, *Inc*., 2018 BCCA 186 at para. 47, citing *Kumar v. Mutual Life Assurance Company of Canada* (2003), 226 D.L.R. (4th) 112 (O.N.C.A).

[39] That wide latitude is inconsistent with a view that an adjournment of a certification application is only available to address technical deficiencies. As a matter of principle, therefore, I agree with the appellant that it is inaccurate to say that only evidentiary deficiencies of a technical nature are amenable to relief under s. 5(6) of the *CPA*.

[40] The express statutory discretion in s. 5(6) of the *CPA* to adjourn the application for certification “to permit the parties to amend their materials or pleadings or to permit further evidence” must be exercised judicially but is not otherwise constrained.

[41] In my opinion, the respondents are correct to say the chambers judge did not apply a threshold standard of a “technical” evidentiary deficiency and refuse the adjournment on that basis.

[42] Rather, as the respondents argue and as described above, she considered several factors in denying the adjournment request, including the history of amendments to the claim and the prior adjournment, the significant revision of evidence needed to address the deficiency identified at the certification hearing and the prejudice which would be occasioned to the respondents. She referred to the non-technical nature of the missing evidence in this case for the purpose of distinguishing case law relied on by the appellant, not for the purpose of identifying a threshold requirement.

[43] It was open to the chambers judge to consider these factors in exercising her discretion, and I see no principled error in her approach which would warrant intervention.

[44] The respondents contend that, in the cases relied upon by the appellant where hearings were adjourned in order to address deficiencies in the case to be certified, it was uncontroversial that the deficiencies in the evidence or pleadings could in fact be rectified.

[45] *Bittner* is particularly instructive. The evidence filed in support of certification was described in that case as “scant”; however, the chambers judge would still have adjourned pursuant to s. 5(6) of the *CPA* “if [she had] considered that the application might be cured by the introduction of additional evidence”: at paras. 22–23 (emphasis added).

[46] In *Jost*, at the certification stage it was plain and obvious the claim could not succeed because the statement of claim did not plead the existence of an undertaking on the part of the Government of Canada to act in the best interests of the class. Leave was granted to permit that particular defect to be rectified: at paras. 48–50.

[47] In *Mackinnon*, Belobaba J. adjourned the certification hearing to provide the plaintiff with an opportunity to file missing evidence. He appears to have done so

because the plaintiff's expert had expressly opined that the missing evidence could be obtained: at paras. 31–32.

[48] As each of these authorities demonstrate, it is clearly appropriate for the judge to consider whether the deficiency in the materials can and will be remedied if the application is adjourned.

[49] The respondents contend that, once certification proceedings have begun, an adjournment should only be granted if the requesting party provides some certainty it can remove the obstacle to certification: *Navarro v. Doig River First Nation*, 2015 BCSC 2173 at para. 23. The principle described in *Navarro*, and relied on by the respondents, is that if a trial is already underway, a request for an adjournment of that trial may be scrutinized on this "certainty" basis. Somewhat different considerations are engaged when a request is made to adjourn an application for certification. In the class certification context, I would not go so far as to say there must be certainty the obstacle will be removed should an adjournment be granted, but, as described above, it is not an error of law to look to the applicant to establish there is a probability the deficiency can be remedied.

[50] The appellant did not do so. The respondents say there is reason to believe Dr. Ware will be unable to isolate the effect of only one of the two exclusivity provisions contained in the agreement using a "before and after" methodology, because the Restrictions on Apple and the Restrictions on Audible always either co-existed or did not exist at all. There was no period when only one of the provisions was in effect, which might serve as a baseline. There was no evidence before the chambers judge of the likelihood that the deficiency could be remedied if an adjournment was granted.

[51] It is also reasonable for a judge to consider the context in which the adjournment was sought. While prejudice is a more prominent concern when an amendment of the class claim is proposed on appeal, the comments of Groberman J.A. in *Harrison v. Afexa Life Sciences Inc*., 2018 BCCA 165, have some

application to cases where an amendment is sought at a late stage in the certification process:

> [47] I accept that an appellate court can, in an appropriate case, accept a narrowed or revised class definition, and can consider modifications to the proposed common issues on appeal: see *Keatley*, particularly at paras. 21-30 and 40-47. Caution must be exercised, however, in allowing such modifications. As noted in *Keatley*, the court must be satisfied that the modifications do not result in prejudice to the party responding to them. Where evidence is incomplete, or a different strategy might have been employed at first instance in responding to the application, the prejudice that results from modifications may preclude the court from considering them.
>
> [Emphasis added.]

[52] In *Ewert v. Nippon Yusen Kabushiki Kaisha,* 2017 BCSC 2357, Myers J. declined to grant the plaintiff an adjournment to adduce additional expert evidence. At the time the request was made, cross-examinations on expert evidence had already taken place and the prospect of additional evidence risked "a never-ending certification process": at para. 21. It is notable that, in that case, the claim was founded upon an allegation of anti-competitive practices, and the plaintiff sought to adduce further evidence from a consulting economist with respect to the methodology that might be employed to prove damages.

[53] Adjournments to rectify technical deficiencies, and to obtain evidence known to exist, occasion less prejudice to defendants than last-minute adjournment proposals to allow a party to seek out new expert evidence to substantiate a fundamentally revised theory of the case. In none of the cases relied on by the appellant was an adjournment granted as a result of a fundamental revision to the plaintiff's claim in circumstances where the opposing party would be prejudiced as a result.

[54] I also agree with the respondents that the judge referred to the non-technical nature of the missing evidence in this case for the purpose of distinguishing case law relied on by the appellant, *Krishnan v. Jamieson Laboratories Inc.*, 2021 BCSC 1396 [*Krishnan S.C.*], aff'd *Krishnan C.A.*, and *Bodnar v. The Cash Store Inc.*, 2007

BCSC 435 [*Bodnar S.C.*] in particular, not for the purpose of identifying a threshold requirement for granting an adjournment pursuant to s. 5(6) of the *CPA*.

[55] Specifically, the chambers judge distinguished *Bodnar S.C.* and *Krishnan S.C.* as cases where the deficiency could be addressed without occasioning significant prejudice to the defendants. In *Bodnar S.C.*, the applicants mistakenly thought evidence was unnecessary to add defendants to an already-certified class action. The error was remedied by filing an application containing a copy of the original certification record. It would be difficult to characterize that measure as prejudicial. As the chambers judge noted: “The “further evidence” in issue in *Bodnar S.C.* was thus known to the defendants and did not take them by surprise”: at para. 149. In *Krishnan S.C.*, the adjournment had been ordered so the applicant could obtain an affidavit from an expert attesting to the truth and accuracy of an opinion expressed in a letter that had been before the court on the initial certification application but had not been presented in a form suitable to the receipt of expert evidence.

[56] I would not accede to this ground of appeal. The judge not only found the deficiencies in the appellant’s case for certification were not “of a technical nature”, she found they amounted to an entire revision of the appellant’s theory and he had “not, before now, obtained expert evidence to support the existence of a plausible methodology to assess harm on a class-wide basis on the basis of the revised theory” (at para. 148). There was no evidence before the judge as to the likelihood such expert evidence could be obtained if an adjournment were granted. In these circumstances, she found if the hearing were to be adjourned to permit the appellant to seek new evidence in support of the revised theory, that would be “unfair and prejudicial to the defendants”.

[57] In my opinion, it cannot be said the chambers judge acted on wrong principle when she concluded an adjournment should not be ordered after the hearing of the certification application in order to permit a new theory to be explored, when doing so would be unfair and prejudicial.

Did the chambers judge act upon irrelevant considerations?

[58] Another factor weighed by the chambers judge in refusing to adjourn the hearing, was the delay and prejudice caused by the amendment of the claim to remove Amazon as a party to the litigation and the assumption made by Dr. Ware that Amazon was a party to the conspiracy alleged. The appellant contends the removal of Amazon was "a red herring" and the chambers judge placed inappropriate weight upon it.

[59] The respondents contend the judge's conclusion that Dr. Ware's methodology was not credible or plausible was "premised on a conspiracy that includes Amazon as a party", and that this finding was grounded in "ubiquitous references to [Amazon] in his reports". In the respondents' submission, Dr. Ware's methodology cannot be salvaged by argument, and only evidence can undo Dr. Ware's apparent reliance on this assumption. The chambers judge, they say, reasonably concluded the combined effects of the evidentiary deficiencies (reliance on only the Restrictions on Audible, the Amazon problem and the limitations issues), required the parties to start "afresh" in retaining and instructing experts.

[60] In order to appreciate the significance of the abandonment of the claim against Amazon, it is necessary to review the history of proceedings. The judge did so. She referred to Amazon when describing the claim advanced in the appellant's original notice of civil claim as follows:

> [19] The plaintiff … alleged that after Amazon acquired Audible in 2008, Amazon, Audible, and Apple entered into an agreement not to compete in the production, distribution, and sale of audiobooks, which permitted the defendants to charge an unlawful premium for audiobooks sold through the iTunes Store, and the Audible and Amazon websites.

[61] She noted that when the certification material was filed, the class was defined to include all persons in Canada who purchased digital audiobooks from the Amazon or Audible websites or Apple's iTunes Store between October 16, 2003 and the date of certification. For the purpose of his analysis, Dr. Ware was asked to assume the exclusive agreement was between Audible, Amazon and Apple, and it covered worldwide sales from the three platforms.

[62] She noted that, in January 2020, shortly before the first scheduled certification hearing, when it became clear Amazon was not a party to the agreements between Apple and Audible which contain the exclusivity provisions, the appellant filed an amended notice of civil claim revising the theory of Amazon's liability and alleging two separate anti-competitive agreements: one, between Apple and Audible with the exclusivity clauses, and another, a "co-branding agreement", between Audible and Amazon.

[63] In December 2021, the appellant filed a further amended notice of civil claim abandoning the claim against Amazon and withdrawing the allegation Amazon was a party to any unlawful anti-competitive agreement in relation to audiobooks.

[64] The judge concluded, as a result of the abandonment of the claim against Amazon, some of the evidence before her at the certification hearing (the second affidavit of John Pecman, a former Commissioner of Competition, and the affidavit of an economist, Dr. Kathrin Westermann, filed by the respondents in order to address the allegations of a conspiracy involving Amazon and the respondents), was irrelevant. In relation to Dr. Ware's opinion, she observed:

> [146] … Dr. Ware's proposed methodologies to determine common economic harm to the class and economic gain to the defendants are premised on a conspiracy that includes Amazon as a party and extends to the entirety of the Exclusivity Provisions, not simply the Restrictions on Audible. In light of the disconnect between the plaintiff's current theory and the methodologies proposed in Ware Affidavits #1 and #2, the plaintiff has not met his burden of providing some evidence to show that these issues can be resolved on a common basis.
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> …
>
> [148] … Dr. Ware was not asked to address the implications of the removal of Amazon from the alleged conspiracy for his proposed methodology, or the abandonment of reliance on the Restrictions on Apple. If the plaintiff was permitted to instruct Dr. Ware at this stage to address the new theory, the defendants would also have to start afresh in retaining and instructing experts to respond to the new theory. Such a process would be unfair and prejudicial to the defendants.
>
> [Emphasis added.]

[65] In neither instance did the judge place weight upon the inclusion of Amazon in the conspiracy as a separate, distinct factor undermining Dr. Ware's opinion. Rather,

in both instances where the inclusion of Amazon was mentioned, she referred to the fact Dr. Ware also weighed the impact of the Restrictions on Apple in his analysis. It is clear from discussions on the record that the judge regarded the latter, not the former, as the significant problem with Dr. Ware's opinion in light of the developments at the certification hearing.

[66] Moreover, the chambers judge was aware of the position of counsel for the appellant that the abandonment of the claim against Amazon was a "red herring". The following exchange occurred:

> CNSL D. KLEIN: …Amazon never sold audiobooks. ... its irrelevant to the calculation of [the plaintiffs'] loss. … A, definitionally, there are no class members who purchased from Amazon and, B, Amazon didn't sell audiobooks. So although Dr. Ware includes the co-branding agreement [between Amazon and Audible] in his analysis, … the evidence is clear … if someone went on to the Amazon website, they were redirected to Audible and made their purchases on Audible. … [T]hat doesn't have an impact on class member losses, because no class members purchased from Amazon and Amazon didn't sell audiobooks to anyone. I don't know, Justice, if you have a question on that.
>
> THE COURT: I don't. I assume you were going to go on to the point about Dr. Ware including both forms of exclusive agreement which seems to be the more trickier point.
>
> CNSL D. KLEIN: That is, that is the trickier point. …

[67] The judge apparently appreciated the abandonment of the claim against Amazon might not substantially affect Dr. Ware's opinion. What was unclear was the impact the abandonment of the claim as it related to the Restrictions on Apple would have on Dr. Ware's proposed methodology.

[68] The abandonment of the claim against Amazon was not, however, a complete "red herring". It formed part of the context in which the adjournment was considered. It was relevant to know the number of theories the respondents had been required to address and to appreciate an adjournment had previously been necessitated as a result of amendments. It was also relevant to appreciate the fact that Dr. Ware's report had not been updated in 2022 to reflect amendments to the pleadings made in December 2021.

[69] As this Court noted in *Sandhu v. HSBC Finance Mortgages Inc*., 2016 BCCA 301, (albeit in a different context) timing is one factor that may be considered when a plaintiff seeks leave to address a deficiency in its cause of action: “The court will consider in this mix the length of time the plaintiff has had to ‘get it right’”: at para. 44.

[70] For those reasons, I am of the view the chambers judge did not err in placing some, but limited, weight upon the fact the appellant’s expert witness had not modified his opinion to reflect the abandonment of the appellant’s case against Amazon.

Did the chambers judge give insufficient or no weight to relevant considerations?

[71] The appellant contends the judge gave insufficient or no weight to relevant considerations. In my view, there is no merit to the argument that the specific or collective weight of those factors were overlooked.

(i) The possibility of mitigating prejudice to Apple and Audible by way of directions rather than dismissal

[72] First, the appellant argues the chambers judge does not appear to have considered the possibility of issuing directions about what supplemental evidence the appellant would be permitted to tender—as occurred in *Mackinnon* and *Krishnan S.C.*—as a means of alleviating any prejudice to the respondents.

[73] The respondents say this critique places an undue burden on the chambers judge to rescue the appellant’s case because the appellant neither sought nor identified a direction that might be of assistance.

[74] I would not accede to the appellant’s argument. The judge clearly identified the deficiency in the appellant’s case for certification: the absence of evidence of the existence of a credible and plausible methodology to assess aggregate damages (i) resulting solely from the Restrictions on Audible, and (ii) for only some portion(s) of the class period. It was also clear what was needed to rectify that deficiency:

Dr. Ware had to reformulate his opinion. In the circumstances, I see little room for the chambers judge to have given the appellant directions.

[75] As this Court noted in *Douez*, when discussing a chambers judge's wide discretion to reformulate class proceedings:

> [45] There are limits to the role that a certification judge should play in re-formulating the class definition, or in stating the common issues. In *Andriuk v. Merrill Lynch Canada Inc.*, 2013 ABQB 422, aff'd 2014 ABCA 177, Martin J. (as she then was) said:
>
> > [107] There is some debate in the jurisprudence over the role of the certification judge in "entering the ring" and remedying the class definition or other aspects of the application for certification. Winkler J in *Caputo v Imperial Tobacco Ltd* (2004), 236 DLR (4th) 348 (ONSC) at para. 41 rejected the plaintiffs' request to redefine the class in any way necessary to render the action certifiable:
> >
> > > …What the plaintiffs suggest is akin to having the court perform the role of class counsel by making wholesale changes to arrive at a definition that the court itself would accept. That goes beyond a simple exercise of discretion and verges into the prohibited territory of descending "into the arena" with the parties to the motion.
> >
> > [108] The same principles are relevant here in relation to the cause of action. While I must take a generous approach to the pleadings in furtherance of the three main goals of class proceedings legislation, there are so many difficulties in the manner in which this application has come forward that even a generous approach cannot fill the numerous gaps.

[76] In my view, the decision to refuse the adjournment in the circumstances did not reflect a failure to consider "the possibility of issuing directions about what supplemental evidence the appellant would be permitted to tender", and did not reflect a failure to give sufficient weight to relevant considerations.

(ii) The fact the evidentiary deficiency stemmed from a narrowing of the claim

[77] The appellant argues the judge focused on the fact of the claim having been revised, while overlooking that the development that necessitated the supplemental evidence, and precipitated the adjournment request, involved a narrowing of the claim (to just the Restrictions on Audible), rather than an expansion or modification of it.

[78] He submits that, had the chambers judge turned her to mind to how the claim had evolved (i.e., that it had narrowed), it would have been apparent nothing that occurred was "worthy of rebuke, and certainly not to a degree capable of justifying the choice to dismiss an otherwise viable class proceeding over acceding to a modest adjournment request to permit supplemental expert evidence on two narrow questions between highly sophisticated litigants."

[79] The respondents say there is no reason why the appellant could not have revised his claim to an attack upon only the Restrictions on Audible at any time before the outset of the certification hearing. Moreover, they say this final revision did not actually narrow the claim in any substantial manner and did nothing to reduce the complexity associated with obtaining responsive expert evidence.

[80] In the circumstances, the narrowing of the appellant's claim at the certification hearing appears to have been precipitated, at least in part, by a report appended to the November 2019 affidavit of Dr. Ralph Winter, the respondents' expert economist. In his report, Dr. Winter expressed the view it was an error to regard both the Restrictions on Audible and the Restrictions on Apple as fundamentally anti-competitive.

[81] Thus, what constituted at least a significant driving force behind the appellant's most recently revised theory, as it came to be during the course of the certification hearing in February 2022, was information available to the appellant for more than two years prior.

[82] That said, I see no indication in the reasons for judgment that the chambers judge considered the conduct of the appellant to be worthy of rebuke. Such a finding was unnecessary. As the respondents point out, the reformulation of the case at bar was late, substantial and prejudicial, as it would have necessitated new responsive expert evidence. It was these factors which appears to have driven the chambers judge's exercise of her discretion.

[83] In the circumstances, I cannot find the judge's conclusion to be inconsistent with the general objective of encouraging the abandonment of untenable claims and encouraging flexibility at certification hearings. I would not accede to the appellant's argument that the chambers judge erred in principle by declining to afford greater weight to the form of the appellant's revision of his case, that is, the "narrowing" of it through the abandoned reliance on the Restrictions on Apple.

(iii) The strength of the case

[84] The appellant contends the chambers judge did not give appropriate weight to the fact the claim had already withstood scrutiny in the very same judgment, "not only on the ordinary pleadings standard, but on the elevated summary judgment standard."

[85] The appellant submits there were inadequate grounds in this case to justify the dismissal of "an otherwise viable class proceeding". This means, the appellant contends, the chambers judge gave insufficient weight to a relevant factor: the strength of the case brought by the appellant.

[86] Before addressing the motion for certification, the chambers judge had dismissed Apple's summary judgment application, concluding she was "not satisfied beyond doubt that the plaintiff's claim under s. 36 of the *Competition Act* is bound to fail": at para. 120. The remaining claims were "derivative", "in the sense that all of [the appellant's] claims against the [respondents] turn on the question of the outcome of the summary judgment application in relation to the *Competition Act* claim": at para. 120.

[87] The chambers judge's findings on Apple's summary judgment application do not equate to a finding the appellant had established the existence of a "viable class proceeding", as the appellant asserts. Viability, in this case, hinged upon a question left unanswered: whether there was a credible and plausible methodology to assess aggregate damages (i) resulting solely from the Restrictions on Audible, and (ii) for only some portion(s) of the class period.

[88] There is no reason to conclude that, when she considered the effect of that deficiency in the case for certification, the chambers judge was unaware of or failed to consider her prior conclusion that the *Competition Act* claim was not bound to fail. I would not accede to this argument.

Did the chambers judge make a decision so clearly wrong that it results in an injustice?

[89] Finally, the appellant contends acceding to the appellant's "modest request to obtain a limited supplemental opinion from Dr. Ware on two narrow questions before ruling on certification was manifestly appropriate in the circumstances." To the contrary, he says, defeating the otherwise viable claims of thousands of potential class members to spare the respondents from "having to respond to evidence on two narrow questions arising from a narrowing of the claim against them" was manifestly not.

[90] This argument is built upon a shaky foundation. First, it is premised on the notion that the missing evidence is a "limited supplemental opinion" on two "narrow issues". The respondents contend the appellant's assertion there is only a "limited evidentiary issue" that needs to be addressed amounts to a collateral attack on the chambers judge's finding of fact that the appellant had "entirely revised" his case. They say the chambers judge was entitled to conclude the evidentiary problem was significant and created deficiencies for all but one of the proposed common issues. I would defer to the chambers judge's characterization of the nature and effect of the appellant's reformulation of the claim.

[91] Second, the argument is premised on the notion that the chambers judge's refusal to grant an adjournment amounts to defeating "otherwise viable claims". As has been discussed, the chambers judge's determination on Apple's summary judgment application did not convert the proposed claims into inherently viable ones. Viability remained an open question.

[92] The argument must be considered with these factors in mind.

[93] The respondents submit the decision is not clearly wrong, and that there is no reason for this Court to intervene. They say the judge was very familiar with the history and evolution of the action, having overseen this matter since 2018. They assert that, in coming to her conclusion, the chambers judge weighed:

i) the lengthy history of proceedings;

ii) the fact the appellant had served no evidence upon the respondents pertaining to damages after the pleadings were amended to remove the alleged conspiracy between Amazon and Audible;

iii) the fact the appellant informally and alternatively made an adjournment request in oral reply submissions on the third day of a four-day hearing; and

iv) the fact the appellant provided the chambers judge with no basis to conclude the proposed remedial evidence was capable of being adduced.

[94] They submit the chambers judge found the appellant "entirely revised" his case, and granting the proposed adjournment would have been unfair and prejudicial to the respondents by requiring the parties to "start afresh in retaining and instructing experts to respond to the new theory". That conclusion, they contend, was open to her on the facts.

[95] I agree with the respondents, and would not accede to this ground of appeal for those reasons. On the record, it was open to the chambers judge to refuse to exercise her discretion under s. 5(6) of the *CPA*. Doing so did not result in a decision which is "clearly wrong" and, accordingly, there is no basis for this Court to interfere.

Disposition

[96] For all of these reasons, I would dismiss the appeal.

"The Honourable Mr. Justice Willcock"

I agree:

"The Honourable Justice Griffin"

I agree:

"The Honourable Justice Skolrood"